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VOLUME 113.

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(15)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

STATE v. THOMAS.

[144 Ala. 77, 40 South. 271.]

CONSTITUTIONAL LAW—Effect to be Given to Evidence.—A statute providing that the failure or refusal of any person who has entered into contract for service and obtained any money or property thereby, to perform such service or refund such money or property without just cause, shall be prima facie evidence of an intent to defraud, is constitutional and valid. (p. 17.)

CONSTITUTIONAL LAW—Effect to be Given to Evidence.—Statutes declaring what shall be presumptive or prima facie evidence of any fact are constitutional and valid. (p. 18.)

S. H. Dent, for the state, appellant.

⁷⁹ HARALSON, J. Section 4730 of the Criminal Code provides, that “Any person, who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and, with like intent, and without just cause, and without refunding such money or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it.” This section has been amended by adding at the end of it the following provision: “And the refusal or failure of any person who enters into such a contract to perform such act or service, or refund such money or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer”: Acts 1903, p. 345. The defendant was indicted under this section as amended.

The indictment charges that defendant "with intent to injure or defraud his employer, T. L. McCullough, entered into a contract in writing for the performance of service as a farm laborer, and thereby obtained the sum of seven dollars from said T. L. McCullough, and with like intent and without just cause therefor, and without refunding said money, refused to perform said service as a farm laborer, against the peace and dignity, etc." There was evidence tending to show that defendant was guilty as charged in the indictment.

The bill of exceptions recites that, after the evidence was all in, the court instructed the jury that so much of the act of the legislature of 1903 amendatory of section 4730 of the Code of 1896 (setting the same out as above), was unconstitutional and void. The state, by its solicitor, excepted to such ruling, and under section 4315 of the code appeals to reverse the same. The solicitor, to raise the same question in a different form, requested a charge "that the refusal or failure of defendant to perform the services alleged in the indictment, or to refund the money obtained from the employer under the contract between him and defendant, and the failure or refusal of the defendant to pay for the property obtained under said contract, makes out a prima facie case of defendant's intent to injure or defraud said McCullough," which charge the court refused.

⁸⁰ The amendment of section 4730, which section simply declares the intent, declares a prima facie rule of evidence in such cases. In 8 Cyclopaedia, 820, it is said: "The legislature has the power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings it may declare what shall be prima facie evidence. On the other hand, it cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary." This seems to be a rule of well-nigh, if not of universal, recognition.

The case of *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179, was one where a statute made it prima facie evidence of a banker's intent to defraud in receiving a deposit, if his failure, suspension or involuntary liquidation occurs within thirty days thereof. In construing that statute, the constitutionality of which was questioned, the court said: "We think it clear that the legislature has the power to prescribe rules of evidence and methods of proof. A law which would in effect exclude the evidence of a party, and thereby

deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proof of guilt would be unconstitutional, as would one which makes an act *prima facie* evidence of crime, which has no relation to a criminal act, and no tendency whatever to establish a criminal act. If, however, the legislature in prescribing the rules of evidence in any class of cases leaves a party a fair opportunity to establish his case of defense, and give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of the legislature are not unconstitutional. It has been repeatedly held that the legislature has the right to declare what shall be presumptive or *prima facie* evidence of any fact." Many cases are cited sustaining the text from Missouri, New York, Massachusetts, Maine, Wisconsin, Iowa, Michigan, Illinois, California, and also 2 Rice on Evidence, Wharton's Criminal Evidence and Black on Intoxicating Liquors.

In an elaborate opinion by the supreme court of Illinois, construing a like statute to the one in Indiana, that court takes the same view of the law as did the Indiana ⁸¹ court, in the case above cited: *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303, 35 L. R. A. 176.

The supreme court of the United States, in a case where the same question was considered, holds that such a rule is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own creation: *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. Rep. 1016, 37 L. ed. 905. If more were needed it may be found in 2 Wigmore on Evidence, section 1364, pages 1670, 1672.

Our attention has been called to but one case, that of *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26, which apparently announces a rule in conflict with the authorities referred to. But, as said by the supreme court of Illinois in *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447 45 N. E. 303, 35 L. R. A. 176, it seems to be against the weight of authority.

We are, therefore, led to conclude that the court below erred in holding said amendatory act to be unconstitutional, and in not giving the charge requested by the state.

Reversed and remanded.

Dowdell, Anderson and Denson, JJ., concurring.

The Validity of Statutes declaring that certain facts shall be deemed prima facie evidence of another is discussed in the note to *People v. Cannon*, 36 Am. St. Rep. 682. A statute making the failure of a banker within thirty days after receiving a deposit prima facie evidence of an intent on his part to defraud is held constitutional in *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447. And a statute making the possession of registered bottles prima facie evidence of a violation of a statute forbidding the use and sale of such bottles without the consent of the person whose name appears thereon is constitutional: *Commonwealth v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590.

TONY v. STATE.

[144 Ala. 87, 40 South. 388.]

APPEAL—Review of Findings.—A statute requiring the supreme court to review the findings of the trial court without any presumption as to their correctness applies to all cases tried at law without a jury, whether civil or criminal, and the findings of the lower court will not be disturbed unless they appear to be plainly erroneous. (p. 21.)

INTOXICATING LIQUORS—Sale to Minor.—A person selling intoxicating liquor to a minor, who does not inform the seller that he is acting as agent for another, nor present an order for the liquor, is guilty of selling intoxicating liquor to a minor, although he is in fact purchasing for an adult third person. (p. 21.)

INTOXICATING LIQUORS—Sale to Minor.—If a minor, employed by a company composed of his father and a third person, is ordered by such third person to purchase liquor for him, the order is not connected with the business of the company, and such third person does not have control of the minor so as to bring the sale within a statutory exception. (p. 23.)

J. T. Green, for the appellant.

M. Wilson, attorney general, for the state.

88 **SIMPSON, J.** The defendant was indicted, tried and convicted for the offense of selling or giving intoxicating liquors to a minor. The trial was by the court, without a jury, and the defendant excepts to the judgment of the court.

Under acts of 1896-97, page 330, section 12, declaring the powers, etc., of the city court of Anniston, it is especially provided that, as to the conclusions and judgment of said court on the evidence, "the supreme court shall review the same without any presumption in favor of the court below on the evidence," etc. As this provision is made applicable to all cases at law tried in said court without a jury, it applies to criminal as well as to civil cases: *Maxwell v. State*, 140 Ala. 131, 37 South. 266; *Holmes v. State* (Ala.), 39 South.

569. The case of Witherspoon v. State, 143 Ala. 65, 39 South. 356, in so far as it contains a contrary doctrine as to an act identical in terms with the one now before the court, is overruled.

As to what force and effect shall be given that portion of the section in question, requiring this court to decide the case without any presumption of the correctness of the judgment below, this court has held that the judgment will not be disturbed, unless it is plainly erroneous: Woodrow v. Hawving, 105 Ala. 247, 16 South. 720. In that case the court called attention to the fact that, inasmuch ⁸⁹ as the court below had the opportunity to observe the manner of the witnesses in testifying, it had a better opportunity to judge of their truthfulness, and consequently this court must give due weight to its conclusions. That would be particularly true in a case in which there was conflict in the testimony, and, on the other hand, would have less weight where the facts are simple and without conflict.

In the case now under consideration the facts are few and simple, and without conflict. The only testimony is by the young man of twenty years of age who is alleged to have bought the whisky, and the defendant. The substance of the testimony of the former is that his employer requested him to go and get a bottle of whisky for his sick wife; that he went to the place where the defendant was employed, and, after stating in his examination in chief that he bought a pint of whisky from defendant, yet on cross-examination stated that he asked some one who he thinks was defendant, though he is not sure, for a bottle of whisky; that said person handed him something wrapped in a paper, and he paid him the fifty cents which his employer had given him; that he did not unwrap it, and consequently could not swear that it was whisky, but he took it and handed it to his employer. The testimony of defendant was that he had no recollection of ever having seen said youth, but cannot state positively that he did not sell to him.

It is insisted by the counsel for defendant, first, that admitting that it was whisky in the bottle and that the defendant was the person who sold it, yet the facts testified to by the witness do not show a sale to the minor, as he was acting merely as agent for Roberts. It will be observed that the minor did not inform the seller that he was acting as agent for anyone else, nor did he bring any order from anyone.

but simply applied for the whisky and, when the package was handed to him, paid for it. The court holds that this constituted a sale to the minor, and it has been so decided by courts of other states having similar statutes: *Black on Intoxicating Liquors*, sec. 420; *Siceluff v. State*, 52 Ark. 56, 11 S. W. 964; *Wallace v. State*, 54 Ark. 542, 16 S. W. 571; *Neely v. State*, 60 Ark. 66, 46 Am. St. Rep. 148, 28 S. W. 800, 27 L. R. A. 503; ⁹⁰ 17 Am. & Eng. Ency. of Law, 2d ed., 337.

On this point Justice Dowdell and the writer dissent. This is a point which has not been decided in this state. In the courts of other states the decisions are generally to the effect that where a minor purchases on an order, either verbal or written, from another person, the sale is not to the minor, but to the person for whom he purchases the liquor, and this principle is applied, even where the order is merely sent verbally through the minor, provided the minor discloses his principal. On the other hand, it is as generally held that, although the minor really purchases for another and merely delivers the liquor to his principal, yet the seller is liable if the minor fails to disclose to him the fact that he is purchasing for the other. From an examination of these cases in other states the only reason which we have been able to discover for the distinction is the analogy of the rule in civil cases, under which, when an agent makes a contract without disclosing his principal, the agent is liable on the contract. We cannot see any analogy. In the civil case the agent is held responsible because the other party made the contract with him, trusting to his responsibility, and he cannot deny his responsibility. The reason for holding that the seller is not liable in the first class of cases is because of the fact that the sale was not made to the minor, as he was a mere agent, acting for another. In other words, in the language of the cases, he was a mere conduit. Accordingly, they also hold that, although the minor may state that he is buying for another, yet if, as a matter of fact, that is not true, the sale is to him, and the seller is liable. So the liability seems to depend upon the facts of the case, and not upon the statements or representations of the parties. A party, in order to be guilty of a criminal offense, must not only intend to do the act, but he must in fact do an act which is violative of the law, and if the minor is really simply purchasing for another person,

who furnishes the money for him, we cannot see why he is any the less the mere agent, or conduit, simply because the seller does not know it. If a man fires a gun, thinking he is shooting a man and intending to kill him, yet as a matter of fact that which he supposed to be a man is a mere wooden image, although morally he may be a murderer, yet he has not violated the ⁹¹ law. So if a man appropriates an article of personal property to his own use, thinking it belongs to another, when in fact it is his own property, while he may be a thief at heart, yet he has not violated the law. Upon the same principle, if a man sells whisky to a minor, without asking or knowing how or why he purchases, yet, if as a matter of fact the minor is a mere agent or conduit for another, who furnishes the money, and to whom he delivers the package without even examining its contents, the sale is really made to the principal, and the seller is not liable. It is true that this principle may offer an inviting field for perjury, yet it is the only logical solution of the matter, and if it should be provided against, it is a matter for the legislature to consider and not the courts. All that the courts can do is to require strict scrutiny as to the evidence in said cases.

It is insisted, second, that under the evidence, even if the whisky was sold to the minor, it was by permission of a person "having the management or control" of the minor. The evidence shows that the minor was a clerk in the employ of the Dixie Hardware Company, which was composed of the father of said minor, said Roberts, and others. The order being an entirely personal matter, not connected in any way with the business, it cannot be said that said Roberts had "the management or control" of said minor in that matter, and in such manner as to come within the exception mentioned in section 5078 of the Code of Alabama of 1896. While it is true that the minor, as witness on cross-examination, could not state positively that defendant was the party who sold to him, yet he had been seeing the defendant for a year or more, passing on the street, and thought he was the person, that he knew other persons who served in the saloon, that it was not bought from either of them, and that he knew that "defendant stayed in that part of the saloon where whisky was sold by the bottle." And while he could not swear it was whisky, yet he asked for whisky at a place where whisky was sold, and paid for whisky.

We do not think that, under the evidence in this case, the finding of the court should be disturbed. The judgment is affirmed.

⁹² Haralson, Tyson, Anderson and Denson, JJ., concur.

Dowdell and Simpson, JJ., dissent.

McClellan, C. J., not sitting.

If Liquor is Sold to a Minor who at the time declares that he is purchasing it for another, whose name is not disclosed, the sale must be regarded as made to the minor, and not to the undisclosed principal, and the seller is liable to punishment under a statute making it criminal to sell liquor to a minor: *Neeley v. State*, 60 Ark. 66, 46 Am. St. Rep. 148.

WESTERN RAILWAY v. RUSSELL.

[144 Ala. 142, 39 South. 311.]

APPEAL—Harmless Error.—If the defendant has the benefit of a defense under the general issue, it is harmless error to sustain demurrers to special pleas setting up the defense available under the general issue. (p. 26.)

MASTER AND SERVANT—Injury to Servant—Sufficiency of Complaint.—A complaint against a railroad company for the death of its engineer due to defects in the roadbed, alleging the negligent failure of the company to maintain its tracks in proper condition, and that a culvert was defectively constructed in being too small to carry off the water during heavy rains, and that the material of which it was constructed had become weak from decay, is sufficient as against demurrer. (p. 26.)

RAILROADS—Duty to Warn Trainmen of Dangers in Roadbed. Trainmen do not assume the risk of defective track conditions and have a right to assume that the track is safe, and the duty to warn them of defects in the roadbed rests upon the company. (p. 27.)

RAILROADS—Injury to Employé—Contributory Negligence.—An averment in an answer to a complaint of an engineer for injury received that he so carelessly and negligently operated his engine and train at a rapid rate of speed without ascertaining the condition of the road ahead of him as to run into a washout, which could have been avoided by the use of ordinary care and diligence, is a mere statement of the conclusion of the pleader, and is not permissible in pleading contributory negligence, where the facts must be averred. (p. 28.)

RAILROADS—Negligence Causing Death to Employé—Contributory Negligence.—In an action to recover for the death of a railroad engineer due to a defective roadbed, a plea alleging that the deceased had been warned of heavy rainfalls along the line of the road, and cautioned to look out for high water at all waterways,

but not alleging that he was informed of the dangerous condition at the place of the accident or that, had he properly watched, he could have discovered the danger in time to avoid the accident, is not sufficient as a plea of contributory negligence. (p. 28.)

RAILROADS—Negligence Causing Death to Employé—Contributory Negligence.—Although a railroad engineer knew the place where he ran into a washout causing his death, but was not informed of any unusual conditions existing there at that time, he was not guilty of contributory negligence simply because he failed to exercise greater care at that place than at any other. (p. 29.)

RAILROADS—Negligence Causing Death of Employé—Contributory Negligence.—The mere fact that a railroad engineer had been warned that there had been a heavy rainfall along the road, and cautioned to look out for high water at all waterways, will not preclude a recovery for his death, caused by his running into a washout, without any negligence on his part. (p. 30.)

RAILROADS—Negligence Causing Death of Employé—Assumption of Risk.—Unless a railroad engineer is warned of the danger where an accident happens, or knows of it personally, or it is obviously open to his observation, he does not assume the risk of injury resulting from a defective roadbed. (p. 31.)

NEGLIGENCE Causing Death—Setoff of Damages.—In an action to recover damages for the wrongful death of a person caused by negligence, damages alleged to have been caused to property of the defendant through the negligence of the deceased cannot be used as a setoff. (p. 31.)

G. P. Harrison, for the appellant.

Cunn & Weil and J. M. Chilton, for the appellee.

150 TYSON, J. This action is by the personal representative of Thomas J. Russell, deceased, to recover damages for alleged negligence on the part of defendants resulting in his death.

The complaint as originally filed comprised six counts, and nine others were added by amendment. Counts 8 and 10 were withdrawn and the trial was had on the remaining counts. To each count a demurrer was interposed, which was overruled by the trial court. These several rulings are assigned as error. There is, however, no such insistence in brief of appellant's counsel on these assignments of error as devolves upon us the duty of passing upon them. All that is said is that they are insisted on, and we are referred to the assignments of error, and the demurrers as set forth in the record. This amounts to no insistence: *Williams v. Spragins*, 102 Ala. 424, 15 South. 247; *Ward v. Hood*, 124 Ala. 570, 82 Am. St. Rep. 285, 27 South. 245; *Syllacauga Land Co. v. Hendrix*, 103 Ala. 254, 15 South. 594; 2 *Mayfield's Digest*, p. 133, sec. 77 et seq.

We have, however, examined each count of the complaint upon which the case was tried and find that each states a cause of action. In some of the counts the negligence is alleged in general terms to have consisted in the failure to maintain the track in proper condition for the passage of trains; in others, that the culvert was defectively constructed; in others, the defect in the construction ¹⁵¹ of the culvert is stated more specifically to have consisted in the fact that it was too small to carry off the water that would accumulate during heavy rains; and in others, that the materials of which the culvert was constructed had become weakened by decay.

There were also two counts (seventh and eighth) predicated on the alleged failure of the servants of defendant to give warning to plaintiff's intestate of the conditions as they existed at the time of the disaster.

The defendant filed originally twelve (12) pleas and a like number were added by amendment. Of course, plea one (1) was the general issue, and 2, 3, 4, 5, 13, 15 and 16, to which demurrers were sustained, set up in different forms that the washing away of the culvert and the death of Russell resulted from a rainfall so severe and unexampled in character as to amount to the "act of God." Without considering the various grounds of demurrer interposed to each of these pleas, suffice it to say that, if they presented a defense to the action, and therefore the court erred in sustaining the demurrer, the defendant could have had the benefit of each of them under the plea of the general issue. The rulings must, therefore, be regarded as innocuous: Louisville etc. Ry. Co. v. Hall, 131 Ala. 161, 32 South. 603. But aside from this, they were clearly no answer to the seventh count.

Pleas 7, 8, 9, 11, 21, 22 and 23 invoke either the defense of contributory negligence or that plaintiff's intestate assumed the risk of the injury which caused his death.

Plea 7 is as follows: "That before plaintiff's intestate sustained the injury complained of as alleged in said complaint, and while in charge of said train, he was notified by defendant that there had been heavy rains along the line of defendant's railway, and was cautioned to look out for high water at all low places and waterways; that notwithstanding said notification and caution, and in disregard thereof, the said intestate so carelessly and negligently operated said engine and train as to run into a washout, which could have been avoided by the use of reasonable care and diligence; where-

fore defendant avers the injury complained of was the result of the careless and negligent conduct of plaintiff's intestate in disregard of such notice and caution in operating said engine ¹⁵² and train, thereby contributing to his own injury, and that such careless and negligent conduct was the proximate cause of the injury complained of."

Speaking of the duties railway companies owe their employes operating their trains, we said in *Northern Alabama Ry. Co. v. Shea*, 142 Ala. 119, 37 South. 796: "Trainmen do not assume the risk of defective track conditions. They have a right to assume that the track is safe. It is not their duty, but the duty of their employers to keep it in proper condition. The acquaintance which trainmen are required to have with the premises, and to acquire which they are carried over the road on trains before being put in charge of trains, is more an acquaintance with the line, so to say, than with the track. They must know, and in the way indicated they are taught the conditions of the line in respect of stations, stopping-places, switches, grades, curves and distances. With these things they have to do; but not with the track itself in respect of its condition and maintenance. This plaintiff, a brakeman, was not charged with knowledge of the defects in this track, but, on the contrary, had a right to assume without investigation that the track was in good and safe condition." The same principle was also declared in *Louisville etc. R. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 457, 16 Sup. Ct. Rep. 618, 40 L. ed. 766. For a failure to discharge these duties, the defendant could not relieve itself by any such general notification or caution as is alleged in the plea.

In *Dresser on Employer's Liability Act*, section 99, it is said: "The master does not discharge the duty cast upon him by giving a general warning of danger, but he is bound so to point out and instruct about the risk that the servant may appreciate what he is to encounter and know how he may avoid it. Mere information in advance that the service generally or a particular thing connected with it was dangerous might give him no adequate notice or understanding of the kind and degree of danger which would necessarily attend the actual performance of his work."

It is true the statement quoted relates to the duty imposed upon the master to give warning of latent dangers or to inexperienced servants in respect to trainmen who ¹⁵³ had

no duties to perform regarding the proper maintenance of the track.

It is not alleged that the engineer was informed of the dangerous conditions existing at the culvert, or that, had he kept a lookout, he could have ascertained those conditions in time to have averted the injury. The averment that he so carelessly and negligently operated his engine and train as to run into a washout, which could have been avoided by the use of ordinary care and diligence, is the mere statement of the conclusion of the pleader, and is not permissible in pleading contributory negligence, where the facts must be averred: *Southern R. Co. v. Shelton*, 136 Ala. 191, 34 South. 194; *Tennessee etc. R. R. Co. v. Herndon*, 100 Ala. 451, 14 South. 287; *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160, 49 Am. St. Rep. 21, 15 South. 511. The court did not err in sustaining the demurrer.

Plea 8 was substantially the same as 7, with the added averment, "that notwithstanding said notification and caution and in disregard thereof, the said intestate carelessly and negligently ran his said train at a rapid rate of speed without ascertaining the condition of the road ahead of him, which he could have done by the use of proper care and diligence," etc.

It will be seen that the plea is open to the same criticism as the seventh. It was not the duty of the engineer, on any such general notice, to do more in the way of examination of the roadways or waterways than could be done consistently with the performance of his own duties as engineer; and there is no averment that, consistently with the performance of his own duties, he could have discovered the situation at the point where he was injured.

Plea 9 was the same as 7 and 8, with the added averment that the deceased, "well knowing the location of the place where it is alleged he was injured, and that it was a waterway, negligently and carelessly failed, before attempting to run his said engine and train thereover, to ascertain the condition of the track or roadway over said waterway."

The added averment falls far short of correcting the defects pointed out in the former pleas. The only fact added as imposing upon the engineer the duty of examining ¹⁵⁴ the road at the place where he was injured, is "that he well knew the locality." There is no averment that he knew or was informed of any conditions existing at the place, at the time,

that required greater care on his part than at other waterways.

Plea 11 invokes as a defense the assumption of risk. It is alleged "that the injury complained of occurred immediately after a very heavy and excessive fall of rain on the line of defendant's railway; that plaintiff's intestate knew this fact, and also knew the condition of defendant's roadway at said place, and with such knowledge voluntarily undertook to operate said engine and train at said time and place, and thereby assumed the risk of the injury which resulted in his death."

Whether deceased knew of the condition of defendant's roadway at said place, as those conditions existed at the time he attempted to cross, the plea does not aver. Construing its averment most strongly against the pleader, he possessed only such knowledge of its conditions as he had previously acquired. It does not appear what "condition" deceased knew, and there is an evident failure to allege that he knew of any conditions existing at the time that made it dangerous to cross with his engine and train. Before it could be said he assumed the risk, it must appear either that he was properly warned of the danger, or that it was open and patent: *Louisville etc. R. R. Co. v. Stuttz*, 105 Ala. 368, 53 Am. St. Rep. 127, 17 South. 29; *Louisville etc. R. R. Co. v. Baker*, 106 Ala. 624, 17 South. 452; *Alabama etc. R. R. Co. v. Brooks*, 135 Ala. 401, 33 South. 181, and authorities there cited.

Plea 21 alleges that "plaintiff's intestate was guilty of contributory negligence, in that before he had reached the place where he was injured he was notified by the defendant that there had been very heavy rains at the place where the injury occurred, and cautioned him to look out for high water at said place; that notwithstanding said notification and caution which was given in ample time for said intestate to have acted thereon, and in disregard thereof, he, plaintiff's intestate, with a full knowledge of the location where said injury occurred, negligently failed to approach said place with caution, but negligently and carelessly ran his engine and train ¹⁵⁵ over the same at a high rate of speed," etc.

It will be observed it is not alleged that plaintiff's intestate failed "to look out for high water at said place," or that, if he had done so, he could have seen the conditions that made it obviously dangerous to attempt to cross. The averment

that he had "full knowledge of the location" is by no means the equivalent of an allegation that he knew the culvert had been washed out or the dangerous condition caused by the stoppage of the water, or that he could have discovered the danger by the exercise of due care, and the failure to make these necessary averments is not remedied by the statement that deceased "negligently and recklessly ran his engine and train over the same at a high rate of speed"; a mere conclusion of the pleader, which, as we have said above, is an insufficient averment in pleas of this character.

The twenty-second plea sets up contributory negligence, and is substantially the same as the seventh and eighth. It avers the same notification that heavy rains had fallen along the line of the defendant's road, and the same caution to look out for high water at all low places and waterways. It is alleged that notwithstanding said notification and caution, "said intestate carelessly and negligently ran his said engine and train at a rapid rate of speed without ascertaining the condition of the road ahead of him, which he could have done by the use of the proper care and diligence, and which it was his duty to do before attempting to pass over the place where the injury occurred. Wherefore," etc. What we have said in respect of the seventh and eighth pleas is applicable to this one. Furthermore, it is not alleged that he failed to keep a lookout, or that he could have maintained such a lookout consistently with his other and primary duties as would have enabled him to ascertain the conditions then existing; and finally, the breach of duty is alleged by way of conclusion merely.

The defense of the assumption of the risk was invoked by the twenty-third plea, which alleged that "the injury occurred immediately after a very heavy and excessive fall of rain on the line of defendant's railway, and that plaintiff's intestate was notified in ample time by defendant of this fact, and further, that plaintiff's intestate was cautioned ¹⁵⁶ to look out for high water at said place; and defendant avers that it was the duty of plaintiff's intestate after receiving said notice not to have crossed said place without ascertaining that it was safe and notwithstanding this notice and duty, and with such knowledge on his part, voluntarily undertook to run said engine and train of cars at a rapid rate of speed over said place, and thereby assumed the risk of injury which resulted in his death."

This plea, it is evident, is open to the objections urged to all the others of the same character. There are no facts stated showing that the danger was open to ordinary observation and known to deceased—necessary allegations before deceased could be said to have assumed the risk, or even that he failed to keep a lookout. As a plea of the assumption of risk, it is nowhere averred that the danger was obvious. There is no distinct averment in either of the pleas that plaintiff's intestate knew of the dangerous conditions existing at the culvert when he attempted to pass, or that they were of so obvious a character that he could, consistently with the performance of his duties, have ascertained these conditions.

The demurrer to plea 10 was properly sustained. The plea alleges that the injury complained of was the result of a mere accident incident to the work in which plaintiff's intestate was engaged. It is sufficient to say that, if the facts were true as stated, the defendant was not guilty of the negligence charged in the complaint and denied by the plea of the general issue: *Going v. Steel & Wire Co.*, 141 Ala. 537, 37 South. 784; *Milligan v. Pollard*, 112 Ala. 465, 20 South. 620.

The averments of plea 12 are substantially the same as in pleas 7 and 8, with the added statement that as the result of the negligence of plaintiff's intestate, the defendant sustained damage to its cars, etc., in a sum stated, which the plaintiff offers to set off against the demands sued for.

As we have already shown, the averments of the plea do not sustain the charge of contributory negligence; but if it were otherwise, the damages alleged to have been sustained could not be set off in an action of this character, where it is sought to recover damages for injuries ¹⁵⁷ alleged to have resulted from defendant's negligence: Code, sec. 27. In each of the cases cited to the proposition by appellant, the action was in assumpsit.

Plea "A" was interposed to the seventh count of the complaint, which alleges the negligent failure of the defendant to give warning to plaintiff's intestate of the dangerous conditions existing at the place where the injury occurred.

The plea alleges that defendant's servants did not know of those conditions in time to give such warning. Whether the defendant had made any efforts to inform itself does not appear, and this failure to allege such effort was one of the

grounds of demurrer interposed: *Robinson Min. Co. v. Tolbert*, 132 Ala. 462, 31 South. 519.

Moreover, if the defendant was guilty of no negligence in failing to warn plaintiff's intestate, that fact could have been shown on issue joined to the seventh count of the complaint, which alleged such negligent failure. What has been said disposes of the rulings upon the pleadings.

The remaining assignments of error are predicated upon rulings which must be shown by a bill of exceptions. The paper in the record, purporting to be a bill of exceptions, must be disregarded, because the order of April 29, 1903, extending the time for its signing, was made by the court, and not by the judge: *Western Railway of Alabama v. Arnett*, 137 Ala. 414, 34 South. 997; *Scott v. State*, 141 Ala. 39, 37 South. 366.

Affirmed.

McClellan, C. J., Simpson and Anderson, JJ., concurring.

A Railway Company owes to its employes operating trains the duty to exercise reasonable care and diligence to provide and maintain a safe track on which to run its trains; and this duty it cannot delegate so as to escape responsibility for its nonperformance: *Rogers v. Cleveland Ry. Co.*, 211 Ill. 126, 103 Am. St. Rep. 185, and cases cited in the cross-reference note thereto.

CENTRAL FOUNDRY COMPANY v. BENNETT.

[144 Ala. 184, 39 South. 574.]

NEGLIGENCE CAUSING DEATH—Evidence of Earning Capacity.—In an action to recover for loss of life caused by negligence it may be shown that the deceased was a bright, economical and industrious boy, learning his trade quickly, as a circumstance to go to the jury in fixing his present earning capacity and future expectancy. (p. 33.)

NEGLIGENCE CAUSING DEATH—Evidence—Wages of Skilled Mechanics.—In an action to recover for loss of life caused by negligence, evidence to show what wages a skilled mechanic earned per day is not admissible when it is shown that the deceased had been learning the trade only about seven weeks, while it required a three years' apprenticeship to become a skilled mechanic. (p. 34.)

Action by the administrator of T. Bennett, deceased, who at the time of his death was employed by the Central

Foundry Company and who was then about sixteen and one-half years of age. The boy Bennett was killed while assisting another employé to adjust a belt on a rapidly revolving pulley, under orders from the superintendent of the foundry. There was a defect in the belt which caused it to break and strike Bennett, killing him instantly.

W. Percy, for the appellant.

F. S. White & Sons, for the appellee.

¹⁸⁶ ANDERSON, J. The right given a personal representative to sue for injuries resulting in the death of his intestate, as provided by section 1751 of the Code of 1896, is intended as a remedy for compensation to those having a pecuniary interest in the person killed, and the amount of recovery is limited to the value of such interest: 3 Wood's Railway Law, p. 1536, sec. 414. "That the jury may have proper data from which a pecuniary interest may be fixed, it is proper to admit evidence of the age, probable duration of life, habits of industry, means, business, earnings, health, skill of deceased, and reasonable future expectations; and perhaps there are other facts which should exert a just influence in determining the pecuniary damage sustained": Louisville etc. R. R. Co. v. Orr, 91 Ala. 548, 8 South. 360. While under the rule laid down a jury would not be rigidly restricted in assessing damages to the earnings of intestate at the time of his death, and where intestate, as in this case, is shown to have been bright, economical and industrious, the jury might consider the fact that these qualities, with age and experience, would bring increased earning capacity. We do not think, however, that it was permissible for the plaintiff to have proven the earning ¹⁸⁷ capacity of a man proficient in a trade, when the evidence shows the intestate was wearing the swaddling clothes of apprenticeship. Such evidence was speculative and remote, and the defendant's objection thereto should have been sustained. He had served but six or seven weeks at this trade, and the undisputed evidence was that it required a service of three years to become a skilled machinist.

In the case of Brown v. Chicago etc. Ry. Co., 64 Iowa, 652, 21 N. W. 193, the court says: "Plaintiff was permitted, against defendant's objection, to prove that firemen, employed on defendant's engines, when they had sufficient ex-

perience, and had acquired the requisite skill, were sometimes employed as engineers, and when so employed they were paid an increased compensation for their services. This evidence was admitted for the purpose of showing what the earnings of the intestate would probably have been if he had lived the natural period of his life. In our opinion it was not competent. In determining the damages which the estate of a decedent will sustain in consequence of his death, and such as it is reasonably certain would have occurred, it is proper to consider his calling at the time of his death, his ability, the amount of his earnings, and the like circumstances; and the estimate should be made with reference to such facts as actually existed at the time of his death, but for his death. It is not claimed that he possessed the skill requisite for the employment, and whether he ever would have acquired that skill was uncertain. The evidence should therefore have been excluded." In *Bonnet v. Galveston etc. Ry.*, 89 Tex. 72, 33 S. W. 334, the court says: "Although it has been testified that the deceased, just before his death, was preparing himself to become a machinist and an engineer, the court did not err in excluding the evidence as to the wages that machinists and engineers ordinarily receive for their services. The probability of his becoming an engineer and machinist was too remote, contingent and speculative to throw any light on his probable future earnings. It was calculated to mislead, rather than aid, the jury in determining the question of damages." For other authorities on this subject, see *Colorado* ¹⁸⁸ *Coal etc. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 255; *Chase v. Burlington etc. Ry.*, 76 Iowa, 675, 39 N. W. 196; *Richmond etc. R. R. v. Elliott*, 149 U. S. 267, 13 Sup. Ct. Rep. 837, 37 L. ed. 728.

Since all of the assignments of error insisted upon are predicated on the admission of this evidence, we need not consider them separately.

The judgment of the city court is reversed and the cause remanded.

Haralson, Dowdell and Denson, JJ., concur.

The Elements and Measure of Damages in actions for causing the death of a person are discussed in the note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383; and in the recent cases of *St. Louis etc. Ry. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65; *Smith v. Middleton*, 112 Ky. 588, 99 Am. St. Rep. 308. In determining what

damages are sustained by a parent from the death of a minor child, it has been held that regard may be had to the calling of the father, since experience teaches that children frequently follow the same general class of business as that of their parents: *Fox v. Oakland etc. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216.

TENNESSEE COAL, IRON AND RAILROAD COMPANY v. BRIDGES.

[144 Ala. 229, 39 South. 902.]

MASTER AND SERVANT—Sufficiency of Complaint.—A complaint for injury to a servant caused by his being struck by defendant's railroad engine, failing to charge that the person whose negligence is complained of was in charge of such engine, does not state a good cause of action. (pp. 36, 37.)

MASTER AND SERVANT—Sufficiency of Complaint.—A complaint alleging that an injury to a servant resulted from the wanton, reckless or intentional act of a fellow-servant, but not alleging that the master was guilty of negligence in the selection of such servant, in the orders given him, or otherwise, does not state a good cause of action. (p. 37.)

MASTER AND SERVANT—Injury to Fellow-servant.—Although a master is liable for the wanton, reckless, willful, or intentional acts of his employé, when acting within the scope of his employment, yet when the injury is to a fellow-servant, the master is not liable, unless the case is brought within statutory provisions, or if the common-law liability is relied on, negligence must be alleged and shown in the master himself. (p. 37.)

MASTER AND SERVANT—Injury to Fellow-servant.—A master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant. (p. 38.)

TRIAL—Instructions.—If a complaint contains several counts, it is proper to refuse a charge instructing the jury, if it believes the evidence, to find for the defendant on one of the counts. (p. 38.)

NEGLIGENCE, CONTRIBUTORY—Defense.—To sustain the defense of contributory negligence, the conduct of the plaintiff must be negligent, and must also contribute proximately to the injury. (p. 38.)

NEGLIGENCE—CONTRIBUTORY—Willful Injury.—If there is evidence tending to sustain counts of wanton, reckless, and intentional misconduct of another resulting in injury to the plaintiff, it is proper to refuse to instruct the jury that if there was a safe way for plaintiff to have discharged his duties, and an obviously dangerous way, and he chose such dangerous way, he cannot recover. (p. 38.)

NEGLIGENCE—Assumption of Risk.—If the evidence shows that injury to a servant was the result of willful, wanton and reckless conduct of the defendant's engineer, a plea that plaintiff assumed the risk is no defense. (p. 38.)

Action for damages for personal injury to an employé. The first count in the complaint alleged the negligence of the defendant, through its servant, an engineer in charge of defendant's engine, by negligently, wantonly and recklessly running his engine against plaintiff and knocking him off a trestle. Such engineer was alleged to be a fellow-servant with plaintiff. The following charges were requested by the defendant and refused by the court:

"3. Gentlemen of the jury, there is no evidence of wanton, willful or intentional injury on the part of the defendant's servant, Street, toward plaintiff; and if you believe the evidence in this case you must find for the defendant on the first and fifth counts of the complaint. . . . 5. The court charges the jury that there is no evidence of willful, wanton or intentional injury on the part of Street; and if they believe the evidence they must find for the defendant on the first and fifth counts. . . . 7. If the jury believe from the evidence that plaintiff's conduct proximately contributed to his own injury, then he cannot recover in this case, and your verdict must be for the defendant. . . . 9. If the jury believe from the evidence that the plaintiff could have performed his duties in unloading the car without being upon the running board of the trestle, where the car to be unloaded was being placed, and that he could have remained in a place of safety until the car was placed, then he contributed by his own negligence proximately to his injury, and he cannot recover. . . . 12. If the jury believe from the evidence that there was a safe way and an obviously dangerous way for the plaintiff to discharge the duties of his employment, and the plaintiff selected the obviously dangerous way of performing said duties, and he was thereby injured, I charge you that the plaintiff was guilty of contributory negligence in selecting the dangerous way to perform his duties, and cannot recover in this case, and your verdict should be for the defendant."

Judgment for plaintiff and defendant appealed.

Tillman, Grub, Bradley & Morrow, for the appellant.

Kirk, Carmichael & Rather, for the appellee.

236 SIMPSON, J. The first count of the complaint is not a count under the statute, because it does not allege that the party whose negligence is complained of was in

charge of an engine on a railroad: Code 1896, sec. 1749, subsec. 5; Sloss-Sheffield Steel & Iron Co. *v.* Mobley, 139 Ala. 425, 36 South. 181. As a complaint at common law said count alleges that the injury resulted from the wanton, reckless or intentional act of a fellow-servant ²³⁷ of plaintiff, but does not allege or show that the master was guilty of negligence in the selection of said servant, or in the orders given him, or otherwise. Consequently, the demurrer to this count should have been sustained: 2 Labatt on Master and Servant, p. 2355, sec. 855a; Lawler *v.* Androscoggin R. R. Co., 62 Me. 463, 16 Am. Rep. 492. While it is true that under our decisions a master is liable for the wanton, reckless, willful or intentional acts of his employé, when acting within the scope of his employment, yet that does not abrogate the principle that when the injury is to a fellow-servant the master is not liable, unless the case is brought within the statute or, if the common-law liability is relied on, negligence be alleged and shown in the master himself: 1 Labatt on Master and Servant, pp. 391, 392, sec. 177, and note. Southern Ry. Co. *v.* Wildman, 119 Ala. 565, 24 South. 764, Gilliam's Case, 70 Ala. 268, Highland Ave. R. Co. *v.* Robinson, 125 Ala. 483, 28 South. 28, and City Delivery Co. *v.* Henry, 139 Ala. 162, 34 South. 389, were all cases of injury to a passenger or a stranger; and the case of Southern Ry. Co. *v.* Moore, 128 Ala. 434, 29 South. 659, merely decides that, in a case within the statute, the fact that the injury was from the willful, wanton, reckless or intentional wrong of the fellow-servant does not prevent a recovery, the same as if it was negligence, strictly speaking. The general principle is that the "master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant": *Lanning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417.

The demurrer to the fourth count of the complaint was improperly overruled. Said count alleges that defendant was operating a furnace in Colbert county, and was operating a locomotive along a certain railroad track, but it does not allege that the engine or car was on any railroad track: See *Mobley's Case*, 139 Ala. 425, 36 South. 181. Notwithstanding acts of 1903, page 182, requiring these actions to be brought in the county where the injury occurred, or in the county where plaintiff resides, it is not neces-

sary to allege these matters in the complaint, as it is a matter of defense to be pleaded. The demurrer to the fifth count should also have been sustained: See Mobley's ²³⁸ Case, 139 Ala. 425, 36 South. 181, and others referred to. The court finds in the record no demurrers to the sixth count of the complaint.

As there was a conflict in the evidence on the subject of giving or obeying signals to stop, and of the safety or unsafety of the position on the running-board, and on the question whether or not the engineer ran the car further than the signals authorized, also as to whether plaintiff was knocked off by the car or by the body of Gay, the court properly refused to give the general charge for defendant. Charges 3 and 5, requested by the defendant, were properly refused. Where the complaint contains several counts, it is proper to refuse a charge instructing the jury, if they believe the evidence, to find for the defendant on one of the counts: *United States Fidelity etc. Co. v. Habil*, 138 Ala. 348, 35 South. 344; *Bessemer Liquor Co. v. Tillman*, 139 Ala. 462, 36 South. 40.

The court did not err in refusing to give charge 7, requested by defendant. In order to sustain the defense of contributory negligence, the conduct of the plaintiff must be negligent, and must also contribute proximately. This charge does not refer it to the jury to determine whether plaintiff was negligent. A man's conduct may proximately contribute to his injury, yet he may have been free from any negligence. Charge 7 was properly refused. The court properly refused to give charge 12, requested by the defendant, as there were counts in the complaint alleging willful, wanton and reckless conduct on the part of the engineer, and the court is not prepared to say that there was no evidence from which the jury might find that said allegations were sustained. Charge 9 was properly refused, because it did not hypothesize that the running-board was a place obviously dangerous.

The demurrers to pleas 2 and 3 were properly sustained, as said pleas do not sufficiently set forth any defense.

For the errors pointed out the judgment of the court is reversed and the cause remanded.

McClellan, C. J., and Tyson and Anderson, JJ., concur.

The Rule that a Master is not Liable to his servant for injuries due to the negligence of a fellow-servant, provided he has exercised due care in his selection of employes (Louisville etc. R. R. Co. v. Dillard, 114 Tenn. 240, 108 Am. St. Rep. 894; Desantels v. Cloutier, 189 Mass. 349, 109 Am. St. Rep. 641; notes to Houston etc. Ry. Co. v. DeWalt, 97 Am. St. Rep. 884; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289), applies in case of willful or intentional acts of negligence: Illinois Steel Co. v. Bauman, 178 Ill. 351, 69 Am. St. Rep. 316.

FIRST NATIONAL BANK v. CHANDLER.

[144 Ala. 286, 39 South. 822.]

MASTER AND SERVANT—Care in Selection of Servants.—The master must exercise due and reasonable care in the selection and retention of his servants, with reference to their fitness and competency. (p. 42.)

MASTER AND SERVANT.—The Liability of Employers for Injury Caused by the Incompetency of a Fellow-servant depends upon its being established by affirmative proof that such incompetency was actually known to the master, or that, if he had exercised due and proper diligence, he would have learned that which would, in law, charge him with such knowledge. (p. 42.)

MASTER AND SERVANT—Negligence of Master—Burden of Proof.—The presumption is that a master has exercised proper care in the selection of his servant, and it is incumbent upon the person charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. (pp. 42, 43.)

MASTER AND SERVANT.—Specific Acts of Incompetency of Fellow-servants cannot be shown to prove that such servants were negligent in doing, or omitting to do, the act complained of. (p. 43.)

MASTER AND SERVANT—Incompetent Servants—Proximate Cause.—The incompetency of a servant, in all cases, in order to charge the master with negligence, must be the proximate cause of the injury. The mere fact that the servant was incompetent and the master had knowledge thereof is of no importance, unless therein is found the cause of the injury or a cause contributory thereto, without which it might not have happened. (p. 43.)

MASTER AND SERVANT—Incompetent Servants.—Negligence such as unfits a person for service or renders it negligent in a master to retain him in the employment, must be habitual, rather than occasional, or of such a character as to render it imprudent to retain him in the service. A single exceptional act will not prove a servant incapable or negligent. (p. 43.)

MASTER AND SERVANT—Incompetent Servants—Waiver of Negligence of Master.—If the injured servant knew of the incompetency of his offending fellow-servant as well as his master knew of it, and, notwithstanding such knowledge, continued in the employment

without objection, he thereby waived the negligence of the master in retaining in his employ such incompetent servant. (p. 44.)

MASTER AND SERVANT—Incompetent Servant—Negligence of Master.—If it is sought to recover for injury to a servant caused by the alleged incompetency of a fellow-servant, it is not necessary that the complaint in charging negligence should state the *quo modo*, or negative the fact that plaintiff knew of such incompetency before going into the place of danger where the injury was received. (p. 44.)

MASTER AND SERVANT—Incompetent Servant—Negligence of Master.—If a complaint for injury to a servant charges the master at common law in failing to inform himself of the incompetency of a fellow-servant of plaintiff, it is not necessary in such complaint to lay such failure to some person intrusted by the master with management and superintendence. (p. 44.)

MASTER AND SERVANT—Negligence of Fellow-servant.—If a servant is injured by the negligence of a fellow-servant in the operation of an elevator while the injured servant was at work in the shaft, the fact that the latter stated that he had only a small amount of work to do and that he would be through with it in a few moments did not justify the elevator operator in causing the elevator to descend the shaft without first ascertaining that the shaft was clear. Especially when such statement was not made to him or to anyone authorized to act upon it. (p. 44.)

MASTER AND SERVANT—Incompetent Servant—Evidence.—Proof of the fact that a servant disobeyed his master's instructions is competent on the issue of the servant's incompetency. (p. 45.)

APPELLATE PRACTICE.—It is Harmless Error to sustain a demurrer to certain pleas, when the defendant has the benefit of all the matters set up therein under the pleas remaining. (pp. 45, 46.)

MASTER AND SERVANT—Incompetent Servant.—If it is sought to recover for injury to a servant caused by the alleged incompetency of a fellow-servant, an answer alleging that the injured servant had knowledge of his fellow-servant's ability to do his work is insufficient to charge the injured servant with knowledge of the incompetency of such fellow-servant. (p. 46.)

EVIDENCE—Opinion.—An inquiry as to whether an alleged incompetent servant was a wide-awake, attentive boy while engaged in his duties, is not open to the objection that it calls for the opinion of the witness, who is not an expert. (p. 46.)

TRIAL—Affirmative Charge.—If the evidence clearly makes a case for the jury, the defendant is not entitled to a general affirmative charge. (p. 46.)

MASTER AND SERVANT—Incompetent Servant.—An instruction that if an injury to a servant was caused by the slipping of the brake of an elevator, he cannot recover, is properly refused when the jury is entitled to find that the slipping of such brake was caused by the incompetency of a fellow-servant of the plaintiff. (p. 46.)

MASTER AND SERVANT—Injury to Servant.—If an employé is injured by the operation of an elevator below the first floor of a building, while he was in the elevator shaft in the basement, a request to charge concerning the running of such elevator to the first floor is properly refused. (p. 47.)

TRIAL—Verdict—Excessiveness.—If there are counts in a complaint that claim more than the amount of the verdict, it is not excessive because it is for more than is claimed in some other counts. (p. 47.)

Chandler, the appellee, was employed by the appellant to repair his elevator shaft between the first floor and the basement of his building, and after notifying the elevator boy that he had gone to work and not to bring the elevator down to the first floor until he was notified to do so, he began his work, and while so engaged the elevator boy brought the elevator down upon him, severely and permanently injuring him.

The following are the charges asked by the appellant and refused by the court:

“Charges 1 to 6 were the affirmative charges with hypothesis as to the several counts of the complaint. Charge 7: ‘If the jury believe from the evidence in this case that the injury to the plaintiff was caused by the brake slipping, then the plaintiff cannot recover.’ Charge 8: ‘If the jury believe from the evidence in this case that Lewis received instructions not to run the elevator below the second floor of the building and was obeying said instructions, and that while Lewis was obeying said instructions, the plaintiff told Lewis that the elevator could be brought down and that it would not interfere with the plaintiff (or words to that effect), and further, believe that Lewis, after he told him as above (if the jury believe the plaintiff told Lewis as above), continued to operate said elevator below the second floor until plaintiff was injured, then the plaintiff cannot recover.’ Charge 9: ‘If the jury believe from the evidence that the injury to the plaintiff was caused either by his own neglect in failing to take precautions for his safety, or if the jury believe that the injury to the plaintiff was caused by the neglect of Murphy in telling Bryant to take the carpet to the basement on the elevator, or by the fault of Bryant in telling the said Lewis (if he did tell him) that Murphy said for Lewis to take him to the basement, or if the jury believe said injury was caused in any other way than by the neglect of Lewis, the plaintiff cannot recover, and the verdict must be for the defendant.’ Charge 10: ‘If the jury believe from the evidence that the said Lewis was instructed not to operate the elevator below the floor, and that Lewis obeyed said instructions until Mr. Pelzer came, and if the jury believe from the evidence that when Pelzer came plaintiff told the elevator boy that the elevator could be brought down without interfering with him (plaintiff), and if they further believe that there-

after said Lewis continued to operate said elevator down to the first floor until the plaintiff was injured, and the plaintiff said nothing further to Lewis as to how far down to operate the elevator, the plaintiff is not entitled to a verdict.' Charge 11: 'If the jury believe from the evidence that Joe Bryant was told by Belton Murphy to take a rug or carpet on the elevator to the basement, and that Joe Bryant went to the elevator and told the elevator boy, Lewis, that Belton Murphy said for him (Lewis) to take him (Bryant) to the basement, and in pursuance of what Bryant said Lewis ran the elevator down to the basement, then the injury to the plaintiff was not caused by the incompetency of Lewis, and the plaintiff cannot recover.' "

T. W. Watts and Rushton & Coleman, for the appellant.

J. M. Chilton and F. S. Ball, for the appellee.

307 ANDERSON, J. The counts to which demurrers were overruled and upon which this case was tried in the court below are not based upon any statutory liability under the employers' liability act, but seek to recover damages under the common law for the negligence of the master in employing or retaining an incompetent servant to run and manipulate its elevator. The master must exercise due and reasonable care in the selection of his servants, with reference to their fitness and competency. "He must also exercise the same degree of care in the matter of the retention of his servants in his service, for his responsibility is the same whether the want of skill of a servant or his incompetency from other causes existed when he was hired or has come up since, if he has been continued in the service with notice or knowledge, either actual or presumed, of such unfitness by the master. Liability on the part of an employer for an injury caused by the incompetency of a fellow-servant depends upon its being established by affirmative proof that such incompetency was actually known by the master, or that, if he had exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. . . . The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent on the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of

incompetency and bringing them home to the knowledge of the master or company, or by showing them to be of such nature, character and frequency that the master, in the exercise of due care, must have had them brought to his notice. But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of. So it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant, to leave it to the jury whether they did come to the knowledge if he had exercised ordinary care. . . . It is understood, of course, that the incompetency of the servant in all cases, in order to charge the master, was the proximate cause of the injury. The mere fact that the servant was incompetent and the ³⁰⁸ master had knowledge thereof is of no importance, unless therein is found the cause of the injury, or a cause contributory thereto, without which it might have been avoided or not have happened": *Bailey on Master's Liability for Injuries to Servants*, 47, 54, 70; *Laning v. New York etc. R. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417; *Chicago etc. R. R. v. Harney*, 28 Ind. 28, 92 Am. Dec. 282; *Michigan Cent. R. R. v. Gilbert*, 46 Mich. 179, 9 N. W. 243; *Kersey v. Kansas City R. R.*, 79 Mo. 362; *Hayes v. Western R. R.*, 3 Cush. 270; *Johnston v. Pittsburg W. R. R. Co.*, 114 Pa. 443, 7 Atl. 184.

It seems to be the rule at law that, in order for the plaintiff to recover against the defendant, he is bound to show by affirmative testimony: 1. That the injury was the result of the act or omission of some fellow-servant; 2. That said fellow-servant was incompetent for the duty he had to perform; 3. That the fact of his incompetency was known to the defendant, or that it or its manager or superintendents acquired a knowledge of it during his employment and before the accident, or by due diligence could have learned of his incompetency: *Snodgrass v. Carnegie Steel Co.*, 173 Pa. 228, 33 Atl. 1104. Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in the employment, must be habitual, rather than occasional, or of such a character as to render it imprudent to retain him in service. A single exceptional act will not prove a person incapable or negligent: *Conrad v. Gray*, 109 Ala. 130, 19 South. 398; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Harvey*

v. New York etc. Ry. Co., 88 N. Y. 481; Couch v. Coal Co., 46 Iowa, 17; Huffman v. Chicago etc. Ry. Co., 78 Mo. 50. It is also a rule of the common law still in force that if the servant knew of the incompetency of the offending servant as well as the master, or had equal knowledge, and, notwithstanding such knowledge, continued in the employment without objection, he waives the negligence of the master in this respect: Laning v. New York etc. Ry. Co., 49 N. Y. 521, 10 Am. Rep. 417; Wright v. New York etc. Ry. Co., 25 N. Y. 562; Mad River etc. R. R. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312.

The grounds of the demurrer to the effect that the complaint fails to aver that the fellow-servant, Lewis, ³⁰⁹ had any superintendence intrusted to him, or that it fails to aver any of the essentials to a recovery under the employers' liability act (section 1749 of the Code of 1896), were without merit. The complaint avers a common-law liability for injuries due to the negligence of Archibald Lewis, resulting from the incompetency of Lewis, and that defendant knew of his incompetency and negligently retained him. If the plaintiff knew of the incompetency of Lewis before going into the shaft that would be defensive matter, and it is not necessary for the complaint to negative the fact. Nor was it necessary for the complainant, in charging negligence, to state the *quo modo*: Mary Lee etc. Ry. Co. v. Chambliss, 97 Ala. 171, 11 South. 897; Georgia P. Ry. Co. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47, 9 South. 252; Kansas City etc. R. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57; Conrad v. Gray, 109 Ala. 130, 19 South. 398. The demurrers to the first count were properly overruled. The demurrers to the third count are the same as those filed to the first, and simply seek to "thresh over old straw," and were properly overruled.

The ninth count charges the defendant with negligence for the failure to exercise reasonable diligence to inform itself of the unfitness of the said Lewis, and it was not necessary to lay the failure to some one intrusted with the management and superintendence. The demurrers to the count were properly overruled. The demurrers to the eleventh count have been treated under the first and ninth counts, and were properly overruled.

The demurrers to the twelfth and thirteenth counts as amended were properly overruled. We do not understand

the amended counts to be a departure from the original cause of action.

The demurrers to pleas 6, 8, and 9 were properly sustained. The fact that the plaintiff stated that he had only a small amount of work to do, and he would be through with it in a few minutes, did not justify said Lewis in causing said elevator to descend in the shaft, within an hour, without having first ascertained whether the plaintiff was in said shaft, as the plea does not aver that the statement was made to Lewis or anyone else authorized to act upon the statement: *Williamson* ³¹⁰ v. *Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 411, 38 L. R. A. 694.

The seventh plea was subject to the demurrer interposed. The fact that the plaintiff told the operator that the descent of the elevator at the time Pelzer wished to go up to the first floor could be made was no license to the operator to continue to come down or to go to the basement.

Pleas 10 and 11 set up no defense to the action, and the demurrers were properly sustained. The complaint charges the elevator boy, Lewis, with being incompetent because of carelessness and inattention, and the fact that he disobeyed the defendant's orders is but an averment of his unfitness, and does not relieve the defendant from liability, as the charge against the defendant is for keeping an incompetent servant. If he disobeyed his master's instructions, that was but an act of inattention to his duties. The authority cited and relied upon by counsel for appellant to sustain the position that the master is not liable for injuries resulting from disobedience of his orders (*Laughran v. Brewer*, 113 Ala. 509, 21 South. 415) has no application to this case. In that case the very gist of the action was the act or omission, made or done in obedience to the rules of the master and under the employer's liability act. The case at bar is under the common-law liability for keeping an incompetent servant, and disobedience to orders is but an act of incompetency.

It is insisted, however, that no sufficient ground of demurrer was interposed to the tenth plea. The grounds interposed to the fourth plea were set up to the tenth, and we think the fourth ground thereof is sufficient to test the sufficiency of the plea. It is harmless error to improperly sustain a demurrer to certain pleas, where the defendant has the benefit of all the matters set up therein under pleas

remaining: *Taylor v. Corley*, 113 Ala. 580, 21 South. 404; *Smith v. Heineman*, 118 Ala. 195, 72 Am. St. Rep. 150, 24 South. 364; *Booth v. Dexter S. F. E. Co.*, 118 Ala. 369, 24 South. 405; *Farley Nat. Bank v. Henderson*, 118 Ala. 441, 24 South. 428. The defendant got the full benefit of plea 12 under the general issue.

³¹¹ Pleas 13 and 14 simply aver that the plaintiff knew of the said Lewis' ability to operate the elevator, but does not charge him with knowledge of the incompetency of the said Lewis, due to his carelessness and inattention, and the demurrers were properly sustained.

The objection to the question to the witness Hastings. "Was Lewis a wide-awake, attentive boy during the time he was engaged in his duties?" was certainly not based upon a good ground, "that it called for an opinion and the witness was not an expert." We do not accept it as calling for an opinion; but, if it did, it related to a subject that did not require expert evidence as to an opinion. It requires no expert to tell how a person looks—if sleepy or awake, if mad or in a good humor, if excited or quiet and composed. Nor did the court err in excluding the answer. The answer, if an opinion, was but the mere short-hand rendering of the facts, and could be given, subject to cross-examination as to the facts on which it is based: *South & North Alabama R. R. v. McLendon*, 63 Ala. 266; *Raisler v. Springer*, 38 Ala. 703, 82 Am. Dec. 736; *Avary v. Searey*, 50 Ala. 54; *Wharton on Evidence*, sec. 510. Nor did the trial court err in reference to the similar question to and answer of the witness Cody.

The motion to exclude the testimony of Murphy that he had been informed of the conduct of Lewis was properly overruled. Murphy had testified that he had charge of the building; that Baldwin, the president, and the man who hired Lewis, told him "to look after the operation of the elevator and to take charge of Archie Lewis." It is not material that he had no authority to discharge Lewis. He had authority to look after him, and it was his duty to report his misconduct to his superior.

Charges 1 to 6, inclusive, were properly refused. The evidence made it clearly a question for the jury, and the defendant was not entitled to the general affirmative charge under any of the counts.

Charge 7 was properly refused. Even if the slipping of the brake caused the injury, the jury could have found that the slipping of the brake was caused by the inattention or carelessness of the elevator boy, Lewis.

Charge 11 was properly refused. If Murphy told Bryant to go to the basement in the elevator and take the rug, ³¹² and Bryant so informed Lewis, and Lewis took the elevator down as a result of said instruction, the jury could have inferred that Lewis was negligent in making the descent without first ascertaining if plaintiff was still in the shaft.

Charge 8 was properly refused. Even if plaintiff did tell Lewis to bring the elevator down, it was no license to him to continue to do so. Besides, the plaintiff testified that he told him not to come after that one time.

Charge 10 was properly refused. If not otherwise bad, it is hypothesized on the running of the elevator to the first floor, when the evidence shows that the injury was caused by running it below the first floor and upon the plaintiff while in the basement.

Charge 9 was properly refused. The injury may have been caused by Murphy telling Bryant to take the carpet to the basement on the elevator, yet the jury might infer that Lewis was negligent in going down with the elevator. It is true the charge asks a finding for the defendant if "the injury was caused any other way than by the neglect of Lewis." But these are alternative and disjunctive postulations, all of which ignore the negligence of Lewis, except the last one.

There was no error in rendering the verdict for three thousand five hundred dollars. There is nothing in the contention that it was in excess of the sum claimed in counts 12 and 13. Said counts were for fifteen thousand dollars, and were amended after demurrer was sustained by setting out special damages, and which did not contain in the estimate anything for future incapacity. Besides, if said counts did claim less than the amount recovered, there were other counts that claimed more, and the verdict was referable to the good counts.

In view of the evidence, practically undisputed as to the character of injuries sustained, and which are of a permanent nature, we do not consider that the sum awarded

was excessive. The motion for a new trial was properly overruled.

The judgment of the city court is affirmed.

McClellan, C. J., and Dowdell and Denson, JJ., concur.

The Rule that an Employer Assumes the Risk of the negligence of his fellow-servants (Tennessee Coal etc. Co. v. Bridges, 144 Ala. 229, ante, p. 35, and cases cited in the cross reference note thereto), implies that the employer has exercised due care in selecting and retaining in his service competent employes: Jenson v. Great Northern Ry. Co., 72 Minn. 175, 71 Am. St. Rep. 475; Chicago etc. R. R. Co. v. Champion, 9 Ind. App. 510, 53 Am. St. Rep. 357; Handley v. Daly Min. Co., 15 Utah, 189, 62 Am. St. Rep. 916.

SOUTHERN RAILWAY COMPANY v. JOHNSON.

[144 Ala. 361, 39 South. 376.]

CARRIERS—Negligence—Passengers, Who are.—If a person who has notified a train conductor that he intends to travel on his train, in attempting to board it while in motion, is thrown to the ground by a sudden jerk of the train necessary to its movement, the relation of carrier and passenger does not exist, and he cannot recover for the injury received from his fall. (pp. 48, 49.)

H. McDaniel and Pettus & Jeffries, for the appellant.

362 SIMPSON, J. In this case the evidence produced by the plaintiff himself shows that the plaintiff remained in a saloon, not connected with the railroad depot or waiting-room, until the train had started and was running from one to three miles per hour (according to the statement of different witnesses), and then ran, took hold of the railing of the caboose, but fell. The only evidence of anything in regard to the movement of the train which might have caused the fall of plaintiff was his statement that when he undertook to take hold of the other railing with his left hand, "It gave a sudden jerk and threw me back. They were putting on more steam or something like that. It went faster, when it gave that sudden jerk and jerked my left hand loose. It swung me around behind the train and I fell."

In the first place, there was no proof that the jerk was anything more than what was proper and necessary in the

movement of the train, but, on the contrary, the plaintiff himself states that "They were putting on more steam or something like that," which was evidently the proper thing to do in moving the train.

In the next place, the relation of passenger had never been established and the defendant was not under any special obligation to the plaintiff. Even if the casual conversation in the saloon between plaintiff and the conductor could have been understood as an agreement to receive plaintiff as a passenger, which it was not, it could only mean that he would be received when he boarded the train in a proper manner, and could not authorize him to remain in the saloon until after the train had started and then run and attempt to board it while it was in motion. There is nothing in the evidence to show that any invitation was extended to him to board the train at this time, or even that anyone in charge of the train had any knowledge of the fact that he was attempting to board it. Even if it were proved, which it was not, that it was customary for the caboose to be pulled up to the platform for passengers to get on, while a ³⁶³ failure to do so might, under some circumstances, give a passenger who was left a right of action, yet it could not justify the action of the plaintiff in this case: *Jones v. Boston etc. R.*, 163 Mass. 245, 39 N. E. 1019; *Merrill v. Eastern R.*, 139 Mass. 238, 52 Am. Rep. 705, 1 N. E. 538; *Spannagle v. Chicago etc. R. R. Co.*, 31 Ill. App. 460; *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665, 29 S. W. 712; *McMurtry v. Louisville etc. Ry.*, 67 Miss. 601, 7 South. 401; *Webster v. Fitchburg R. R.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Browne v. Raleigh etc. R. R. Co.*, 108 N. C. 34, 12 S. E. 958; *McLaren v. Alabama Mid. Ry.*, 10 Ala. 506, 14 South. 405; *North Birmingham Ry. Co. v. Liddicout*, 99 Ala. 545, 13 South. 18.

It results that the court erred in refusing to give the general charge in favor of the defendant, on written request.

The judgment of the court is reversed and the cause remanded.

McClellan, C. J., Tyson and Anderson, JJ., concurring.

For Authorities upon the question decided in the principal case, see the monographic notes to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. Rep. 82; Duchemin v. Boston etc. Ry. Co., 104 Am. St. Rep. 587.

WELLS v. GALLAGHER.

[144 Ala. 363, 39 South. 747.]

NEGLIGENCE—Damages—Sufficiency of Complaint.—In an action to recover damages for alleged negligence, the complaint is sufficient if it alleges a duty owing to the plaintiff from the defendant, or state facts from which the law will imply the duty. (pp. 50, 51.)

EXPLOSIVES Left in Highways.—The law implies a duty not to place, or cause to be placed, or cause to remain, in the public highway, a bomb or explosive capable of inflicting injury by being exploded, and a complaint averring facts from which the law will imply this duty is sufficient. (p. 51.)

EXPLOSIVES in Highways—Negligence.—It is negligence to place, or cause to be placed, or cause to remain, in a public highway, a bomb or explosive capable of inflicting injury by being exploded; and it is unimportant how long such bomb or explosive is allowed to remain in the highway if injury results from placing or leaving it there. (p. 51.)

EXPLOSIVES in Highways—Negligence—Proximate Cause.—If an injury is the proximate consequence of negligence in placing and leaving an unexploded bomb in a public highway, it is immaterial whether it was exploded where placed or was carried to an adjacent yard before being exploded. (p. 51.)

EXPLOSIVES in Highways.—Evidence to show that children were accustomed to play in an alley where an unexploded bomb was placed and left, is admissible under a count in a complaint charging wantonness. (p. 51.)

Tillman, Grub, Bradley & Morrow, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

367 DOWDELL, J. The complaint contained two counts, the first counting on simple negligence, and the second on wantonness. Demurrers were interposed by the defendants to each of said counts, which demurrers were overruled by the court. The demurrer questioned the sufficiency of the averments of the first count as to showing any duty owing by the defendants to the plaintiff. In an action to recover damages for alleged negligence, the complaint is sufficient if it alleges a duty owing the plaintiff by the defendant, or states facts from which the law will imply the duty: *Louisville etc. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620. Here the facts stated are that the bomb or explosive which produced the injury was caused to be or remain in a public alley in the city of Birmingham, and that this was negligently done,

and as proximate consequence of such negligence the plaintiff received his injuries. The law, we think, clearly implies a duty not to place, or cause to be placed, or cause to remain, in the public highway a bomb or explosive capable of inflicting injury by being exploded. On the facts stated the law implies a duty, and it was therefore not necessary to aver it in terms in the complaint. It is not pointed out in the demurrer wherein the count is "vague, indefinite and uncertain." It is unimportant how long the bomb remained in the public alley, if it remained long enough ³⁶⁸ to cause injury; and it is equally unimportant whether the plaintiff, a boy under fourteen years of age, exploded the bomb in the public alley, where it is alleged to have been negligently placed, or whether he carried it to an adjacent yard and there exploded it, and received the injury complained of. In either case the alleged injury is the proximate consequence of the alleged negligence. We are of opinion that the first count sufficiently stated a cause of action, and was, therefore, not open to the demurrer interposed.

We need not consider the ruling on the demurrer to the second count, since it appears that the court gave the general affirmative charge in favor of the defendants on this count.

There was no error in overruling the defendants' objections to the question put by plaintiff to the witness, Mrs. Gallagher, in reference to the habit of children playing in the alley in question. The evidence offered was competent in rebuttal of this evidence. Moreover, at the time the question was asked, the second count of the complaint charging wantonness was in, and the fact that children were in the habit of playing in the alley would become a circumstance in the direction of showing elements constituting wantonness.

Charge 1, requested by the defendants, was the general affirmative charge to find in favor of the defendants; and charge 2 was the general charge to find in favor of the defendants as to the first count. It was open to the jury, under the evidence, to find all the facts alleged in the first count to have been proven, and consequently these charges were properly refused.

Written charges 3, 4, and 6 were each and all faulty in permitting consideration of due care on the part of the de-

fendants' servant in ascertaining the dangerous character of the bomb or explosive at the time he placed it in the alley. Charge 5, requested by the defendant, besides being obscure, was an invasion of the province of the jury.

We are unable to see that the trial court committed any error in overruling the motion for a new trial by the defendant Wells, based on the grounds of surprise, mistake or fraud. We fail to see that there was any fraud ³⁶⁹ perpetrated upon this defendant by his codefendant, Williams. Moreover, as to the defense which the defendant Wells claims that he might have interposed, to the effect that he was in no wise connected with the management and control of the Bijou Theater, opposed to his affidavit stating these facts was the evidence of Fleming Humphreys, the janitor, who swore that he was employed by Williams and Wells, and the evidence of Will Johnson, the property man, who swore that both Humphreys and himself were working for Williams and Wells. Besides this, the testimony of Williams tended to show that Wells, jointly with himself, managed and controlled a theater. These three witnesses were sworn and examined on the original trial in behalf of the defendants. This evidence was offered on the hearing of the motion for the new trial, and we do not think the unaided affidavit was enough to overcome it and justify the court in awarding the defendant Wells a new trial.

We find no reversible error in the record, and the judgment appealed from will be affirmed.

Haralson, Tyson and Denson, JJ., concur.

The Liability of One Who Leaves Dangerous Explosives on his premises where people are likely to come in contact with them is discussed in the recent cases of *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483; *Nelson v. McClellan*, 31 Wash. 208, 96 Am. St. Rep. 902; *Hughes v. Boston etc. R. R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518. And the liability for injuries due to fireworks in a public street is considered in *Landaw v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709. The general rule is, that persons having the possession and control of dangerous explosives must exercise the highest degree of care and exert the utmost caution to prevent others from being injured by coming in contact therewith: *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483.

FITTS v. CRADDOCK.

[144 Ala. 437, 39 South. 506.]

PARTITION—Life Estate and Estate in Remainder.—Property held by joint owners or cotenants consisting of a life estate and an estate in remainder may be partitioned in equity at the suit of the life tenant when the property cannot be equitably divided. (p. 53.)

PARTITION—Duration of Estate.—Partition is a matter of right among joint owners or tenants in common holding the lands, without reference to the duration of the estate, and may be compelled against a life tenant, as well as at his suit in equity when the property cannot be equitably divided. (p. 54.)

PARTITION—Life Estates and Remainders.—Partition may be had at the instance of a life tenant of property held in common, and the court in decreeing partition may make such orders as are necessary to preserve to the remainderman his share of the estate at the termination of the particular estate. (p. 54.)

H. Fitts, for the appellant.

438 TYSON, J. The real estate sought to be sold for partition, prior to the acquisition by complainant of any interest therein, was owned jointly by Berry and Craddock, each owning an undivided one-half interest.

Complainant acquired Berry's interest. Craddock died leaving a will by which he devised to his wife a life estate in the property and a remainder to a certain named person or persons, who are made parties respondent to the bill. Complainant acquired this life estate. It is shown that the property could not be equitably divided.

On motion the bill was dismissed for want of equity.

At one time it was doubted whether partition could be declared in favor of a tenant for life so as to affect the estate of a remainderman. Under the older authorities the impression obtained that partition had at the suit of a life tenant was and could be binding only during the continuance of the particular estate, and that when the life estate falls in, there will be a lapse to the status of occupancy in common unless other partition proceedings be resorted to.

But this idea has long since been departed from, and the rule established permitting all interest in the estate to be brought before the court and represented, so that a decree may be rendered binding them and concluding the claims of all remaindermen as well as that of a life tenant.

"If a complete partition be desired, all parties in interest may be brought before the court, and all estates, ⁴³⁹ whether in possession or expectancy, including those of infants and all persons not in esse, may be bound by the decree": *Gayle v. Johnston*, 80 Ala. 395, and authorities there cited.

In *McQueen v. Turner*, 91 Ala. 273, 8 South. 863, it is said: "Partition is a matter of right, and is authorized by the statute among joint owners, or tenants in common holding the lands, without reference to the duration of the estate. It may be compelled as well against a life tenant as obtained at his suit. The statute confers on the chancery court concurrent jurisdiction with the probate court to divide or partition, or to sell for division or partition, any property, real, personal or mixed, held by joint owners or tenants in common. . . . By authority of the statute, the chancery court may, in all cases in which the party asking for partition is entitled, decree a sale and divide the proceeds when the property cannot be equitably divided." It is also held in that case that a remainderman's interest in the property may be bound by the decree, and may be preserved to him by securing his share of the proceeds at the termination of the particular estate, by requiring bond and security before turning it over to the life tenant. The remedy in equity by partition, says Mr. Pomeroy, "is not confined to the tenants in possession, but extends to all persons interested, whether presently or in expectancy, and remaindermen, reversioners, infants and person not in esse may be bound by the decree": 4 *Pomeroy's Equity*, 3d ed., sec. 1387, and cases cited in note 1.

Under these principles the bill clearly has equity and the decree dismissing it must be reversed.

The respective rights of the respondents as remaindermen, under the will of Craddock in the property sought to be sold, as between themselves, are not involved on this appeal. Therefore, a construction of the will to the end of ascertaining which of them are remaindermen and the character of the estate devised in remainder is wholly unnecessary.

Suffice it to say that the averments of the bill clearly show that complainant has an interest in the property, and the extent of that interest, and that a remainder interest belongs to some one of the respondents.

440 A decree will be here entered reversing the decree appealed from and overruling the motion to dismiss the bill. Reversed and rendered.

Simpson, Anderson and Denson, JJ., concurring.

THE PARTITION OF ESTATES HELD IN REVERSION OR REMAINDER.

I. The Common-law Rule, 55.

II. Classification, 55.

III. Cases in Which Nothing but the Estate in Reversion or Remainder is Sought to be Partitioned, 55.

IV. Where the Proceeding is Brought by a Cotenant of an Estate in Possession, 56.

V. Where the Party Seeking Partition Has an Estate in Fee, 57.

I. The Common-law Rule.

The remedy by suit for partition was doubtless devised solely for the relief of persons in possession or entitled to be in possession of the property. As to persons having estates in remainder, they were not entitled to be in possession, and no partition of their interests could have been had, of any practical effect, unless by sale. It was a rule both at common law and in chancery that none but estates in possession were subject to compulsory partition: *Evans v. Bagshaw*, 39 L. J. Ch. 145, L. R. 5 Ch. 340, 18 Week. Rep. 657. This rule prevails in the greater number of the United States, but it has in some of them been modified or abrogated by statute.

II. Classification.

The question of the right to partition an estate in reversion or remainder may be considered, first, when such partition is sought without undertaking to affect the estate in possession; second, when a reversioner or remainderman seeks a partition which will also include the estate in possession; third, when a cotenant of an estate in possession seeks partition which will include both it and the estate in reversion or remainder; and fourth, when a cotenant of the fee seeks a partition which will include all other estates whether in possession or not.

III. Cases in Which Nothing but the Estate in Reversion or Remainder is Sought to be Partitioned.

Doubtless in chancery, at the common law and also under the rules prescribed by the statutes in the greater portion of the United States, neither an action nor a suit for partition can be sustained where the estate involved is not one in possession, but is either in reversion or remainder: *Culver v. Culver*, 2 Root, 278; *Schori v. Stephens*, 62 Ind. 441; *Stout v. Dunning*, 72 Ind. 313; *Paekard v. Paekard*, 16 Pick.

191; *Hunnewell v. Taylor*, 60 Mass. 472; *Center v. Herschel*, 24 Nev. 152, 50 Pac. 851; *Brown v. Brown*, 8 N. H. 93; *In re Burroughs*, 13 N. J. L. 284; *Stevens v. Enders*, 13 N. J. L. 271; *Reeves v. Reeves*, 6 N. J. Eq. 156; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242; *Sullivan v. Sullivan*, 66 N. Y. 37; *Hughes v. Hughes*, 63 How Pr. 408, 30 Hun, 349; *Tabler v. Wiseman*, 2 Ohio St. 207; *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 795, 23 Pac. 890; *Ziegler v. Grim*, 6 Watts, 106; *Robertson v. Robertson*, 32 Tenn. (2 Swan) 197; *Norment's Admr. v. Wilson*, 24 Tenn. (5 Humph.) 310; *Baldwin v. Aldrich*, 34 Vt. 526, 80 Am. Dec. 695; *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56; *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 918, 49 S. E. 136; *Pabst B. Co. v. Melms*, 105 Wis. 441, 75 Am. St. Rep. 921, 81 N. W. 882; *Moore v. Shannon*, 6 Mackey, 157. In a few of the states, however, a partition is allowed among the reversioners or remaindermen confined solely to their estate and not assuming to affect the preceding estate in possession: *Scoville v. Hilliard*, 48 Ill. 453; *Hilliard v. Scoville*, 52 Ill. 449; *Drake v. Merkle*, 153 Ill. 318, 38 N. E. 654; *Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115; *Cook v. Webb*, 19 Minn. 167; *Smalley v. Isaacson*, 40 Minn. 450, 42 N. E. 352; *Smith v. Gaines*, 38 N. J. Eq. 65; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161; *Aydlott v. Pendleton*, 111 N. C. 28, 32 Am. St. Rep. 776, 16 S. E. 8; *Witherspoon v. Dunlap*, 1 McCord, 546. The right, though created and recognized by the statute of Illinois, cannot be exercised where the interests of the parties cannot be ascertained until after the death of the life tenant: *Seymour v. Bowles*, 172 Ill. 521, 50 N. E. 122. In New York, the right of a remainderman to partition (first affirmed: *Bradshaw v. Callaghan*, 8 Johns. 558; *Woodworth v. Campbell*, 5 Paige, 518; *McGlone v. Goodwin*, 3 Daly, 185; *Blakeley v. Calder*, 15 N. Y. 617, 13 How. Pr. 476; and subsequently denied: *Sullivan v. Sullivan*, 66 N. Y. 37; *Hughes v. Hughes*, 63 How. Pr. 408, 30 Hun, 349), was by statute extended to cotenants of vested reversions or remainders: *Prior v. Hall*, 13 Civ. Proc. R. 83; *Havey v. Kelleher*, 36 App. Div. 201, 56 N. Y. Supp. 889; *Garvey v. Union T. Co.*, 29 App. Div. 513, 52 N. Y. Supp. 260. We believe no statute has yet conferred on a cotenant of an estate not in possession the right to compel a partition which will include and affect the estate in possession or any cotenant thereof: *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065.

IV. Where the Proceeding is Brought by a Cotenant of an Estate in Possession.

A cotenant of an estate in possession, though less than in fee, is generally, if not invariably, entitled to maintain a suit for partition, but his suit cannot affect estates in remainder or reversion unless specially authorized by statute: *Smith v. Samuels*, 97 Iowa, 55, 65 N. W. 1002; *Love v. Blauw*, 61 Kan. 496, 78 Am. St. Rep. 334, 59 Pac. 1059, 48 L. R. A. 257; *Williams v. Hassell*, 74 N. C. 434; *Simpson v.*

Wallace, 85 N. C. 477; Austin v. Rutland R. Co., 45 Vt. 215; Turner v. Barraud, 102 Va. 324, 46 S. E. 318. In a few of the states, as appears by the opinion in the principal case, such right has been created by statute, and therein a tenant of an estate in possession may compel a partition binding all interested, whether in possession, reversion or remainder: Gayle v. Johnston, 80 Ala. 395; McQueen v. Turner, 91 Ala. 273, 8 South. 863; Moody v. West, 12 Ind. 399; Sikemeier v. Galvin, 124 Mo. 367, 37 S. W. 551; Palethorp v. Palethorp, 194 Pa. 408, 45 Atl. 332; Carneal v. Lynch, 91 Va. 114, 20 S. E. 959.

V. Where the Party Seeking Partition Has An Estate in Fee.

Where several persons are cotenants of the fee, and each, therefore, has the right to compel a partition, it would be unreasonable to hold that any of his cotenants, by creating an estate in reversion or remainder, could defeat the right to a complete partition which would vest a title in fee. The more difficult question is, where there are two cotenancies, one of the estate in possession and the other of an estate in reversion, whether a cotenant of either by acquiring a moiety of the other, and thus becoming an owner of a moiety in fee, may compel partition of both estates and thus acquire title in fee and in severalty. In some of the states he doubtless can: Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Aylesworth v. Crocker, 21 R. I. 436, 44 Atl. 308; Freeman v. Freeman, 56 Tenn. (9 Heisk.) 301. His right to do so is statutory, and, in the absence of statutes creating it, does not exist: In re Hodgkinson, 12 Pick. 374; Johnson v. Johnson, 7 Allen, 196, 83 Am. Dec. 676; Metcalfe v. Miller, 96 Mich. 459, 35 Am. St. Rep. 617, 56 N. W. 16; Belew v. Jones, 56 Miss. 342; Harding v. Craft, 21 App. Div. 139, 47 N. Y. Supp. 450; Baldwin v. Aldrich, 34 Vt. 526, 80 Am. Dec. 695; Pabst B. Co. v. Melms, 105 Wis. 441, 76 Am. St. Rep. 961, 81 N. W. 882. Of course partition may be made by suit where all the parties consent, though some of them might, from the nature of their estate, resist with success: Brillhart v. Mish, 96 Md. 447, 58 Atl. 28; Biddle v. Biddle, 117 Mich. 28, 75 N. W. 91; Bice v. Nixon, 34 W. Va. 107, 11 S. E. 1004.

ALABAMA INDUSTRIAL SCHOOL v. ADDLER.

[144 Ala. 555, 42 South. 116.]

ACTIONS Against State, What is.—A state industrial school, being a component part of one of the departments of the state, is within a constitutional prohibition against the state being made a party defendant to any suit. (p. 58.)

ACTIONS Against States—Waiver of Prohibition.—If the constitution contains a prohibition against the state being made a party defendant to any suit, and does not provide for any waiver of such exemption, the legislature has no power to pass a law permitting such waiver, nor can the state or its agent waive such exemption by failure to plead to the jurisdiction or otherwise. (p. 59.)

ACTIONS Against States—Void Judgment.—The supreme court will take cognizance of the lack of capacity of an inferior court to render a judgment in an action against the state expressly prohibited by the constitution, although no objection to the jurisdiction was made in the latter court. (p. 60.)

Whitson & Dryer and S. W. John, for the appellant.

Smith & Smith, for the appellee.

556 DENSON, J. Section 14 of article 1 of the constitution of 1901, which is a literal reproduction of section 15, article 1, of the constitution of 1875, expressly prohibits the state from being made a party defendant in any court of law or equity.

In the case of Alabama Girls' Industrial School v. Reynolds, in MS., we held that an action or suit against the defendant in this case (appellant here) is really and substantially one against the state, and that it is exempt under the constitution from all actions or suits.

Under the influence of the case above cited, the judgment rendered by the lower court against the defendant (appellant here) must be held void for want of jurisdiction in the court to hear and determine the cause, and the appeal must be dismissed, unless it can be properly held that there was a waiver by the defendant of its immunity from being sued.

The defendant appeared by counsel and, without making any objection to being sued and without in any way raising the question of the jurisdiction of the court, went to trial on the plea of the general issue. If the defendant had been a person, or a corporation liable to suit, by the course adopted by it, unquestionably the question of the jurisdiction

of the court of the person of the defendant would have been waived.

But we must determine the question of waiver here in connection with the constitutional prohibition referred to. "The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented ⁵⁵⁷ which brings this power into action. But before this power can be affirmed to exist it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the cause of action therein contained": *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

There is not only no law giving the court capacity to entertain the complaint against the defendant, but there is the section of the organic law of the state which prohibits such capacity. There is no provision in the constitution by which the exemption of the state from suit may be waived. The legislature is without competency to enact a statute allowing the state to consent to a suit against itself, and it would seem that, if the law-making body has no power to enact a law granting such consent, certainly any action on the part of an attorney, a mere agent of the state, would be futile in that respect and as a waiver of the state's exemption from suit: *Ex parte State*, 52 Ala. 231, 23 Am. Rep. 567.

At the time the eleventh amendment to the constitution of the United States became operative, on the eighth day of January, 1798, the question arose whether the amendment did or did not supersede all suits pending, as well as prevent the institution of new suits, against any one of the United States by citizens of another state. In the case of *Hollingsworth v. Virginia*, the supreme court rendered a unanimous opinion to the effect that there could not be exercised by the courts any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state: *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644. So in the case of *Ex parte State of Alabama*, this court held that repeal of the law authorizing suits against the state strips

a court, in which such a suit is pending, of all jurisdiction to proceed further in the cause: *Ex parte State of Alabama*, 52 Ala. 231, 23 Am. Rep. 567.

⁵⁵⁸ In the case of the *State of Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233, which was a case in which Rhode Island filed a bill against Massachusetts to establish the northern boundary between the states, after answering the bill, a motion was made to dismiss the bill on the ground that the court had no jurisdiction. In discussing the question the court, on page 719 of the report, said: "An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue, but when the objection goes to the power of the court over the parties, or the subject matter, the defendant need not, for he cannot give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in law or equity, the ground of the objection is not taken by plea in abatement, as an exception of the given case, from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer or at the trial or hearing, unless it goes to the manner of bringing the defendant into court, which is waived by submission to the process. And whether the want or excess of power is objected to by a party, or is apparent to the court, it must surcease its action."

We have seen that the court below was without capacity to entertain a suit against the defendant on account of the prohibition in the constitution. It must follow, then, that the complaint failed to state a cause of action, and, in this state of the pleading, that objection was made in the court below is immaterial; this court will take cognizance of the lack of capacity in the court below: *L. & N. R. R. Co. v. Williams*, 113 Ala. 402.

The conclusion is, that the city court was without jurisdiction to render judgment against the defendant, and the want of jurisdiction could not be, and was not, waived. The judgment appealed from is void, will not support an appeal, and the appeal is therefore dismissed.

Tyson, Dowdell, Simpson and Anderson, JJ., concurring.

A Suit Against a Public Corporation, such as "The National Home for Disabled Volunteer Soldiers," having no other powers than the performance of a function of government, and accomplishing no other object, is a suit against the government, which cannot be maintained unless it has consented to be sued: *Overholser v. National Home*, 68 Ohio St. 236, 96 Am. St. Rep. 658. See the note to *Sanders v. Saxton*, 108 Am. St. Rep. 830-844, as to when public officers are subject to suit although they assume to be acting for a state or the United States.

HASS v. CITIZENS' BANK.

[144 Ala. 562, 39 South. 129.]

BILLS OF LADING.—Assignments of bills of lading are not governed by the commercial law, and an assignee simply acquires the title to the goods described therein. (p. 62.)

BILLS OF LADING—Liability of Assignee.—The assignee of a bill of lading of goods in transit becomes the owner of the goods and assumes the responsibility of delivering them according to the terms of the original contract. (p. 63.)

BILLS OF LADING—Liability of Assignee.—An absolute assignment to a bank of a bill of lading of goods, and of the draft for their purchase price, makes such bank the owner of the goods, and the bill of lading is not held by it as collateral security for the draft. (p. 63.)

BILLS OF LADING—Liability of Assignee.—An assignee of a bill of lading of goods and of the draft for their purchase price becomes the owner of the goods and liable to deliver them according to the terms of the original contract and cannot avoid such liability on the ground that as owner of such draft he is a bona fide purchaser of the goods for value, and as such not responsible for their delivery. (p. 64.)

Cunn & Weil, for the appellants.

T. W. Watts and A. Troy, for the appellee.

569 **TYSON, J.** The question raised by demurrer to the complaint as amended because of misjoinder of counts was eliminated by striking the third count, which was the common count for money had and received. The theory of this demurrer was that the two special counts were in case—for a breach of duty. We do not so construe 570 them. They are each clearly a special declaration in assumpsit, predicated upon a breach of contract, and practically seek a recovery for the money paid by plaintiffs for goods which were never delivered to them. They are in substance counts for money had and received, averring specially the facts upon which that claim is predicated.

Doubtless the purpose of the pleader in framing them was to have the liability of the defendant *vel non*, for the money paid by plaintiffs to it as the owner of the goods, determined by demurrer instead of by objections to evidence or by charges, which latter method would necessarily have been resorted to had the complaint simply contained the common count for money had and received for their use.

On the facts averred, there can be no doubt of Klyce's liability if he had made no assignment of the bill of lading. Did the defendant, by becoming the owner of the bill of lading, and the debt to accrue upon the actual or symbolical delivery of the goods to the plaintiffs, take Klyce's place? In other words, did it by becoming the owner of the goods, while in transit, become responsible for the performance of Klyce's contract? Or is it entirely relieved of all its burdens and entitled to have and hold the money paid to it for the goods which it never delivered?

It will scarcely be doubted that defendant, by becoming the owner of the bill of lading, became the owner of the goods, and the goods continued to be its property until the account assigned by Klyce to it against the plaintiffs and the draft drawn by Klyce on the plaintiffs, which also became its property, were paid and the goods delivered: *American Nat. Bank v. Henderson*, 123 Ala. 612, 82 Am. St. Rep. 140, 26 South. 498.

Assignments of bills of lading are not governed by the commercial law. The transferee simply acquires the title of the transferor to the goods described in them: *Commercial Bank of Selma v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38, 12 South. 568, 19 L. R. A. 701; *Jasper v. Kansas City etc. R. R. Co.*, 99 Ala. 416, 42 Am. St. Rep. 75, 14 South. 546; 4 Am. & Eng. Ency. of Law, 2d ed., p. 549.

The contract of sale between Klyce and the plaintiffs was merely an executory one. Klyce had agreed to sell ⁵⁷¹ and the plaintiffs to pay for the goods upon their delivery. Before this contract was executed between these parties, the defendant became the owner of the goods and of the right to receive pay for them. It undertook the performance of the executory contract by a delivery of the goods to plaintiffs and received the money to be paid by plaintiffs upon the execution of that contract; and notwithstanding it was paid for goods, which it never delivered, and which it assumed

to deliver, it undertakes to avoid its liability by saying that because it became the owner of the draft which was paid by plaintiffs, it is a bona fide purchaser for value of the goods from Klyce, and therefore not responsible for their delivery. To so hold would be to give effect to only a part of the transaction—to ignore its ownership of the goods and the account transferred to it by Klyce.

By no rule of construction can the averments of the complaint justify the conclusion that the bill of lading was held by defendant as collateral security to the draft, or that defendant was merely Klyce's agent for its collection. The cases relied upon by appellee (reported in 75 S. W., 84 N. W. and 96 N. W.) proceed upon the theory that the bill of lading was held by the bank as a security for the payment of the draft. The writers of those opinions were influenced to reach that conclusion partly upon the idea that to hold otherwise would impose a hardship upon the bank. The complaint in neither of the cases justified such a construction. And in order to sustain that conclusion the court resorted to its common knowledge of usages among banks to discount drafts and to accept a transfer of bills of lading as collateral security instead of dealing with the transaction as laid in the complaint. In each of the cases it was necessary to sustain the conclusion reached that the unqualified ownership by the bank of the bill of lading be gotten rid of; otherwise, there was no escaping the conclusion that it was liable. To do this, notwithstanding the complaint alleged a purchase of the draft and the bill of lading by the bank, it became necessary to hold that the transaction in legal effect was a loan of money by the bank, and the transfer of the debt and bill of lading was intended as a security therefor. There is ⁵⁷² no rule of law or of public policy against a bank becoming the absolute owner of the debt and the bill of lading for the goods, or its undertaking to perform an executory contract for the sale of the goods. And no sound reason exists why it should not be required to perform its contracts as individuals are required to do.

Would any court hold that if A contracted to sell B a horse, warranting its soundness, for one hundred dollars to be paid upon its delivery, and A should assign the contract to C, and C should deliver an unsound horse to B and receive the one hundred dollars, that C would not be liable for a breach of the warranty? We think not.

The case in hand is not different in principle, unless the fact that plaintiffs paid the draft, which was the property of defendant, for the purchase price of the goods differentiates it. The draft was drawn to the defendant's order accompanied by the bill of lading and the account, each of which was sold to it. The draft had not been accepted by the plaintiffs before its negotiation to defendant, and until accepted, in the absence of some fact tending to show that defendant was induced by the conduct of the plaintiffs to purchase it, they were not bound by it.

When it was paid, the purchase price to be paid for the goods as well as the goods themselves belonged to the defendant. The plaintiffs were not parties to the transaction by which it acquired the ownership of the goods and the right to receive payment for them. And when, as here, the defendant becomes the owner of the debt and the goods, and assumed necessarily the responsibility and burden of delivering them to the plaintiffs, it became the seller in fact and must bear the burden of the transaction. In short, the defendant took the contract of Klyce, the shipper, and stood in his shoes, with the same rights—no greater, no less. And the payment of the draft by plaintiff, which merely evidenced the price to be paid for the goods, can no more shield or protect the defendant from liability than its payment would have protected Klyce had he undertaken a delivery of the goods and received the purchase price for them.

It would be an anomaly to hold that the defendant is protected as purchaser of the account and bill of lading, ⁵⁷³ because the plaintiffs paid the draft, which also belonged to it in right of its ownership of the goods; or that it held the bill of lading as security for a debt which belonged to it. Just how it could be the unqualified owner of the debt, and only a qualified owner of the goods, when it purchased both, we confess our inability to see. When it purchased these papers it was bound to know the nature of the transaction between Klyce and plaintiffs. The bill of lading and the account attached to the draft carried notice on their face that Klyce had contracted to sell the goods represented by the account and bill of lading and to deliver them at the point of their destination.

To repeat in a measure, the essence of the agreement between Klyce and plaintiffs was that of a cash transaction

to be consummated in the future; that is, the goods were to remain the property of Klyce until there was an actual or symbolical delivery of them and contemporaneous payment of the price.

The distance of the parties from each other necessitated a resort to the usages of trade, whereby the price is paid on a symbolical delivery of the goods by a transfer of the bill of lading.

By shipping the goods to his own order Klyce retained the absolute title, and he would have had the title until the goods were at the place of delivery, so that an actual delivery could have been made on and for the payment of the price. But he chose not to do so. He said, in effect, to defendant: "I have agreed to sell and deliver to the plaintiffs at a certain place, certain goods at a certain price. Here is a bill of lading for these goods to my order; here is a draft for the price to be paid on delivery of the goods and here is an account showing the items. I desire the money for these goods now. I propose to sell the contract to you. If you choose to deliver the goods, which you may do actually or symbolically by assignment of bill of lading to plaintiffs, you will have the money to be paid for them at the place of delivery, otherwise you will have your goods and an obligation of plaintiffs to take them at the price." Thus far the defendant has dealt only with Klyce. After defendant purchased the contract it went to plaintiffs and said: "Here is the ⁵⁷⁴ bill of lading for the goods Klyce was to deliver to you, but which belongs to me—pay me the price and you can have the goods." The plaintiffs pay the price and take an assignment of the bill of lading. It is, therefore, plain that the symbolical delivery was the defendant's act, and as it took the place of an actual delivery, it must be as perfect as an actual delivery. If it is false in any respect, there is a liability upon defendant, who made itself a party to the transaction. The plaintiffs, having paid the purchase price to defendant for its goods, it will not be allowed to say to plaintiffs, "You did not deal with me." This conclusion is fully sustained by our own case of Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 South. 389, and the following cases in other jurisdictions:

Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679;
Searles v. Smith Grain Co., 80 Miss. 688, 32 South. 287.

On the facts averred, if proven, we entertain no doubt of the plaintiffs' right to recovery.

Reversed and remanded.

The Rights and Liabilities of Assignees of Bills of Lading are discussed at length in the recent note to *National Bank v. Baltimore etc. R. R.*, 105 Am. St. Rep. 332-375; and in the case of *Arkansas etc. Ry. Co. v. German Nat. Bank*, 77 Ark. 482, post, p. 160.

WESTERN UNION TELEGRAPH COMPANY v. MERRILL.

[144 Ala. 618, 38 South. 121.]

TELEGRAPH COMPANIES—Failure to Deliver Message—Presumption as to Free Delivery Limits.—If a telegraphic message is handed in for transmission, the presumption is that the sendee lives within free delivery limits and that the sender takes the risk of delivery unless he makes arrangements for delivery at a greater distance. Handing in such a message without explanation casts no duty on the transmitting operator, other than to forward the message accurately and with proper diligence, and it casts no duty on the terminal operator other than to copy the message correctly and to deliver it with all convenient speed, if the sendee resides within the free delivery limits. (p. 67.)

TELEGRAPH COMPANIES—Failure to Send Message—Presumption of Negligence.—Failure to send a telegraphic message raises the presumption of negligence, and casts upon the telegraph company the burden of overcoming such presumption. (p. 68.)

TELEGRAPH COMPANIES—Failure to Send Message—Free Delivery Limits.—If a telegraph company wishes to avail itself of the defense that the residence of the sendee and his place of business were beyond the free delivery limits, it must plead and prove such facts, and that it transmitted the message promptly, and a failure to start the message is a breach of the entire contract. (p. 68.)

PLEADING AND PRACTICE—Demand for Jury Trial.—A statute requiring that a demand for a jury be indorsed on the pleadings does not necessarily make such requirement mandatory. (p. 68.)

EVIDENCE.—Opinions of a nonexpert witness are inadmissible. (p. 69.)

TELEGRAPH COMPANIES—Authority of Agent—Presumption.—It is presumed that a telegraph agent intrusted with receiving messages for transmission has authority to bind it by his agreement as to the time for sending it, even to the extent of disregarding the regulations as to the hours of opening and closing its office, to which the message is to be sent. (p. 69.)

TELEGRAPH COMPANIES—Failure to Send Message—Damages—Proximate Cause.—If damages are sustained by reason of the failure of a telegraph company to send a message notifying the sendee of the serious illness of his wife, it is error to charge, as matter of law,⁶²¹ that he is entitled to recover damages for mental anguish and pain suffered by him. That is a question to be determined by the jury upon consideration of whether such failure was the proximate cause of the suffering, or whether it would not have followed if the message had been promptly transmitted and delivered. (p. 70.)

Walker, Tillman, Campbell & Morrow, for the appellant.

H. D. McCarthy and H. D. Merrill, for the appellee.

⁶²¹ TYSON, J. The complaint contains two counts and each predicates a right of recovery upon a breach of contract by defendant, for its failure to transmit and deliver a telegram received from plaintiff's agent, Abercrombie, at Birmingham, to be sent to plaintiff at Edwardsville, containing the information of the serious illness ⁶²² of the latter's wife: Western Union Tel. Co. v. Cunningham, 99 Ala. 314, 14 South. 579.

These counts were amended so as to meet certain objections pointed out in the demurrer interposed to each of them. This demurrer was refiled after the amendments were allowed and overruled by the court and properly so.

To the amended complaint the defendant filed two special pleas to which a demurrer was sustained. The first of these averred that plaintiff resided outside the free delivery limits of the town of Edwardsville and that the plaintiff's agent Abercrombie did not deposit with the receiving officer a special charge to cover the cost of delivery, and that the plaintiff's agent did not advise the office of the fact that plaintiff resided beyond the free delivery limits of said town, and that the agent at the receiving office had no knowledge of that fact.

The other plea sets up substantially the same facts, with the additional averment that plaintiff had a law office within the free delivery limits, but that his office was closed between the time the message was received for transportation and the time the train left for Birmingham. Neither of these aver that the company transmitted the message or attempted to transmit it promptly as it contracted to do, and which the law required it to do. "When a message is handed in for transmission the presumption must be and is that sendee

lives within the limits of free delivery, or that the sender takes the risk of delivery unless he makes arrangements for delivery at a greater distance. And handing in such message, without explanation, casts no duty on the transmitting operator, other than to forward the message accurately and with proper diligence. And it casts no duty on the terminal employé or operator other than to copy the message correctly and to deliver it with all convenient speed, if the sendee resides within the free delivery limits": *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. 419.

A failure to send the message raises the presumption of negligence and casts upon defendant the burden of overcoming that presumption: 27 Am. & Eng. Ency. of Law, 2d ed., 1090.

⁶²³ From what we have said it will readily be seen that the facts alleged in these pleas did not relieve the defendant from transmitting the message. If the defendant wished to avail himself of the fact, as a defense for its failure to deliver, that the plaintiff's residence and place of business were beyond the free delivery limits, it should have shown by the pleas that it transmitted the message to its operator at Edwardsville promptly. Non constat the plaintiff was within the free delivery limits and his whereabouts known to its operator at that point. A failure to start the message as alleged was a breach of the entire contract: *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844. The pleas were clearly bad.

There was no merit in the motion to continue the case or to strike it from the jury docket because the demand for a jury, indorsed upon plaintiff's complaint, was not signed by him or his attorney.

The act requiring the demand for a jury to be indorsed on the pleadings does not make such a requirement mandatory: Acts 1897-98, p. 808, sec. 11. The demand for a jury is not a pleading within rule 4 of practice, found on page 1186 of the Code.

The question propounded to Abercrombie, "You did not consider him [plaintiff] liable to you for that twenty-five cents, did you?" was clearly objectionable as calling for the opinion of the witness. Whether plaintiff was liable to witness was a question of law and fact not determinable by

him: Birmingham Ry. etc. Co. v. Franscomb, 124 Ala. 621, 27 South. 508.

This witness in the course of his cross-examination testified that he sent another message to plaintiff besides the one on which this action was predicated, but that he did not remember whether plaintiff had repaid him the charge or not. There was no error, therefore, in sustaining the objection to the question by defendant, "Did he [plaintiff] ever pay for any message except this one?" Evans v. State, 109 Ala. 11, 19 South. 535.

The questions propounded by defendant to the witness, Sightly, to which objections were sustained, constituting its eleventh, twelfth, thirteenth and fourteenth assignment of error, were ⁶²⁴ each properly excluded. The answer to each of them would have involved either the opinion or conclusion of the witness and are not within the principle applied in Choate v. Southern Ry. Co., 119 Ala. 611, 24 South. 373, conceding the correctness of the application of it in that case. Sightly was not an expert as to the matters inquired of him. His duty, it appears, was to receive the message from the sender and deliver it to the operator for transmission. To permit him to state that he did all in his power to get the message off would be a conclusion; and that everything was done by the operator and other agents of defendant in the office to get it off, or that nothing was left undone to get it off, would be an opinion. There was a direct conflict in the testimony of this witness and Abercrombie as to the time when this message was received at the office of defendant for transmission. Abercrombie swore that he delivered it to the receiving agent for transmission on Sunday afternoon between 4:35 and 5 P. M.; the witness Sightly swore that he received it at 6:16 P. M. The time when it was received was an important issue of fact in the case. For, if Abercrombie's version of the transaction was true, it was open to the jury to find that had it been transmitted promptly it would have reached the Edwardsville office before that office closed on that day; whereas, if this witness' testimony be true, it was received by him after office hours at the Edwardsville office. For the purpose of testing the recollection of the witness it was within the permissible bounds of cross-examination to ask him as to the time he received the first message for transmission on the day preceding. The testimony of Abercrombie afforded

an inference that the receiving agent bound the defendant to transmit the message promptly notwithstanding its regulations as to the office hours of the Edwardsville office. Nothing appearing to the contrary, it is presumed that defendant's agent who was intrusted with receiving messages for transmission had authority to bind it by his agreement as to the time for sending it even to the extent of disregarding the regulations as to the hours of opening and closing the office at Edwardsville: *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 South. 517.

⁶²⁵ On the other hand, Sightly testified that, when he received the message at 6:16 P. M., from Abercrombie for transmission, he told him that the office at Edwardsville had closed at 6 o'clock and that he would receive it at Abercrombie's risk and wrote on the back of it "Accepted at sender's risk on account of office closing early on Sundays"; that Abercrombie told him that a train would pass Edwardsville about 7 o'clock and that if his office would call Edwardsville at that time he would be sure to get it. He also testified that Abercrombie insisted that the agent at Edwardsville was at the office, and the testimony of the agent at Edwardsville showed that he was at the office on that afternoon from 6:20 to 7:50, although his office hours on Sunday afternoons were from 4 to 6.

We apprehend that on this version of the transaction it may be declared as a matter of law that it was the duty of defendant to have transmitted the message by 7 P. M., and the risk assumed by Abercrombie was that the Edwardsville agent would not be in his office at that hour, and that such an assumption by Abercrombie did not authorize the defendant to delay its transmission until the next morning. Nor did Abercrombie assume the risk of the failure of defendant's agent at Edwardsville, if present at his office, to receive the message if it was transmitted or his declination to answer the call if one was made on him.

The first exception reserved to the oral charge of the court is, therefore, without merit. The court in its oral charge also instructed the jury that, if the proof showed that plaintiff sustained damages in any sum, then he was entitled to recover for mental anguish and pain occasioned by his failure to receive the message in time to reach Birmingham before his wife died. In this there was error.

Whether the failure to transmit and deliver the telegram was the proximate cause of plaintiff's mental anguish occasioned by his failure to be with his wife when she died was, under the evidence, a question of fact for the jury, and not one of law for the court. It cannot be affirmed as matter of law on the testimony that he would have been able to have caught the only train passing Edwardsville on that afternoon for Birmingham ⁶²⁶ had the message been transmitted promptly and delivered promptly. If Sightly's testimony be true the message could not have been received by the Edwardsville agent before 6:20 P. M., nor was the defendant under any obligation to transmit it before that time. How long it would have taken that agent to have found plaintiff in order to deliver the message to him is not shown. And again, had it been transmitted at that time and delivered promptly, the testimony tends to show that plaintiff would have had to have gone to Heflin, a distance of some seven or eight miles from Edwardsville, to have caught the train. And just how long it would have taken him to make that trip is not shown. So, then, upon this phase of the testimony, whether plaintiff's deprivation of being with his wife in her last hours was attributable to defendant's negligent conduct was a question for the jury and not for the court. We are of the opinion that, on the testimony, the case under each count of the complaint was one for the jury. And also whether the plaintiff suffered mental pain, and whether that was the proximate cause of defendant's conduct, were each questions for the determination of the jury.

These principles will suffice for the guidance of another trial, without reviewing in detail the several written charges refused to defendant.

Reversed and remanded.

McClellan, C. J., Simpson and Anderson, JJ., concurring.

Where a Telegraph Company has Established Free Delivery Limits, notice of which is given on its blanks, it has been thought that the duty is on the sender of a message to ascertain whether the sendee resides within the free limits, and to notify the sending operator of the fact; and that a failure to observe this duty will excuse prompt delivery by the company: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148.

A Telegraph Company Which Receives a Message for delivery and fails to deliver it with reasonable diligence becomes prima facie liable, and the burden rests upon it of alleging and proving such

facts as it relies upon to excuse its failure: *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, 78 Am. St. Rep. 658; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 70 Am. St. Rep. 205; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190, 5 Am. St. Rep. 672.

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CASES
IN THE
SUPREME COURT
OF
ARKANSAS

ALLEY v. BOWEN-MERRILL COMPANY.

[76 Ark. 4, 88 S. W. 838.]

ATTORNEYS AT LAW—Law Partnership.—The act of one partner in a firm of lawyers within the scope of its business is the act of all. (p. 76.)

ATTORNEYS AT LAW—Law Partnership—Authority to Purchase.—A member of a law partnership is authorized to purchase in the name of the firm such law books as are reasonably necessary for carrying on the firm's business. (p. 77.)

CORPORATIONS, FOREIGN—Doing Business in State.—The institution and prosecution of an action by a foreign corporation does not constitute doing business within the state. (p. 77.)

W. Prickett and J. I. Alley, for the appellant.

R. G. Shaver, for the appellee.

WOOD, J. This is a suit begun in a justice's court on the second day of August, 1902, by Bowen-Merrill Company, a corporation under the laws of Ohio, against Glitsch & Alley, a law firm.

Omitting the caption, the complaint filed in justice's court by said corporation sets forth the following allegations:

"That the said Bowen-Merrill Company is a corporation organized under the laws of the state of Ohio, and doing business in Indianapolis, in the state of Indiana, with a branch house at Kansas City, Missouri. That the said defendants, by their said contract in writing, under their said firm name of Glitsch & Alley, promised to pay to the said plaintiff on the twenty-fifth day of June, 1898, the sum of twenty-five dollars for law books, with interest from maturity at the rate of ten per cent per annum; that the said defendants, by their

written contract, promised to pay to the said plaintiff on the twenty-seventh day of October, 1898, the sum of twelve dollars for law books, with ten per cent interest from maturity—copies of which said contracts are filed herewith, as exhibits 'A' and 'B,' respectively, and asked to be made and taken as a part of this complaint; and the said plaintiff also files herein a statement, duly verified, of the amount due and owing by the said defendants to the said plaintiff; and the said plaintiff says that the said defendants, nor either of them, have paid the said sums of money, nor the interest thereon, and that same is due, etc., and pray for judgment."

At the trial in the justice's court, in answer to the above allegations of plaintiff, J. I. Alley, a member of the former law firm, filed his separate answer, which, aside from caption and prayer, reads as follows:

6 "Admits that he was at some time a partner of H. Glitsch in the practice of law, but denies that he, as a member of the firm of Glitsch & Alley, made or signed the contract sued upon; denies that it was done with his knowledge or consent by Glitsch or anyone else; denies that it was a part of the partnership business, or that, if Glitsch signed said contract with the firm name, as alleged, he had any right or authority to do so, and [alleges] that same is not binding upon defendant J. I. Alley."

Defendant denies that the contract was made as alleged by plaintiff. Defendant, further answering, says: "That the plaintiff corporation herein is a foreign corporation, and that, as such corporation, it has never complied with the laws of Arkansas, and especially with the act of the legislature approved February 16, 1899, in the filing of a copy of its articles of incorporation with the Secretary of State, and for said reason cannot do business or maintain this suit in this state"

Further answering, defendant says: "The claim and contract sued on herein is barred by the statute of limitations; the same, if made as alleged, was made more than three years ago." Prayer for judgment.

The case was tried upon the issues as made by the complaint and answer in the justice's court, where judgment was in favor of defendant Alley, and the case was appealed to the Polk circuit court, where it was tried upon the same issues by the court sitting as a jury, and upon the following agreed statement of facts:

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"1. It is agreed that during 1898 Henry Glitsch and J. I. Alley were partners in the practice of law in Mena, Arkansas, under the style of Glitsch & Alley, and that the partnership agreement was a verbal one.

"2. It is further agreed that Henry Glitsch signed the firm name of Glitsch & Alley to a contract for law books of the Bowen-Merrill Company, and that the order, contract and agreement was made by Henry Glitsch in the firm name and committed to writing.

"3. It is agreed that J. I. Alley never gave his consent to nor authorized Henry Glitsch to make this order for books, nor any other order, nor to sign the firm name to the order, nor any other order nor contract, other than the use of his and the firm name in pleadings in court.

"4. It is agreed that this suit was begun in the justice's court of S. H. Smith on August 9, 1902.

"5. It is agreed that the following is a correct statement of the account:

1898.

July 15, Shearman & Redfield on Neg.....	\$12 00
July 18, Sackett's Instructions to Juries.....	6 00
July 18, Underhill's Criminal Evidence.....	6 00
October 27, Beach on Contracts.....	12 00

"6. It is agreed that the plaintiff, the Bowen-Merrill Company, is a foreign corporation, and that it has not complied with the laws of the state of Arkansas by filing a certificate of articles, etc. (Act of February 16, 1899), with the Secretary of the State of Arkansas.

"7. It is further agreed that the defendant, J. I. Alley, never acknowledged this indebtedness, or any liability whatever.

"8. It is agreed that J. I. Alley has been a continuous resident of the state of Arkansas since the making of this contract.

"9. That the defendant, Henry Glitsch, in two letters written by him, one to the plaintiff and one to the plaintiff's attorney, admitted that said books were bought for the use of said firm, and that he, as one of the partners, signed the firm name to the contract for the purchase thereof.

"10. It is agreed that the contract for the purchase of said books was made outside of this state."

This trial resulted in a verdict in favor of plaintiff, and defendant Alley appeals to this court.

§ 1. Is J. I. Alley, the appellant, liable on the contract made by Glitsch, his law partner, without his knowledge or consent? 2. Can the Bowen-Merrill Company bring this suit and maintain it in this state, it being an Ohio corporation, without filing here its articles of incorporation and appointing an agent?

1. Upon the first question the trial court declared the law as follows over defendant's objection, which was declaration No. 4: "In a partnership for the practice of law the act of one partner in the scope of business of said firm is the act of all, and every responsibility incident to other partnerships in general attaches to legal partnerships, as well as corresponding rights."

Upon this point the defendant asked the following declarations, which were refused:

§ "(1) That a firm of lawyers is a nontrading partnership, and one member of the firm cannot bind the other without express authority from the other."

"(2) It is necessary in this case for the plaintiff to prove that Henry Glitsch had the right to contract for books in the firm name."

"(3) It is the duty of persons or firms doing business with a nontrading partnership to know if one member is authorized to bind the other on contracts and commercial paper."

"(5) That a firm of lawyers is a nontrading partnership, and that one partner cannot bind the other, either on commercial paper or on contracts, although the proceeds were used in the business, without express authority from the other partner."

The court correctly declared the law that the act of one partner in a firm of lawyers in the scope of its business is the act of all.

It is generally held that nontrading firms have no power to borrow money and sign negotiable paper, and that one member of such firm has no power to bind the other members by signing the firm name to such paper: *Worster v. Forbush*, 171 Mass. 423, 50 N. E. 936; *Smith v. Sloan*, 37 Wis. 285, 19 Am. Rep. 757; 22 Am. & Eng. Ency. of Law, p. 154, note (Lawyers). This is because such transactions are not generally within the legitimate scope of the business of such firms. There is no reason why such firms should not be

bound by the acts of their members within the scope of their business. This would be true even in the case of negotiable paper, where it was shown that such paper was executed within the scope of the firm's business: 1 Bates on Partnership, sec. 343. Mr. Bates, after an exhaustive review of the authorities on the powers and liabilities of nontrading partnerships, says: "Each partnership must stand largely on the nature of its peculiar business, and no rule of universal application is possible." This is the correct doctrine, and there is no reason why a firm of lawyers should not be bound by the act of one of its members in buying such law books as may be reasonably necessary for carrying on the business. Such an act is certainly within the scope of the business of such a ¹⁰ partnership. It is impossible to practice law successfully in these times without some law books. As Mr. Bates says: "It is difficult to conceive of a partnership which does not require some purchases to be made in the usual course of its business." In nontrading firms this is certainly necessary. He instances the case of lawyers purchasing their law books: *Miller v. Hines*, 15 Ga. 197. See, also, *Crosthwait v. Ross*, 1 Humph. 23, 34 Am. Dec. 613. The purchase of law books reasonably necessary in the business is a responsibility and liability incident to a partnership for the practice of law. And when lawyers come together for that business, they are presumed to repose in one another the trust and confidence necessary to attend to the duty of purchasing law books for the firm, and to clothe each with authority to bind the other.

2. "The institution and prosecution of an action is not doing business within the meaning of the act of February 16, 1899, and other statutes upon the subject": *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; *Railway Co. v. Fire Assn.*, 55 Ark. 163, 18 S. W. 43.

Affirm.

Each Partner is the general agent of his copartners as to the firm business, and the members of the firm are considered as sanctioning the contract which they singly enter into: *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAIL-
WAY COMPANY v. REED.

[76 Ark. 106, 88 S. W. 836.]

RAILROADS—Passengers on Freight Trains—Presumption.—If there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger, and if he claims that he is, it devolves upon him to rebut the presumption. (p. 79.)

RAILROADS—Injury While Riding on Freight Train.—If a person of mature years rides upon the caboose of a freight train, in violation of the rules of the railroad company, when he knows, or ought to know, that the caboose is not intended for the carriage of passengers, and while so riding is injured in a collision, he cannot recover damages unless the injury was wantonly and willfully inflicted. (p. 80.)

B. S. Johnson, for the appellant.

E. H. Vance, Jr., and A. I. Roland, for the appellee.

108 RIDDICK, J. This is an action by the plaintiff to recover damages received while riding on one of the defendant's through freight trains. The rules and regulations of the company did not allow the conductors of such trains to carry passengers. The plaintiff in this case was an employé of another railroad company, but, being an acquaintance of the conductor who had charge of this train, he was permitted by him to ride in the caboose attached to it. The plaintiff testified that he did not know that it was against the rules of the company to carry passengers on such trains, but, leaving out the testimony of the witness for the defendant on this point, the question arises whether the undisputed facts do not show that he either had notice, or, what is the same thing, that he had notice of facts sufficient to put him upon inquiry, and that if he had made any inquiry he could easily have ascertained the fact that the employés of this train had no right to accept him as a passenger. Now, plaintiff did not find this train at the passenger depot. He boarded it in the yards of the company, near the stock-pen. It had no passenger coach attached, and there was nothing about it to indicate that it was intended for the carriage of passengers. Plaintiff himself shows that, though he had time and opportu-

ity to inquire and ascertain whether passengers were allowed to be carried on this train, he did not do so.

109 When we consider that plaintiff was fifty-three years old, had worked for railroads about fifteen years, was then at work at Texarkana for the Cotton Belt Railway Company, while his family lived at Malvern, a town on defendant's railway, between which place and Taxarkana several passenger trains were run each day, one of which trains was due to leave Texarkana only a few hours after plaintiff left on the freight, and by which plaintiff could have reached his home as soon or sooner than he could have reached it by the freight train, even had there been no accident—when we consider that plaintiff took this freight, on which an acquaintance was conductor, when he could have taken a passenger train and made better speed, and that up to the time of the accident he had neither paid, nor offered to pay, nor been asked to pay any fare—it seems not unreasonable to believe, as counsel for defendant contends, that he chose this train in preference to the passenger because he had grounds to hope that, through the courtesy of his friend, the conductor, he would be given free transportation. But we need not discuss that feature, for it is quite immaterial. For, conceding that plaintiff acted in good faith in getting on this train, it is clear that he acted carelessly. One should not get on the caboose of a through freight train, standing away from the passenger depot, in the yards of the company near a stockpen, with the intention to travel thereon as a passenger, without making some inquiry as to whether the train is intended for passengers. If, without inquiring, he does get on such a train, not intended for passengers, and is carried safely to his destination, he gains that much at the expense of the company. On the other hand, if an accident happens, and he is injured, there is no reason or justice in requiring the company to pay for his injuries, unless they have been wantonly or willfully inflicted. "When," said Chief Justice Cockrell, "there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger; and if he claims that he is, it devolves upon him to show a state of case that will rebut the presumption": *Hobbs v. Texas Pac. Ry. Co.*, 49 Ark. 357, 5 S. W. 586.

110 The facts in this case do not rebut this presumption, but show conclusively that the circumstances under which plaintiff boarded this train were sufficient to give him notice that this train was not intended for the carriage of passengers. Whether in fact he believed it was intended for passengers is a matter of no moment; for, although members of the train crew were present, he made no inquiry, and cannot hold the company responsible for his ignorance. The law in such a case treats him as knowing those things which he could and should have ascertained by inquiry. This question has been fully discussed by a recent decision of the court of appeals to which we refer: *Purple v. Union Pac. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

Had plaintiff been a boy or person of immature years, there would be more reason to support the judgment; but the facts in this case show that plaintiff, and not the company, was to blame for his presence on this train. He was injured by a collision which the evidence shows was the result of carelessness, but was not the result of wanton or willful negligence. On the whole case, we are convinced that it would be unjust to compel the company to pay damages for the injury to plaintiff which was caused by his getting on a train not intended for passengers, in violation of the rules of the company.

Judgment will, therefore, be reversed, and the action dismissed. It is so ordered.

Persons on Trains not operated for carrying passengers, by invitation, are entitled to at least reasonable care from the railway company. As to trespassers on a train, however, the carrier seems to owe no other duty than to refrain from doing them no willful or wanton injury: See *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, and cases cited in the cross-reference note thereto.

MARTIN v. BACON.

[76 Ark. 158, 88 S. W. 863.]

PROCESS—Exemption from Service of.—A person cannot be lawfully served with civil process while he is attending on a court in a state other than that of his residence, either as a party or a witness, or while going to or returning therefrom. (p. 82.)

PROCESS—Exemption from Service of.—If a nonresident is attending court within the state as a party to a suit therein, service on him of process in another civil suit will be set aside upon his motion. (p. 84.)

Graves & Martin, for the appellant.

Wood & Henderson, for the appellee.

158 **BATTLE, J.** James T. Grubb in his lifetime brought an action against C. H. Bacon for damages caused by an assault and battery made upon him by the defendant. The action was commenced on the 16th of November, 1901. The plaintiff died, and the action was revived in the name of W. H. Martin, as special administrator.

159 The defendant moved the court to quash the summons, setting out the grounds in his motion; and the plaintiff replied, stating facts. The court sustained the motion, and dismissed the action, and the plaintiff appealed.

The motion was heard and sustained upon the following agreed statement of facts:

“The alleged assault for which this action was brought was made on the sixth day of May, 1901, in the city of Hot Springs, Garland county, Arkansas. Upon said date the defendant was a visitor to the city of Hot Springs, and was not present in said city under compulsion of any judicial process, but was here voluntarily.

“Said defendant, C. H. Bacon, is, and was on the said sixth day of May, 1901, a resident of the state of Tennessee.

“That upon a preliminary examination being made and held, in which said alleged assault was investigated, the defendant was held to await the action of the grand jury of Garland county, and was permitted to, and did, give bond in the sum of one thousand dollars for his appearance on the first day of the October, 1901, term of the circuit court of Garland county, next ensuing.

"That afterward, to wit, on the nineteenth day of October, 1901, said grand jury returned a bill of indictment charging the said Bacon with assault with intent to kill, committed upon the person of the said J. T. Grubb, and on the — day of —, 1901, an order was made by the circuit court of Garland county permitting the said Bacon to remain upon the bond already given by him until the further order of the court; and the case was set for trial on the nineteenth day of November, 1901, the same being also a day of said October term of said court.

"That the defendant left his home, in Tennessee, and came to the city of Hot Springs, arriving here on the fifteenth day of November, 1901—coming here for the purpose of being present at said trial, and of making his arrangements for said trial—and was served with summons herein on the sixteenth day of November, 1901, and came here in obedience to his said bail bond, requiring him to be present at said trial, and for the purpose of being tried under said indictment, and that said defendant was in this county for no other purpose than to be present and ¹⁶⁰ submit himself to the orders and judgment of this court in said cause."

It is well settled by the great weight of authority that a party cannot be lawfully served with civil process while he is in attendance on a court in a state other than that of his residence, either as a party or a witness, or while going to and returning therefrom: *Murray v. Wilcox*, 122 Iowa, 188, 101 Am. St. Rep. 263, 97 N. W. 1087, 64 L. R. A. 534; *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 504, 54 Am. St. Rep. 276, 33 S. W. 842; note to *Mullen v. Sanborn*, 79 Md. 364, 47 Am. St. Rep. 421, 29 Atl. 522, 25 L. R. A. 721. In this state a party, in civil actions and criminal prosecutions, can testify as a witness, and may be exempt from service of civil process in both capacities. Judge Elliott, in *Wilson v. Donaldson*, 117 Ind. 356, 10 Am. St. Rep. 48, 20 N. E. 250, 3 L. R. A. 266, gives the reason for the exemption as follows: "If citizens of other states are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state who submits to the jurisdiction of our courts, and here wages his forensic

contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions. It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right because he is willing to trust our courts and our laws without removing his case to the federal courts, or refusing to put himself in a position where a personal judgment may be rendered against him. High considerations of public policy require that the law should encourage him to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him¹⁶¹ with the obligation to submit to the writs of our courts if he comes within our borders."

Judge Trent, in *Small v. Montgomery* (C. C.), 23 Fed. 707, said: "All the United States circuit judges who have passed upon the question of late, as well as dicta by the supreme court of the United States in respect thereto, reach this result, viz., that where a party in good faith is brought within the jurisdiction of the state, or detained therein, being a non-resident, either as party to the suit, or as witness in another suit, he is not subject to service. And the reason—the main reason—is very potential, so far as our country is concerned. There are many states, stretching from Maine to Oregon, and a man who is required to go from one to the other, either as a witness or as a party to a suit, should not be pursued by writ while abroad, instead of being sued at his own residence; otherwise everyone, as is stated in many of these opinions, would avoid as far as possible being subjected thousands of miles away to suits of this character": *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582.

Upon the same principle of justice, good faith, and comity, and to subserve the due administration of justice, it has been held that "a person who has been brought within the jurisdiction of a court from another state upon a requisition, as a fugitive from justice, and has been tried for or discharged as to the offense against him, is not subject to arrest

on a civil process until a reasonable time and opportunity have been given him to return to the state from which he was taken': *Moletor v. Sinnen*, 76 Wis. 308, 20 Am. St. Rep. 71, 44 N. W. 1099, 7 L. R. A. 817; *Blair v. Turtle*, 1 McCrary, 372, 5 Fed. 394; *Compton v. Wilder*, 40 Ohio St. 130; *People v. Judge*, 40 Mich. 630; *Cannon's Case*, 47 Mich. 482, 11 N. W. 280.

The appellee comes within the spirit of the rule which exempts persons from service of civil process, and is entitled to its benefit. He is a nonresident of this state—a resident of the state of Tennessee—and was bound to attend the Garland circuit court, in this state, to avoid the forfeiture of his bond. He was also entitled to attend as a witness in his own behalf. His attendance was compulsory. While in attendance in obedience to his bond, process in this case was served upon him. The service, on his motion, should be set aside: *Murray v. 162 Wilcox*, 122 Iowa, 188, 101 Am. St. Rep. 263, 97 N. W. 1087, 64 L. R. A. 534.

Judgment as to the service of process is affirmed, and in other respects is reversed.

The Exemption from Service of Process of witnesses and parties to an action who are not residents of the state wherein the action is pending is discussed in the note to *Worth v. Norton*, 76 Am. St. Rep. 535-540; and in the subsequent cases of *Gynn v. McDanel*, 4 Idaho, 605, 95 Am. St. Rep. 158; *State v. Kennan*, 33 Wash. 247, 99 Am. St. Rep. 949; *Greenleaf v. People's Bank*, 133 N. C. 292, 98 Am. St. Rep. 709. The immunity from service of civil process on a witness while attending a trial in another state seems to be universally conceded; and it has recently been affirmed that a nonresident defendant in a criminal prosecution, attending the courts of the state for the purpose of his trial, is exempt from the service of civil process while coming and departing as well as while actually in attendance at court: *Murray v. Wilcox*, 122 Iowa, 188, 101 Am. St. Rep. 263.

ST. LOUIS AND NORTH ARKANSAS RAILROAD COMPANY v. MATHIS.

[76 Ark. 184, 91 S. W. 763.]

MASTER AND SERVANT—Injury to Servant—Contributory Negligence.—A railroad section-hand, who is killed by a train while helping to remove a handcar from the track under orders from a section foreman on whose vigilance he relies, is not guilty of contributory negligence. (p. 88.)

NEGLIGENCE Causing Death—Damages—Loss of Parental Care.—In an action by minor children for the death of their parent, the industry, moral character, and parental care and affection of the deceased may be taken into consideration in estimating the damages. (p. 89.)

CONSTITUTIONAL LAW—Restriction on Appellate Jurisdiction.—A statute limiting the power of the circuit court to set aside verdicts as excessive a restriction upon the constitutional appellate power of the supreme court, and for that reason is void. (p. 91.)

CONSTITUTIONAL LAW—Restrictions on Appellate Jurisdiction.—A constitutional provision conferring appellate jurisdiction upon the supreme court, "under such restrictions as may from time to time be prescribed by law," does not confer power to limit the right of appeal by statute, but only power to prescribe regulations as to the manner of taking appeals, and the time within which they may be taken. (p. 91.)

CONSTITUTIONAL LAW—Restrictions on Appellate Jurisdiction.—If a constitutional provision confers upon the supreme court appellate jurisdiction in all cases of final judgment, a statute which seeks to prohibit in that court an inquiry as to the sufficiency of the evidence to sustain the amount of damages assessed by a jury, or to require a litigant to surrender his right of appeal as a condition upon which he may accept the reduction by the trial court of an excessive verdict, is unconstitutional and void. (p. 92.)

DEATH BY WRONGFUL ACT—Excessive Damages.—While the damage to infant children caused by the death of their father by wrongful act, and the loss of his care, attention and moral training, can be measured by no fixed rule, yet there is a limit to the amount to be allowed in such case, and it is the duty of the appellate court to see that such limit is not exceeded. (p. 93.)

DEATH BY WRONGFUL ACT—Damages to Minor Children.—While no amount of money can fully compensate minor children for the distress of mind suffered by them in the violent and painful death of their father caused by negligence, and in the loss of his affectionate care and attention, yet it is the duty of the court, in determining whether the amount awarded is excessive, to ascertain what amount would constitute fair compensation for the injury inflicted. (p. 93.)

G. J. Crump, J. M. Moore and W. B. Smith, for the appellant.

F. O. Butt and C. D. James, for the appellee.

¹⁸⁵ McCULLOCH, J. This is a suit brought against appellant railroad company by the administrator of the estate of John Gunn, deceased, for the benefit of the widow and the next of kin of said decedent for damages occasioned by reason of the alleged negligent killing of deceased by a train of appellant. Damages are laid in the sum of twenty-five thousand dollars, and plaintiff recovered a judgment for ten thousand dollars, from which the defendant appealed.

Appellant claims that the evidence is insufficient to sustain the verdict, and that the court erred in refusing to instruct the jury peremptorily to return a verdict in its favor, but concedes that, if the testimony is legally sufficient, there was no error in the instructions or other proceedings. Deceased was a section-hand employed by appellant, and worked under one Lisk as foreman. On the morning of September 12, 1901, deceased and the foreman, and gang, of which he was a member, started on a handcar from Coin, a station on appellant's road, to the place of their labor of the day. After running only about one-fourth of a mile they discovered the approach of a local freight train, ¹⁸⁶ and hastily stopped the handcar, and endeavored to remove it from the track. It is contended on behalf of appellee that Gunn was killed while assisting, under orders of the foreman, in the removal of the handcar from the track, and while so engaged appellant was guilty of negligence, through its foreman, in failing to warn him of the imminent danger. Appellant claims, on the other hand, that Gunn was duly warned of the near approach of the train, and, pursuant to the warning, left the track, but voluntarily returned to secure his dinner-pail, and in so doing was struck by the engine and killed. On this point there is a sharp conflict in the testimony, and it is not the province of this court to determine where the weight lies. The foreman and several of the section-hands testified that, when they discovered the approaching train, they, with deceased, stopped the handcar, and tried to lift it off the track, and partially succeeded, but one end of the car was against a stump, and they failed to get it off; that the foreman then called out to the hands to leave the car, and they all ran up the hill and across a ditch about twelve feet away from the track, when deceased returned to the car to get his dinner-pail, and was struck by the train. George Carson, a witness introduced by the plaintiff, testified that he was about two hundred yards away, and saw the accident, which he de-

scribed as follows: "There was one man standing at the left corner of the car, and when they went to throw the car off they threw the car this way—one side—and there were three at that end, and two at this, and when it caught that way, the car dropped down, the hind end, and they seemed to give away, and let it drop two or three times before they got it off. About the time I thought they had shoved the car off the track, two of these men run right around the car there this way, and this man left at this corner had never raised up out of a stooping position, and these two men, just as they passed by, the engine struck the car, they just got away."

"Q. Before the car was struck, had any of these men left the track and gone back? A. No, sir; I never saw any come back; no man at all."

George Gunn, a son of deceased, testified that the accident occurred in his view, and he described it as follows:

187 "Well, like this way: the track [indicating] and the car running up that way, and they were all on there running. He was right there on the front end, and when they got ready to get off the car, why, three of them got off at one end, and two at the other end, and they moved the car around, and got it across the track that way, and then went to lifting the car and got it, it looked to me like, pretty near off, and part of the men started to run up the bank, and two of them stayed with that end of the car, and it looked to me like, I know it got one of them, and it looked like the other one just got away.

"Q. Which way were you looking? A. I was looking right up the track.

"Q. Was there anything in the track to obstruct your view? A. No, sir; he was struck at this corner of the car [indicating].

"Q. And the other man ran around the car, and ran up the bank? A. Yes, sir.

"Q. Had any of these men prior to that time left the handcar before that? A. They left when the train was pretty close.

"Q. They left just about the time the train struck the man? A. Yes, sir.

"Q. Did you see anybody before the train struck the car and the man; did you see anyone run up the bank and come back? A. No, sir; no, sir."

Two of the witnesses, John Bridgeford and T. L. Plummer, who were passengers on the train, testified that they looked out of the car window, and saw the engine strike the handcar and a man who appeared to be trying to get it off the track, and that several of the men were running up the hill. The testimony of both these witnesses tended to show that deceased did not leave the handcar and return after crossing the ditch. The jury was therefore warranted in finding from the testimony that deceased was struck while at work, under order of the foreman, removing the car, and that he did not leave the track and then return in the face of danger. Treating it as thus established that the deceased did not leave the handcar or track and return after receiving ¹⁸⁸ warning of the danger, there is no testimony tending to show contributory negligence on his part. Joining his fellow-workmen at the accustomed meeting-place that morning, he and they proceeded, by direction and command of the foreman, toward the place at which they were to work. If the train was thus expected, and due care was not observed in awaiting its passage, it was the negligence of the foreman, who was vice-principal, and not the negligence of the section-hands. They met the train in a curve, and there is evidence that no signal was given from the approaching train by whistle or bell. When the party discovered the approach of the train, they hastily descended from the handcar, and endeavored to remove it before the train reached them.

The language of the court in *St. Louis etc. Ry. Co. v. Rickman*, 65 Ark. 138, 45 S. W. 56, is particularly applicable to the facts here: "What the plaintiff did was manifestly done in obedience to the orders of the foreman to get the car off quick. Plaintiff had a right to presume that the foreman, who was in a position to devote his whole attention to the approaching train and the efforts of his men to get the handcar off the track, could better determine than he what was best to be done under the circumstances. We do not think that the danger was so apparently imminent but that he could reasonably rely upon the direction of the foreman. He did so, and was injured. He should not be charged with contributory negligence under the circumstances."

We think there was sufficient evidence to sustain a verdict for the plaintiff, and the court did not err in refusing to take the case from the jury.

It is set forth as a further ground for new trial that the verdict is excessive. The testimony fairly establishes the fact that deceased contributed to the support of his family as much as three hundred and fifty dollars per annum, in addition to his earnings in supervision of his farm, and that the present value of an annuity in that sum for his expectancy would be four thousand six hundred and ninety dollars. He owned a small farm of eighty acres of land, and was out of debt. It is also shown by undisputed testimony that he was a very industrious man of good moral character, and was especially solicitous as to the mental and moral training of his children. That he was a kind and indulgent father, provided well for his family, and gave much attention to ¹⁸⁹ the proper instruction and education of his children. He had five children, the youngest being only two years of age at the time of the accident. This is a well-recognized element of damages in suits of this kind for the benefit of minor children, and it is held to be for the jury to say, from all the facts and circumstances found, what will be a fair compensation to the children for the pecuniary loss of the care and attention of the father in the way of training and instruction: *St. Louis etc. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472.

The amount of damages of this kind being of an indeterminate character, and left largely to the sound discretion of the jury, we cannot say as a matter of law that the verdict is so excessive as to appear to have been given by the jury under passion or prejudice.

The judgment is therefore affirmed.

ON REHEARING.

¹⁹⁰ McCULLOCH, J. Counsel for appellant ask a reconsideration by the court of the question of excessiveness of the verdict, and in doing so they necessarily attack the validity of the act of April 25, 1901 (*Kirby's Digest*, sec. 6217), which is as follows:

"An Act to Regulate the Practice in the Circuit Courts in Certain Cases.

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. The verdict of any jury rendered in any action for the recovery of damages, where the measure thereof

is indeterminate or uncertain, shall not be held to be excessive, or be set aside as excessive, except for some erroneous instruction, or upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice; provided, that the circuit judge presiding at the trial may, on motion for a new trial filed by the losing party, if he deems the verdict excessive, indicate the amount of such excess, and thereupon, if the losing party shall offer to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive, and the prevailing party shall refuse to remit the same, the verdict shall be set aside."

It is contended by learned counsel, first, that the statute applies only to practice in the circuit court, and not to this court on appeal; and next that if it does apply to this court, it is void because it is an unauthorized curtailment by the legislative branch of government of the appellate jurisdiction vested by the constitution in the court.

It seems plain to us that, if the statute is binding upon the circuit court, unless it be held to be unwarranted restriction upon the appellate jurisdiction of this court, it is also binding here on appeal, for the reason that this court only searches for errors in the proceeding below, and will reverse cases only on account of errors, either of omission or commission, of the trial court.

Our inquiry, then, is whether the statute in question is valid so far as it attempts to control this court in the determination ¹⁹¹ of cases on appeal. If it is, the effect of it is to prevent a review by this court of an erroneous assessment of damages made by a jury, and the failure of the trial court to correct the error. The right of appeal is, to that extent, cut off by the statute, if it be given full force. The statute also imposes upon an unsuccessful litigant, before he can accept a reduction of an excessive verdict, the penalty of of surrendering his right of appeal.

The constitution of the state confers upon this court, in the broadest terms, appellate jurisdiction coextensive with the state. It provides that the supreme court shall have a general superintending control over all inferior courts of law and equity.

The section fixing jurisdiction of the court is as follows: "The supreme court, except in case otherwise provided by

this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and super-sedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs": Const. 1874, art. 7, sec. 4.

It has been often held by this court that the appellate jurisdiction conferred by the constitution upon the court cannot be enlarged or divested by the legislature: *State v. Ashley*, 1 Ark. 279; *Ex parte Woods*, 3 Ark. 532; *Ex parte Anthony*, 5 Ark. 358; *State v. Jones*, 22 Ark. 331; *Ex parte Batesville etc. R. Co.*, 39 Ark. 82; *Simpson v. Simpson*, 25 Ark. 487; *O'Bannon v. Ragan*, 30 Ark. 181.

It follows, then, that unless the constitution empowers the legislature to limit the appellate jurisdiction of the court, it cannot be done. It is contended on behalf of appellee that it was meant, by the use in the constitution of the words "under such restrictions as may from time to time be prescribed by law," to confer upon the law-making body the power to limit the right of appeal. Placing this construction upon the language used, the ¹⁹² effect of the constitutional provision would be to give to the court only such appellate jurisdiction as the law-making body should see fit to leave to it. Bearing in mind our scheme of constitutional government, both state and national, and the policy of dividing it into three co-ordinate branches of equal dignity and power within defined limits, we cannot believe that the framers of the present constitution meant to thus subordinate the jurisdiction of the highest court of the state to the will of the legislature. For, if it be held that the legislature may limit the power of the court to review the decision of an inferior court in one respect, it may do so in another; and if it may prohibit the court from reviewing one question in a case, it may prohibit the review of all questions, and may cut off the right of appeal altogether. Thus by the process of elimination the legislature could strip the court of all appellate jurisdiction, and deny to litigants the right of appeal, which is guaranteed by

the constitution. The manifest intention of the framers of the constitution was, primarily, to give a right of appeal to the supreme court from all final judgments of circuit and chancery courts, but to vest in the legislature the power to prescribe regulations as to manner of taking appeals and time within which the same may be taken and prosecuted. This is, we think, what is meant by the words "under such restrictions as may from time to time be prescribed by law." To construe it otherwise would be to make it read that the supreme court shall have only such appellate jurisdiction as may from time to time be prescribed by law. If the framers of the constitution had intended to so limit the jurisdiction of the court, doubtless they would have employed a more appropriate and less ambiguous form of expression to convey that meaning. We therefore hold that it was beyond the power of the legislature to prohibit an inquiry in this court as to the sufficiency of the evidence to sustain the amount of damages assessed by a jury, or require a litigant to surrender his right of appeal as a condition upon which he may accept the reduction by the trial court of an excessive verdict.

After careful reconsideration of the evidence in the case, we are constrained to believe that the verdict is for an excessive amount of damages. We said in the former opinion that the evidence ¹⁹³ warranted a verdict for four thousand six hundred and ninety dollars damages to cover the probable contributions of the deceased to the support of his family. This is certainly the utmost limit to which the jury could have gone upon this element of damages. If we indulge in the presumption that the jury confined the verdict to the limits warranted by the evidence as to this element, it leaves the sum of five thousand three hundred and ten dollars which must have been assessed to cover damages for loss of the care, attention and moral training of the father to his children. It is difficult to determine what amount should be allowed upon this element of damages. It is indeterminate, and is ascertained by no fixed rules for admeasurement, and is left to the sound discretion of the jury. Yet there must be some limit to the amount to be allowed, and it is the plain duty of the appellate court to see that the just limits are not exceeded. It is often said that where loss of limb is sustained and great suffering endured, no amount of money will compensate therefor; that no amount of money might induce a person to voluntarily undergo the loss of limb and consequent

suffering; yet that would be a highly improper basis upon which the damages should be estimated. It is the duty of courts and juries to allow such a sum as will fairly compensate for the pecuniary loss. So, in a case of this kind no amount of money can fully compensate children for the distress of mind suffered by them in the violent and painful death of the father, and in the loss of his affectionate care and attention, but the court must ascertain some just amount to allow a fair compensation for the injury: *St. Louis Ry. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *St. Louis etc. Ry. Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472; *St. Louis etc. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

Believing, as we do, that the amount allowed by the jury, either upon one or the other of the two elements of damages, was excessive, it becomes our duty to remand this case for a new trial, or to require the plaintiff to remit the judgment down to such an amount as we can say the evidence fully warranted, there being no errors of law in the proceedings.

We think that upon the whole proof, considering the earning capacity of the deceased and the amount of contribution he would probably have made to his family, together with the proof upon the other element of damages, eight thousand dollars will compensate for the loss as fully as pecuniary compensation can be rendered. So, if the ¹⁹⁴ plaintiff will, within fifteen days after this day, remit two thousand dollars of the judgment, the same will be affirmed as to the remainder; otherwise it will be reversed, and the cause remanded for a new trial.

It is so ordered.

Mr. Chief Justice Hill Dissented to that part of the opinion concerning any reduction of damages. He expressed the opinion that the verdict, under the circumstances, was not excessive, but moderate indeed, was not improperly produced, and that it was the duty of the court to let it alone.

The Legislature cannot Deprive the Supreme Court of its revisory jurisdiction over all the other state tribunals (*Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438), nor can it annul a rule of the supreme court respecting the mode of printing transcripts on appeal (*Jordan v. Andrus*, 26 Mont. 37, 91 Am. St. Rep. 396), nor require that court to state the reasons for its decisions in writing: *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

BURNETT v. STATE.

[76 Ark. 295, 88 S. W. 956.]

CONSTITUTIONAL LAW—Suspension of Prosecution—Right to Speedy Trial.—If one under prosecution for seduction marries the female alleged to have been seduced before the termination of such prosecution, and thereby causes it to be suspended in accordance with statutory provisions, and subsequently deserts her without cause, whereupon the prosecution is reinstated, he cannot complain that the suspension of the prosecution by his marriage has deprived him of his constitutional right to a speedy trial, if he has at no time demanded a speedier conclusion of such trial. (p. 96.)

CONSTITUTIONAL LAW—Former Jeopardy.—If a prosecution for seduction is suspended on account of the marriage of the accused and the prosecutrix after a jury has been sworn and evidence introduced, and such prosecution is reinstated upon his willful desertion of her in accordance with statutory provisions, no jeopardy attaches by reason of the former prosecution unless the suspension thereof is ordered without the consent of the accused, express or implied. (p. 96.)

CRIMINAL LAW—Former Jeopardy.—If a trial is suspended by the act of the accused, or for his benefit, or at his own request, no jeopardy attaches by reason of that trial. (p. 96.)

SEDUCTION—Suspension of Prosecution—Presumption.—If the record of a former trial for seduction shows that the prosecutrix and the accused were married in open court, and the case was thereupon continued, it must be presumed that the accused consented to the suspension of the prosecution, and the prosecution need not prove an express consent. (p. 97.)

SEDUCTION—Corroboration of Prosecutrix.—In a prosecution for seduction, in order to secure a conviction, there must be corroboration of the prosecutrix as to the promise of marriage, its falsity, and that the accused obtained carnal intercourse with her by virtue of such false promise. (p. 98.)

C. C. Reid and Sellers & Sellers, for the appellant.

R. L. Rogers, attorney general, for the appellee.

296 McCULLOCH, J. Appellant was indicted, tried and convicted of the crime of seduction, alleged to have been committed by obtaining carnal knowledge of Fannie Bruton, an unmarried woman, by virtue of a false promise of marriage.

The case was here on a former appeal (72 Ark. 398), and after it was reversed and remanded he was again tried and convicted, and again appeals to this court.

297 1. During a former trial of appellant for the offense, and after the jury had been impaneled and sworn and the testimony introduced, appellant and the prosecuting witness,

Fannie Bruton, procured a license, and were duly married in open court, and the court thereupon suspended the trial, discharged the jury, and continued the case. In the last trial, in which the judgment of conviction was rendered from which he now appeals, he interposed a plea of former acquittal, and introduced in support of the plea the record of the former suspended trial.

Section 2044, Kirby's Digest, is as follows: "If any man against whom a prosecution has begun, either before a justice of the peace or by indictment by a grand jury, for the crime of seduction, shall marry the female alleged to have been seduced, such prosecution shall not then be terminated, but shall be suspended; provided, that if at any time thereafter the accused shall willfully, and without such cause as now constitutes a legal cause for divorce, desert and abandon such female, then at such time such prosecution shall be continued and proceed as though no marriage had taken place between such female and the accused."

Learned counsel for appellant contend that the above-quoted statute is unconstitutional, in that the suspension provided for serves to deprive the defendant under indictment of a speedy trial; and that, even if the statute is held to be valid, so as to suspend a prosecution at all, it does not apply after jeopardy has attached. They say that to apply it after jeopardy has attached would be to put the defendant in jeopardy twice for the same offense, which is forbidden by the constitution. It is argued that if the statute is valid, the marriage of the defendant and the female alleged to have been seduced would ipso facto deprive the court of jurisdiction to proceed further, even though the marriage was without reference to the prosecution, and the defendant was demanding a speedy trial, notwithstanding the marriage. We are not confronted with such a state of facts here. The statute can be held to be void in so far as it ²⁹⁸ denies an accused person a speedy trial where he demands it, notwithstanding the marriage, and yet be held valid and enforceable in a case where no demand for trial is made.

In *Stewart v. State*, 13 Ark. 720, this court quoted, with approval, the following language of the supreme court of Mississippi in the case of *Nixon v. State*, 2 Smedes & M. 497, 41 Am. Dec. 601: "By a speedy trial is there intended a trial conducted according to fixed rules, regulations and proceedings of law, free from vexatious, capricious and oppressive

delays manufactured by the ministers of justice." And this court in the same case said: "We think the spirit of the law is that, for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on record in the attitude of demanding a trial, or at least of resisting postponements." The statute in question, providing for a suspension of the prosecution upon the intermarriage of the parties, was designed for the benefit alike of the person accused of the offense and of society; and as a protection to society against an insincere show of repentance on the part of the accused, it further provides that if he shall thereafter willfully desert the female whom he has, by the marriage, rescued from the disgrace brought upon her by his criminal act, the prosecution may be renewed. He is not bound to marry the female, nor to invoke the benefit of the statute, if he does so before the termination of the prosecution; but if he does so, he cannot thereafter complain because of a suspension of the prosecution on that account when he has never demanded a speedier conclusion of it.

Nor can it be said that the suspension of the trial before verdict on account of the marriage and subsequent trial anew after the desertion is putting the accused twice in jeopardy of his liberty. If the trial be suspended by the act of the accused himself, or for his benefit, or at his own request, no jeopardy has attached by reason of that trial. Mr. Bishop, in speaking of this constitutional guaranty, says: "This guaranty of immunity from a second prosecution is, in its nature, a restraint on the courts, not on the party. It would be absurd to promise a man protection from his own act, but reasonable to make the like promise as to the act of another": 1 Bishop's Criminal Law, sec. 1043.

In *Atkins v. State*, 16 Ark. 568, Chief Justice English, speaking for the court, said: "Lord Coke seems to have been of the ²⁹⁹ opinion that a jury charged in a capital case could not be discharged without giving a verdict, even though with the consent of the prisoner and attorney general: 1 Coke's Institutes, 227b; 3 Coke's Institutes, 110. But the doctrine was fully discussed in the case of *The Kinlochs*, Fost. 16, and the law settled to be that where the jury is discharged by the consent and for the benefit of the prisoner, he cannot avail himself of such discharge as ground to be released from further prosecution."

This court held in *Whitmore v. State*, 43 Ark. 271, that jeopardy attached from the time that the jury was impaneled and sworn, and that the discharge of a juror without the consent of the accused, except for death or illness of a juror or other overruling necessity, operates as an acquittal; but the court said that, "while there is no right of challenge for cause after the jury is sworn, the court might, upon the demand of the prisoner, have stopped the trial and called another jury, without its having the legal effect of an acquittal": Citing *Stewart v. State*, 15 Ohio St. 155. And the court further said that "if the jury is discharged without an obvious necessity, and without the defendant's consent, express or implied, he cannot be again placed upon trial for the same offense." The effect of the statute is to provide grounds for suspension of the trial at any time before verdict, and there is no jeopardy unless the suspension be ordered without the consent of the accused, either express or implied.

The special plea of former acquittal was properly overruled.

2. In the hearing of appellant's plea of former acquittal, the state was permitted, over his objection, to prove by oral testimony that he had in the former trial consented to the suspension of the trial and discharge of the jury. This is assigned as error. The record of the former trial, which was introduced by appellant in support of his plea, recites that he and the prosecuting witness procured a marriage license, and were married in open court, the presiding judge performing the marriage ceremony, and "whereupon the jury in this case was by the court discharged, and this cause continued until next term." The record does not show that appellant objected to the suspension of the trial, and, the same being for his benefit, his consent will be implied. Hence, the record, standing alone, was insufficient to sustain the appellant's plea of former jeopardy, and it was unnecessary for ³⁰⁰ the state to prove by parol an express consent. The testimony was, therefore, immaterial and not prejudicial, as it did not tend to impeach or contradict the record.

3. It is contended by counsel that the court erred in its instruction as to the necessity for corroboration of the testimony of the female seduced, and in refusing to give the instruction on that subject asked by appellant. The court instructed the jury on this point as follows: "You are in-

structed that you cannot convict the defendant upon the uncorroborated testimony of the prosecuting witness, and the corroboration must be upon every material fact testified to by her necessary to constitute the offense charged; and if you find that her testimony is uncorroborated upon any material fact necessary to constitute the offense, you will acquit the defendant." We find no valid objection to this instruction. It is equivalent to an instruction that there must be corroboration as to the promise of marriage, its falsity, and that the defendant obtained carnal intercourse with the female by virtue of such false promise.

Other rulings of the court are assigned as error, all of which we have considered, but are not deemed of sufficient importance to discuss in this opinion. None of them are sufficient to warrant a reversal of the case.

The instructions of the court upon the whole correctly and fully declared the law applicable to the case. The evidence was sufficient to sustain the charge made against the defendant in the indictment. It shows that he falsely promised to marry the prosecuting witness, Fannie Bruton, and by virtue of that promise seduced her. She bore a child as the result of the illicit intercourse, and afterward, during his trial for the offense, he married her, but soon afterward commenced a course of conduct toward her which necessarily rendered the relations between them intolerable to her, and caused her to consent to a separation.

We find no error in the proceedings, and the judgment is affirmed.

Hill, C. J., absent and not participating.

The Right to a Speedy Trial of a person accused of crime is the subject of a monographic note to *In re Begerow*, 85 Am. St. Rep. 187-204.

Seduction as a Criminal Offense is discussed in the monographic notes to *State v. Carrow*, 87 Am. Dec. 405-411; *Bradshaw v. Jones*, 76 Am. St. Rep. 659-682. The subsequent marriage of the parties as a defense to a prosecution for the crime is considered in *Re Lewis*, 67 Kan. 562, 100 Am. St. Rep. 479; note to *Bradshaw v. Jones*, 76 Am. St. Rep. 677.

The Necessity of a Prosecutrix Being Corroborated in order to warrant a conviction for seduction is considered in the note to *Stone v. State*, 98 Am. St. Rep. 179.

LIDDELL v. JONES.

[76 Ark. 344, 88 S. W. 961.]

GARNISHMENT—Transfer of Lien.—A garnishment when carried into judgment operates to transfer to the garnisher all the rights and remedies possessed by the judgment defendant, including any lien to secure the indebtedness. (p. 99.)

CHATTEL MORTGAGES—Waiver of Lien.—If the holder of a chattel mortgage levies an execution upon the mortgaged property, he thereby waives his mortgage lien thereon. (p. 100.)

EXEMPTIONS—Effect of Garnishment.—A vendee who is garnished for the purchase price of chattels in his hands cannot claim an exemption therein. (p. 100.)

Hawthorne & Hawthorne, for the appellant.

J. H. Hill and F. G. Taylor, for the appellee.

345 HILL, C. J. The appellee Jones purchased two horses and harness of one Strong for one hundred and eighty dollars, and, to secure payment of the purchase money, executed a mortgage to Strong on the horses and harness and also one log wagon. Strong was indebted to Hancock, who sued him, and caused attachment to issue, and ran a garnishment on Jones. The result of this proceeding was the sustaining of the attachment, and a judgment against Jones in favor of Hancock for the debt of one hundred and eighty dollars, which he owed Strong for the horses. Hancock caused execution to issue, and the horses, harness and wagon were levied on. Jones filed a schedule of his personal property, and claimed this property as exempt. The circuit court held it exempt, and the sheriff, representing the rights of Hancock, the judgment plaintiff, prosecuted this appeal.

There are two lines of decisions on the effect of a garnishment: one holding that it amounts to a compulsory assignment of the debt, and carries with it the liens securing the debt; the other holding that it does not operate as an assignment, but as an impounding of the debt for the garnisher's benefit. The cases on this subject are collected in a note under section 192 of Rood on Garnishment. This court in *Smith v. Butler*, 72 Ark. 350, 80 S. W. 580, held that the garnishment, when carried into judgment, operated to transfer to the garnisher all the rights of the judgment defendant.

and give him the rights and remedies possessed by him, including a lien to secure the indebtedness. Therefore it follows that Hancock became the owner of the debt of Jones and the mortgage securing it, and became possessed of the same rights which Strong, the mortgagee, possessed.

When Hancock levied on the property in question, he waived the mortgage which he then owned by operation of law. No one else could levy on the property, because mortgaged chattels ³⁴⁶ are not subject to execution: *Jennings v. McIlroy*, 42 Ark. 236, 48 Am. Rep. 61. The mortgagee, however, can waive his mortgage rights, and levying an execution upon the property is inconsistent with the mortgage, and a waiver of it: *Cox v. Harris*, 64 Ark. 213, 62 Am. St. Rep. 187, 41 S. W. 426. It follows that the levy was proper, and the property subject to the execution.

The next question is whether Jones could claim the property as exempt. It is provided by article 9, section 1, of the constitution of 1874, and section 4966 of Kirby's Digest, that exemptions cannot be claimed in property in the hands of the vendee against the debt for its purchase. It is contended that Hancock, as an involuntary assignee of Strong, is not clothed with Strong's rights in this regard, but these cases settle that question against the appellant: *Creanor v. Creanor*, 36 Ark. 91; *Morris v. Ham*, 47 Ark. 293, 1 S. W. 519; *Smith v. Butler*, 72 Ark. 350, 80 S. W. 580. The log wagon was properly held to be exempt, as there was no debt for the purchase money due against it, and no mortgage was sought to be enforced against it in this action; in fact, a position inconsistent with the mortgage, so far as Hancock's rights were concerned, was taken. The court erred in holding the horses and harness exempt from seizure under the execution, as it was levied to enforce a debt for purchase money while the property was in the hands of the purchaser.

Reversed and remanded, with directions to enter judgment in conformity herewith.

The Effect of a Judgment Against a Garnishee is discussed in the note to *Sessions v. Stevens*, 46 Am. Dec. 339-346.

MILLER v. NUCKOLLS.

[76 Ark. 485, 89 S. W. 88.]

ABATEMENT OF ACTION.—If, in an action of slander, final judgment is entered for plaintiff, and the defendant appeals, and thereafter dies, the action becomes merged in the judgment, and there can be no abatement unless the judgment is set aside or reversed. (p. 101.)

APPEAL AND SUPERSEDEAS do not Vacate a judgment, but only stay proceedings thereunder. (p. 101.)

G. Jones, for the appellant.

W. A. Oldfield and Wright & Matheny, for the appellee.

⁴⁸⁶ McCULLOCH, J. This is an action for slander. The plaintiff (appellee) recovered judgment below, and the defendant (appellant) took an appeal to this court. Since the appeal was perfected the appellant died, and his attorney, as amicus curiae, presents this motion to abate the cause. The appellee responds to the motion, and asks that the cause be revived against the administrator or executor of the deceased.

At common law actions of this kind abated with the death of either party, the wrongdoer or the party injured. "Actio personalis moritur cum persona," was a maxim of the common law. The statute of this state providing for revival of causes of action for wrongs done to the person expressly excepts from its operation actions for slander or libel, thus leaving the common-law rule in force as to those actions: Kirby's Digest, sec. 6286. It does not follow, however, that after a verdict and judgment in favor of the plaintiff, an action for slander or libel abates. On the contrary, we hold that the cause of action becomes merged in the judgment, and unless the same be set aside or reversed, there can be no abatement. This view is sustained by authority: Newell on Slander and Libel, p. 375; 21 Ency. of Pl. & Pr. 351; Dial v. Holter, 6 Ohio St. 228; Akers v. Akers, 16 Lea (Tenn.), 7, 57 Am. Rep. 207.

An appeal and supersedeas do not have the effect of vacating a judgment, but only stay proceedings thereunder: Fowler v. Scott, 11 Ark. 675; 2 Cyc. 971; 20 Ency. of Pl. & Pr. 1240; Runyon v. Bennett, 4 Dana, 598, 29 Am. Dec. 431;

Low v. Adams, 6 Cal. 277; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591; Fawcett v. Superior Court, 15 Wash. 342, 55 Am. St. Rep. 894, 46 Pac. 389.

The motion to abate is therefore overruled.

Where the Defendant in an Action of Libel died pending an appeal from a judgment in the action, the action was held to be abated in Akers v. Akers, 16 Lea, 7, 57 Am. Rep. 207. According to Shayne v. Evening Post Pub. Co., 168 N. Y. 70, 85 Am. St. Rep. 654, a cause of action for libel against a corporation survives its dissolution and may be prosecuted against its trustees.

RODGERS v. CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.

[76 Ark. 520, 89 S. W. 468.]

TRIAL Directing Verdict—Review.—If the trial court directs a verdict for the defendant, the question on appeal is whether the evidence introduced by plaintiff was legally sufficient to support a verdict in his favor, and in testing that question the testimony must be given its strongest probative force, and that view of the facts accepted which it will warrant most favorable to plaintiff's cause of action. (p. 103.)

RAILROADS.—Passengers Riding in freight or mixed trains must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel on such trains, and are not entitled to insist upon having the same care and attention as may be justly demanded upon regular passenger trains. (p. 104.)

RAILROADS—Passengers on Freight Trains.—If a railroad company undertakes the carriage of passengers on freight trains it owes such passengers the same high degree of care to protect them from injury as if they were on a regular passenger train, but at the same time the passenger assumes the increased risk incident to the operation and management of such trains. (pp. 104, 105.)

RAILROADS—Passengers on Freight Trains—Negligence of Train Men.—If the conductor on a freight train is aware of the peril of a passenger thereon and can, by the exercise of ordinary care, warn him, and fails to do so, or if he can by the exercise of ordinary care prevent a sudden movement of the train and fails to do so, the railroad company is liable for the injury to a passenger resulting therefrom. (p. 105.)

RAILROADS—Passengers on Freight Trains.—Although a passenger on a freight train is negligent in putting himself in a perilous position, yet if the direct cause of the injury to such passenger is the omission of the railroad employes, after becoming aware of his peril, to use a proper degree of care to protect him, the railroad company is liable. (p. 105.)

C. F. Greenlee, for the appellant.

E. B. Pierce and T. S. Busbee, for the appellee.

521 McCULLOCH, J. Appellant, J. D. Rodgers, sued the Choctaw, Oklahoma and Gulf Railroad Company to recover damages for injuries caused by negligent operation of its train while he was a passenger thereon. A trial was had before a jury, appellant testified in his own behalf, and rested his case, whereupon the court instructed the jury to return a verdict in favor of the defendant, which was done.

522 The only question before us for determination is whether the evidence introduced by the plaintiff was legally sufficient to support a verdict in his favor; and in testing that question we must give the testimony its strongest probative force, and accept that view of the facts which it will warrant most favorable to plaintiff's cause of action: Catlett v. St. Louis etc. Ry. Co., 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; Ford v. St. Louis etc. Ry. Co., 66 Ark. 363, 50 S. W. 864; Burns v. St. Louis etc. Ry. Co., 76 Ark. 10, 88 S. W. 824.

Appellant lived at Brinkley, a station on defendant's railroad, but was engaged in business at a switch known as the G. and C. Siding, six and one-half miles west of Brinkley, on defendant's road. Passenger trains did not stop at this switch, and appellant was accustomed to ride out there two or three times a week on freight trains which stopped there. On the occasion in question he boarded a freight train at Brinkley to go to the switch, and also shipped a lot of merchandise to be put off there. En route he became sick, and his bowels wanted to move, the call being too urgent to await the arrival at his destination. The caboose was not provided with a closet, and he asked the conductor to slow the train down so that he could get off, attend to the call of nature, and walk the remainder of the distance to the switch. The conductor declined to do that. Shortly afterward the train reached the switch, and was brought to a stop, but the caboose was stopped over a trestle eighty-five feet long and twenty feet above the surface of the ground.

Appellant testified that he did not know that the caboose was over the trestle, and walked out on the rear step, expecting to get off; that as he walked out on the step he met the conductor going into the caboose, and the latter

said to him, "You are in a hurry?" to which appellant replied, "Yes, I am"; that a brakeman on the front platform of the caboose called to him, saying, "Just squat on the steps." Appellant describes the incident as follows: "This man I was speaking about [the brakeman] said, 'Just squat down there,' and I said, 'I can't get off on the dump, for they have stopped over a trestle,' and he said, 'Squat on the steps,' and I loosed my pants, and had the rail by my left hand, and the train ⁵²³ gave a jerk, and I fell to the trestle, and from there to the ground, and that's all there is to it." He testified also to material injury resulting from the fall—his collar bone and one rib were broken, and his arm was severely hurt.

Appellant contends that the railroad company was guilty of negligence in failing to provide a closet for the use of passengers, and that he should recover damages on that account. Freight trains are not equipped for the carriage of passengers, and public carriers are not required to equip them for that purpose: *Arkansas Midland Ry. v. Canman*, 52 Ark. 517, 13 S. W. 280; *Krumm v. St. Louis etc. Ry. Co.*, 71 Ark. 590, 76 S. W. 1075; *Chicago etc. Ry. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313.

"A passenger riding in a freight train or a mixed train must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel on such trains, and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train": 4 *Elliott on Railroads*, sec. 1629; *Hutchinson on Carriers*, p. 616; 1 *Fetter on Carriers of Passengers*, pp. 33, 34; *Olds v. New York etc. Ry. Co.*, 172 Mass. 73, 51 N. E. 450. But where the railroad company undertakes the carriage of passengers on freight trains, it owes such passengers the same high degree of care to protect them from injury as if they were on a passenger train: *Hutchinson on Carriers*, p. 614; 1 *Fetter on Carriers of Passengers*, p. 585; *Erwin v. Kansas City etc. Ry. Co.*, 94 Mo. App. 289, 68 S. W. 88; *Chicago etc. Ry. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313. Judge Thompson states the rule thus: "We find the courts are agreed upon the proposition that where a railway carrier carries passengers upon its freight trains, it thereby assumes toward them the relation of a carrier to his passenger. And while in such a case it is a reasonable conclusion that the passenger assumes the

increased risk incident to the operation and management of such trains, yet, subject to this qualification, the railway company becomes bound in favor of the passenger by all the obligations of a common carrier upon a regular passenger train." 3 Thompson on Negligence, sec. 2901. Moreover, if it be held that it was the duty of the company to provide closets, the omission to do so cannot be said to have been the proximate cause of the injury complained of by appellant.

524 We think, however, that there was evidence from which the jury might have found that the conductor knew of the perilous position of appellant and could have prevented the injury, either by warning him of the danger, or by holding the train at a standstill. If the conductor was aware of his peril, and could, by the exercise of ordinary care, have warned him and failed to do so, or could by the exercise of such care, have prevented the sudden movement of the train which threw appellant off, and failed to do so, the company is liable for the injury.

Appellant testified that the conductor saw him go down the steps, and said, "You are in a hurry?" Whether the conductor meant that appellant was in a hurry to debark, or to relieve himself from the steps of the caboose, does not appear; but the testimony shows that the conductor went into the caboose, and the jury might have found that he knew appellant was in a position of danger on the steps with the caboose on a trestle twenty feet high. They might also have found that the conductor heard the brakeman direct appellant to "squat down on the steps," and knew that he was about to relieve his bowels in that position. If so, he should have warned appellant of the danger or exercised some care to prevent the train from suddenly moving. At least, the question of his knowledge of appellant's position and care exercised to protect him should have been submitted to the jury under proper instructions.

This court has repeatedly held that, notwithstanding the negligence of the injured person in putting himself in a perilous position, whether a passenger or a trespasser on the track, if the direct cause of the injury is the omission of employé of the railroad company, after becoming aware of his peril, to use a proper degree of care to protect him, the company is liable: *Little Rock etc. Ry. Co. v. Pankhurst*, 36 Ark. 371; *Little Rock etc. Ry. Co. v. Cavenesse*, 48 Ark.

106, 2 S. W. 505; St. Louis etc. R. Co. v. Townsend, 69 Ark. 380, 63 S. W. 994; St. Louis etc. Ry. Co. v. Evans, 74 Ark. 407, 86 S. W. 426; Little Rock etc. R. Co. v. Kimbro, 75 Ark. 211, 87 S. W. 121, 644; K. C. Sou. Ry. Co. v. McGinty, 76 Ark. 356, 88 N. W. 1001.

The court erred in directing a verdict, and the judgment is reversed, and the cause remanded for a new trial.

A Passenger on a Freight Train assumes such risks and inconveniences as usually attend the operation of such trains: *Steele v. Southern Ry.*, 55 S. C. 389, 74 Am. St. Rep. 756. See, too, *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, and cases cited in the cross-reference note thereto.

DOWDLE v. WHEELER.

[76 Ark. 529, 89 S. W. 1002.]

EJECTMENT—Burden of Proof as to Title.—The defendant in ejectment may rely upon the weakness of the plaintiff's title, and the burden of proof is upon the latter to show title in himself. (p. 108.)

ACCRETIONS.—If there is a process of accretion going on along the shore line of a river, and this process continues until the bed of the river rises to the level of the bed of a creek, which had previously run into the river above, and then as the waters of the river receded the flow from the creek prevented further deposits in its extended channel and established a permanent channel along the old bed of such river, the land which formed as an accretion between the river and the creek belongs to the owner of the land beyond the creek lying adjacent to the former shore line of the river. (pp. 108, 109.)

ACCRETIONS.—If an accretion is begun by a deposit against the shore of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the owner of the mainland. (p. 109.)

ADVERSE POSSESSION—Inclosures.—**Natural Barriers** may be taken advantage of in constructing inclosures of land, and if the natural, together with the artificial, barriers used are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession, it is sufficient to put the statute of limitations in motion and establish adverse possession. (pp. 109, 110.)

ADVERSE POSSESSION—Character of Occupancy.—The fact that a person builds a fence across a peninsula formed by the junction of two streams on land owned by him, and pastured cattle on the land thus inclosed, does not constitute adverse possession against another person who owns part of the land thus inclosed. (p. 110.)

Ratcliffe & Fletcher, for the appellants.

A. F. Vandeventer, C. C. Reid and Sellers & Sellers, for the appellee.

⁵³⁰ McCULLOCH, J. This was an action in ejectment brought by Mrs. G. M. Wheeler against R. A. and M. A. Dowdle to recover part of an accretion, which she claims has been formed to the original land of which she held title.

The Dowdles filed an answer, denying that the land was an accretion to Mrs. Wheeler's land, and alleging that it was an accretion to their lands, and also pleaded the seven years statute of limitation. The case was transferred to equity on motion of the defendants. A decree was rendered in Mrs. Wheeler's favor, and the Dowdles appealed.

There is no question that Mrs. Wheeler owns the original land to which she claims the land in controversy is an accretion, and that it was at one time upon the north bank of the Arkansas river. The same is true as to the title of the Dowdles to the original land to which they claim the land is an accretion. The plats of the original United States surveys show that the original land owned by the Dowdles is situated south of the Point Remove creek, which at that time emptied into the Arkansas river at the terminus of the Old Cherokee line—the land of the Dowdles coming to the creek immediately opposite this point or a little south thereof—and that the original land of Mrs. ⁵³¹ Wheeler bordered upon the Arkansas river some distance, perhaps sixty-three rods, below the mouth of the creek, and down the stream of the Arkansas river. Point Remove Creek flows in an easterly direction, and the Arkansas river from the mouth of the creek, at the time of the original survey, flowed in an easterly direction. The old Cherokee line, commencing on the old bank of the river at or near the mouth of Point Remove creek, runs north, fifty-three degrees east, thus forming, with the old channel of the river, an acute angle with the apex at the mouth of the creek. It is shown that the accretion began to form upstream, and gradually extended downstream until the land in controversy was formed in front of the original land owned by Mrs. Wheeler. In front of the original land of the Dowdles accretion was formed which is in their possession, and their right thereto is not controverted. As the accretion gradually extended downstream, the mouth of Point Remove creek extended itself

eastward along the old channel of the river until it passed the original land of Mrs. Wheeler, and is now some distance below (east of) her east boundary. Its bed, east of the old mouth, is now along the old channel of the river. It is three chains wide at low water, and four and one-half to five chains wide at high water, and has at all times separated the accretion in controversy from Mrs. Wheeler's original land.

It is the contention of appellants that the land in controversy is not accretion to Mrs. Wheeler's land, and that the formation began as an accretion to the Dowdles' land; and as it gradually continued downstream, the extension of Point Remove creek kept pace with its progress, thus preventing any contact with or accretion to Mrs. Wheeler's land. They say that the land in controversy belongs to them; that, the formation having commenced as an accretion to their title, their title followed its progress downstream; or that the title to this land is in the state. At any rate, they contend that it is not an accretion to Mrs. Wheeler's land, and does not belong to her.

The burden is upon Mrs. Wheeler to prove that it is an accretion to her land. Appellants may rely upon the weakness of the title of their adversary: *Nix v. Pfeifer*, 73 Ark. 199, 83 S. W. 951, and cases cited.

⁵³² A careful consideration of the evidence convinces us that the chancellor was correct in his conclusion that the land in controversy was an accretion to the original tract of Mrs. Wheeler. There is much plausibility in the contention of appellants, but it ignores certain facts clearly established by the evidence. They contend that the channel of Point Remove creek runs with the old bank of the river, but it is established by the proof that there is a narrow margin of accretion between the old shore line of the river and the bank of the creek. This goes to show that there was a deposit against the shore line before the waters of the river receded, that this process continued until the bed of the river rose to the level of the creek's bed, and that then, as the waters of the river receded, the flow from the creek prevented further deposits in its extended channel, and established a permanent channel along the old bed of the river. This theory is, we think, far more consistent with the physical facts existing now, and within the recollection of witnesses, than the theory advanced by appellants that the

flow from the creek followed the recession of the waters of the river before there could be a deposit against the old shore line, and that the deposit began at the extended south bank of the creek. If the deposit formed in the manner which we have stated, it is, in a legal sense, an accretion to the lands of appellee, and became her property, notwithstanding the conceded fact that the flow of water from the creek separated it from the original tract.

We held in *Nix v. Pfeifer*, 73 Ark. 199, 83 S. W. 951, that "when the formation begins with a bar or an island detached and away from the shore, and by gradual filling in by deposit, or by gradual recession of the water, the space between bar or island and mainshore is joined together, it is not an accretion to the mainland in a legal sense, and does not thereby become the property of the owner of the mainland." So if it were proved that there was no deposit against the old shore line, and no recession of the waters therefrom, the formation out from the mainshore would be a bar or island, and would in no sense constitute an accretion to the mainland. This is what was held in *Crandall v. Smith*, 134 Mo. 633, 36 S. W. 612, which is relied upon by learned counsel for appellants to sustain their contention. We find, however, the facts to be to the contrary in this case. The fact that a stream or body of water separates ⁵³³ the accretion from the original shore would, as said by the Missouri supreme court (*DeLassus v. Faherty*, 164 Mo. 361, 64 S. W. 183, 58 L. R. A. 193), at first blush seem to be an insurmountable barrier to a claim of ownership on the part of the shore owner; yet where it is shown, as in the case at bar, that the formation began by a deposit against the shore of the mainland, the subsequent existence of an intermediate stream of water between the accretion and mainland does not exclude such claim of ownership.

This brings us to a consideration of appellant's plea of the seven years statute of limitations. They allege and undertake to prove that they have held actual adverse possession of the land in controversy for more than seven years continuously next before the commencement of the suit. The chancellor also found against them on this issue.

The only character of occupancy attempted to be proved by appellants is the following: The extended channel of Point Remove creek on the north side, and the new channel of the Arkansas river on the south and east, form a head-

land or neck of land extending eastward from the former mouth of the creek, and appellants erected across this neck or headland a wire fence from the creek near its former mouth to the bank of the river. They claim this to be an inclosure in which they pastured cattle—the river and creek forming natural barriers, which, with the wire fence, completed the inclosure. They also show that along the creek in a few places at intervals they stretched wires to prevent cattle from attempting to cross the creek. This, however, is disputed, and the testimony is conflicting in regard thereto.

It is no objection that natural barriers are taken advantage of in constructing inclosures of land, provided that the same are not out of proportion to the artificial barriers erected. If the natural, together with the artificial, barriers used, are sufficient to clearly indicate dominion over the premises, and to give notoriety to the claim of possession, it is sufficient to put the statute of limitation in motion: *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705; *Sanders v. Riedinger*, 51 N. Y. Supp. 937; *Thomas v. United States*, 136 Fed. 159. "Natural barriers may or may not be of such a character as to serve as part of an inclosure by which a party subjects land to his dominion and control, and so acquires possession of it": *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705.

⁵³⁴ The question, after all, in such cases is whether the inclosure, like other acts of possession and claim of ownership, is sufficient to "fly the flag" over the land, and put the true owner upon notice that his land is held under an adverse claim of ownership. We think that in this case these acts were insufficient to sustain a claim of adverse possession. They did not constitute such notoriously hostile acts as necessarily put the owner of the land upon notice. This is especially true because the fence erected by appellants from creek to river bank was not on the land of Mrs. Wheeler, and its presence there was not notice to her that her land was fenced. She was not bound to take notice of the natural objects—the creek and the river—as barriers inclosing her land. We hold that appellants pasturing cattle within such inclosure did not, under the circumstances, constitute adverse possession so as to ripen into title.

Upon the whole case, we find no error in the decree of the chancellor, and the same is affirmed.

The Law of Accretion and Reliction is discussed in the notes to *Coulthard v. Stevens*, 35 Am. St. Rep. 307-313; *Bellefontaine Imp. Co. v. Niedringhaus*, 72 Am. St. Rep. 280-286.

The Character of an Inclosure of Lands necessary to impart notice of its adverse possession is discussed in the note to *De Frieze v. Quint*, 28 Am. St. Rep. 161; *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905. If one incloses land on three sides, when the fourth is bounded by a natural watercourse sufficient to keep his stock within his inclosure and the stock of others out of it, and uses the premises generally, as do owners of similar land, this will support a finding of adverse possession: *Clithero v. Fenner*, 122 Wis. 356, 106 Am. St. Rep. 978.

VANCE v. CALHOUN.

[77 Ark. 35, 90 S. W. 619.]

PARENT AND CHILD—Emancipation of Infant.—If a father permits his infant son to make his own contracts, collect his own wages and appropriate them to his own use, such wages are the son's property until the license is revoked, and he is entitled to recover them. (p. 112.)

INFANCY—Disaffirmance of Contract.—If an infant employs an attorney to bring suit for him and afterward sells him the judgment recovered, the infant may subsequently disaffirm such sale and recover the amount collected on the judgment, less attorney's fees. (p. 112.)

E. H. Vance, Jr., and A. I. Rowland, for the appellant.

N. P. Richmond and H. Berger, for the appellee.

36 BATTLE, J. Son Calhoun, by his guardian, Anderson Calhoun, brought a suit in equity against E. H. Vance, Jr., to recover money in his hands claimed by Son Calhoun. He states in his complaint that he is a minor, and by his next friend recovered a judgment against the St. Louis, Iron Mountain and Southern Railway Company at the February, 1902, term of the Hot Spring circuit court, for two hundred and four dollars; that the judgment was paid in the month of August, 1902, to the clerk of the circuit court; that the defendant obtained the money from the clerk under a pretended claim of purchase from Son Calhoun, a minor, which, if made, was by him and his guardian jointly and severally avoided; and that the defendant refuses to pay the money so collected to the plaintiff. He asked that the defendant be required to account for the money so collected, and for judgment therefor.

The defendant answered, and stated that he had purchased the judgment recovered by the plaintiff, and that he was entitled to the money collected thereon by virtue of the purchase.

The facts, in part, are as follows: Son Calhoun is a minor. His father allowed him to make his own contracts, and collect and use the money due him on such contracts. He paid his father for board and lodging. He was employed by the St. Louis, Iron Mountain and Southern Railway Company. He rendered services for which it was owing him the sum of twenty-four dollars. The company discharged him without paying this amount. The defendant was and is a practicing attorney at law. Son Calhoun employed him to sue the railroad company for his wages and the penalty for discharging him without paying the same. He agreed to pay defendant one-half he recovered for his services. His attorney brought an action for him, by his next friend, against the railroad company before a justice of the peace to recover the twenty-four dollars due for wages and the penalty, and recovered judgment for the twenty-four dollars and thirty-seven dollars and fifty cents for penalty on account of nonpayment of the wages on the day of discharge. The railroad company appealed from the judgment to the Hot Spring circuit court, and he recovered judgment in that court against the railroad company for twenty-four dollars for wages, and for one hundred and eighty dollars penalty; amounting in the aggregate to two hundred and four dollars. On the ³⁷ 15th of February, 1902, he sold this judgment to the defendant for twenty-four dollars. The defendant collected on the judgment on the 1st of September, 1902, the sum of two hundred and nine dollars and ten cents, the two hundred and four dollars and interest due thereon. He, Son Calhoun, disaffirmed the sale to the defendant, and brought this suit to recover the money collected by Vance. Evidence was adduced to show equitable grounds of recovery. The trial court gave the defendant credit for one-half of the judgment for fee for services, and for the twenty-four dollars paid for the judgment, and rendered a decree against him in favor of the plaintiff for seventy-nine dollars and seventy-five cents.

The father of Son Calhoun permitted him to make his own contracts, collect his wages, and appropriate them to

his own use. Until this license is revoked, his wages were his own property, and he is entitled to recover them: *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Fairhurst v. Lewis*, 23 Ark. 435; 21 Am. & Eng. Ency. of Law, 2d ed., 1059, 1060, and cases cited. Being a minor, Son could avoid the sale made by him to the defendant, which he did do, and recover the amount collected on the judgment, less the amount owing by him to the defendant: *St. Louis etc. Ry. Co. v. Higgins*, 44 Ark. 293; *Kansas City etc. R. R. Co. v. Moon*, 66 Ark. 409, 50 S. W. 996.

Decree affirmed.

EMANCIPATION OF INFANTS.

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I. Emancipation—What is and how Established.

It is well settled that a father or parent has a right to permit or authorize his infant child during minority to labor for himself, collect his own wages and to appropriate them according to his own inclinations. This is known in the law as the emancipation of the child: *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Fairhurst v. Lewis*, 23 Ark. 435; *Jenison v. Graves*, 2 Blackf. 440; *Wheeler v. St. Joseph etc. R. R. Co.*, 31 Kan. 640, 3 Pac. 297. By emancipation is understood such act of the father as sets the son free from his subjection, and gives him the capacity of managing his own affairs, as if he were of age: *Everett v. Sherfey*, 1 Clarke (Pa.), 356. A father may emancipate his minor child, and when emancipated the child is freed from parental control and is in all respects his own man: *Lackman v. Wood*, 25 Cal. 147. An agreement by a parent with his minor child to relinquish his right to its services or earnings is valid and irrevocable and amounts to an emancipation: *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73.

Emancipation of a minor must be by consent, express or implied, of the parent, if living, and is an entire surrender of all right to the care, custody and earnings of the child, as well as a renunciation of parental duties. It occurs by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or in some way conducting in relation thereto in a manner which is

inconsistent with the further performance of them: *Carthage v. Canton*, 97 Me. 473, 54 Atl. 1104.

Emancipation may be established by contract between parent and child, as well as otherwise. It must be by consent, express or implied, of the parent and is an entire surrender of all right to the care, custody and earnings of the child, as well as a renunciation of parental duties: *Inhabitants of Lowell v. Inhabitants of Newport*, 66 Me. 78.

The emancipation of a minor is not to be presumed but must always be proved, although it need not be in writing: *Inhabitants of Lowell v. Inhabitants of Newport*, 66 Me. 78. The father's emancipation of his minor son may be in writing or by parol, and may be proved by circumstantial evidence, or implied from conduct: *Bristor v. Chicago etc. Ry. Co.*, 128 Iowa, 479, 104 N. W. 487. A father may voluntarily relinquish his right to his child's earnings, and when he does so, his child is said to be emancipated. The emancipation may be parol or in writing, or may be inferred from circumstances: *Halliday v. Miller*, 29 W. Va. 424, 6 Am. St. Rep. 653, 1 S. E. 821.

A mother who has entered into a second marriage has power, with the consent of her husband, to emancipate a minor child of her first marriage, and such emancipation may be inferred from the conduct of the parties: *Inhabitants of Dennysville v. Inhabitants of Trescott*, 30 Me. 470.

A writing is unnecessary to establish the emancipation of an infant, and it may be implied from the circumstances: *Benziger v. Miller*, 50 Ala. 206; *Flynn v. Baisley*, 35 Or. 268, 76 Am. St. Rep. 495, 57 Pac. 908, 45 L. R. A. 645; *Washington v. Washington* (Tex. Civ. App.), 31 S. W. 88.

The emancipation of a son and the relinquishment of the father's claim to his earnings may be established by direct evidence, or may be implied from circumstances: *Dierker v. Hess*, 54 Mo. 246. A father may verbally give his minor son his time and after that the son is entitled to his earnings: *Chase v. Smith*, 5 Vt. 556.

Emancipation of a minor may be absolute and unqualified, or it may be partial and conditional: *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 18 S. W. 262, 15 L. R. A. 211; *Tillotson v. McCrillis*, 11 Vt. 477.

II. Acts Amounting to Emancipation:

A parent, by agreement with his minor child, may relinquish to the latter the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and the parent will then have no right to demand such wages, either from the employer or from the child: *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73; *Boynton v. Clay*, 58 Me. 236; *Corey v. Corey*, 19 Pick. 30, 29, 31 Am. Dec. 117; *Hall v. Hall*, 44 N. H. 293; *Manchester v. Smith*, 12 Pick. 113; *United States v. Mertz*, 2 Watts, 406;

Torrens v. Campbell, 74 Pa. St. 470; *Monaghan v. School District*, 38 Wis. 100.

If a contract of employment is made by a minor and approved and confirmed by his father and under such contract the son is to receive the wages earned by him, the father, by approving and confirming the agreement, in effect emancipates his son as to wages earned by him under the contract, which become the property of the son and not the property of the father: *Pardey v. American Ship Windlass Co.*, 19 R. I. 461, 34 Atl. 737. If a minor son contracts on his own account for his services with the knowledge of his father who makes no objection thereto, there is an implied emancipation and assent that the son shall be entitled to his earnings in his own right: *Burdsall v. Waggoner*, 4 Colo. 261; *Whiting v. Earl*, 3 Pick. 201, 15 Am. Dec. 207; *Armstrong v. McDonald*, 10 Barb. 300. If a minor makes an agreement of employment by which he is to receive his own wages, and his parent consents thereto, but from time to time receives such earnings and invests them for his child's benefit, the child is entitled to the property in which such earnings are invested as against the parent or his creditors: *Jenney v. Alden*, 12 Mass. 375. Or if a mother permits her infant child to receive his own wages, and invest them, she cannot, after such appropriation with her consent, claim the benefit of such investment, nor can she, after such child has arrived of age, call upon him to account to her for his earnings during his minority: *Campbell v. Campbell*, 11 N. J. Eq. 268. Or, if an infant, with the consent of her father, performs services for a person upon a promise that she shall be compensated in such person's will, this constitutes a relinquishment by the father of all claim for such services, and a legacy given by the debtor as compensation for such services is the property of the infant: *Taylor v. Welsh*, 92 Hun, 272, 36 N. Y. Supp. 952.

The fact that a minor receives his own wages, pays his parents for his board, and retains the balance, shows an emancipation: *Berla v. Meisel* (N. J. Eq.), 52 Atl. 999. If a minor is in the habit of doing business on his own account and in his own name, and of becoming responsible for his own supplies, this is sufficient to establish his emancipation: *Lackman v. Wood*, 25 Cal. 147. The fact of the emancipation of an infant may be proved by circumstances the same as any other fact, and a formal contract between the parent and infant need not be shown. The acquiescence of the father in the acts of his son in drawing his own wages, and other facts tending to show that the father has emancipated him may be given in evidence: *Haugh Iron Works v. Duncan*, 2 Ind. App. 264, 28 N. E. 334.

The whole doctrine of emancipation of an infant is well stated in *Farrell v. Farrell*, 3 Houst. 633, where the rule is laid down that a father may voluntarily and expressly emancipate his minor son, as by authorizing him to go out and labor for his own benefit, or emancipation may be implied from the conduct and relations of the

parties; that is to say, the emancipation and freedom of the son to labor for his own living may be inferred from the fact that his father has knowledge of, and has permitted him to enter into, contracts and manage business for himself or on his own account for a considerable length of time. Or when he makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his own earnings: *Farrell v. Farrell*, 3 Houst. 633. However, the emancipation of a minor must always be proved and is never presumed: *Inhabitants of Sumner v. Inhabitants of Sebec*, 3 Greenl. 223; *Lisbon v. Lyman*, 49 N. H. 553. A child may be emancipated by the act of the father and without the election of the child, as where the father turns the child from his home, and will not permit him to remain in the home of his family: *Brown v. Ramsey*, 29 N. J. L. 117.

If a father neglects or refuses to support and maintain his son during his minority, or denies him a home, or discards or abandons him, so that he is forced to labor abroad to procure a living for himself, he is not entitled to the earnings of such son, as, under such circumstances, the law will imply that the father has emancipated the son from his service, and conceded to him the right to enjoy the fruits of his own labor: *Farrell v. Farrell*, 3 Houst. 633; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101. Thus, a father loses the right to sue for and recover the value of his minor child's services by voluntarily releasing his parental control to a third person, or by failing to provide for his minor child's maintenance: *Southern Ry. Co. v. Flemister*, 120 Ga. 524, 48 S. E. 160.

If prior to his majority a son is permitted by his parents to carry on the business of selling newspapers and he turns over his earnings to his mother, with his father's consent, and she invests such earnings in her own name, without the exercise of any control over the minor or his earnings by such father, the facts are sufficient to show the minor's emancipation: *Jacobs v. Jacobs*, 130 Iowa, 10, 104 N. W. 489.

That a parent has emancipated his minor child and waived his right to its earning is shown by his deserting such child and leaving the state and not returning during the child's minority, and such waiver may be shown by such conduct occurring while the services are in progress as well as before, or at the time they began: *McMorrow v. Dowdell*, 116 Mo. App. 289, 90 S. W. 728. If a father willfully deserted his son when nine years of age, and contributed nothing to his support for the next seven years, during which time he was obliged to support himself, the law implies an emancipation of such son and recalls the father's right to the child's services and earnings: *Swift v. Johnson*, 138 Fed. 867.

An infant may be emancipated by being given away by its parents, but, to constitute such an emancipation, it must appear that the parents have absolutely transferred all their right to the care and

control of the infant, and all their right to its services and that the person to whom such rights are transferred has accepted the infant as his own, and agreed to stand in loco parentis: *Town of Tunbridge v. Town of Eden*, 39 Vt. 17.

III. Acts not Amounting to Emancipation.

The fact that a father allows his minor son to receive and spend his own wages is not of itself such a complete emancipation of the son as to relieve his father from liability for his son's torts: *Dunks v. Grey*, 3 Fed. 862. Or the fact that an infant is receiving the proceeds of his own labor is not alone sufficient to establish that permission on the part of his parent has been given to engage in business with the amount of such earnings: *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788. The facts that a minor son is out at service and that the father receives his wages are not sufficient to show any relinquishment on the part of the father of his property in his son's wages: *United States v. Mertz*, 2 Watts, 406.

If a parent, on removing to a distant part of the state, leaves his minor daughter in the care of a friend to live with him until she should be eighteen years of age, and he treats her as his adopted child, this is not an emancipation of the child, and the father still has the right to reclaim her: *Sumner v. Sebec*, 3 Me. 223.

Where a minor whose father is dead went to live outside the family under an arrangement with the mother, who still retained her parental rights over such minor, no emancipation of the latter occurs, so as to enable him to sue for and recover wages earned: *Blivin v. Wheeler*, 25 R. I. 313, 55 Atl. 760. The simple fact that a minor child is bound out until he shall come of age to a third person, with whom he lived for ten years, does not show emancipation of the minor: *Frankfort v. New Vineyard*, 48 Me. 565. If a minor daughter departs from home for temporary employment, leaving part of the clothing and bedding at home, even though she receives wages for her labor for her own use, is not so uncommon an occurrence as to authorize an inference of such a change in the parental and filial ties as to constitute emancipation: *Searsmont v. Thorndike*, 77 Me. 504, 1 Atl. 448. Although a minor deserts his home, this does not constitute emancipation so long as the father has not relinquished his right of control, nor consented that the child should act for himself independently of his father: *Bangor v. Readfield*, 32 Me. 60.

If a father gives his minor son the privilege of working for himself and having whatever wages he may earn, and afterward the minor voluntarily returns home, and works on his father's farm until he reaches his majority, the law does not imply a promise on the part of the father to pay the son wages during his minority: *Albee v. Albee*, 3 Or. 321.

IV. Emancipation by Marriage.

Although there is some authority to the contrary, it may be stated to be established by the great weight of the decisions that marriage emancipates a minor, whether such minor be male or female. Thus the marriage of a minor daughter with her father's consent constitutes one mode of emancipation, and such consent may be implied from circumstances: *Inhabitants of Bucksport v. Inhabitants of Rockland*, 56 Me. 22. Marriage emancipates a minor child from parental control. Accordingly, if a girl fourteen years of age marries, her father has no legal right to restrain her from living with her husband if she so elects: *State v. Lowell*, 78 Minn. 166, 79 Am. St. Rep. 358, 80 N. W. 877, 46 L. R. A. 440. The legal marriage of a female infant terminates her father's right to her custody and services: *Aldrich v. Bennett*, 63 N. H. 415, 56 Am. Rep. 529. The marriage of a female infant emancipates her, and prevents her taking an after-acquired settlement from her father: *Fremont v. Sandoun*, 56 N. H. 300.

A lawful marriage of an infant daughter displaces parental rights, and if damage ensues to the parent therefrom, it is *damnum absque injuria*, and recoverable from no one: *Wilkinson v. Dellinger*, 126 N. C. 462, 35 S. E. 819.

As to male minors, their marriage emancipates them from the control of their parent, and gives them the right as against such parent to apply all their earnings to the support of their families, but it does not give them capacity to make binding contracts beyond other infants, or any political or municipal rights which do not by law belong to minors: *Taunton v. Plymouth*, 15 Mass. 203.

Emancipation of a male minor by marriage is discharge from parental power, gives him control of his personal property, and enables him to make contracts, but does not relieve him from all disabilities of minority, and especially in relation to real property: *Burr v. Wilson*, 18 Tex. 367.

Generally speaking, marriage emancipates a male minor: *Sherburne v. Hartland*, 37 Vt. 528; *Northfield v. Brookfield*, 50 Vt. 62; *Croftsbury v. Town of Greensboro*, 66 Vt. 585, 29 Atl. 1024. A married man, although a minor, has control over his own actions, and is entitled to apply the proceeds of his labor to the support of his family, and where a son marries during his minority and continues in the service of his father subsequently thereto, the marriage is, of itself, a legal emancipation, and entitles the son to the proceeds of his labor independent of any act of emancipation on the part of the father. A bona fide contract made by the father with his son under such circumstances is good as against the other creditors of the father: *Dick v. Grissom*, *Freeman's Ch. (Miss.)* 428.

The marriage of a minor son, whether with or without his father's consent, so far emancipates him that the father is no longer entitled to his wages, if necessary for the support of the son's wife: *Common-*

wealth v. Graham, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706, 16 L. R. A. 578. On the other hand, it has been held that the marriage of a minor child without his father's consent will not impair his right to recover for his services: Halliday v. Miller, 29 W. Va. 424, 6 Am. St. Rep. 653, 1 S. E. 821. And that a minor son is not emancipated by his marriage without the consent and contrary to the directions of his father: White v. Henry, 24 Me. 531. And that a female minor's marriage without the consent of her mother, although in every respect legal, does not have the effect of emancipating her from the disabilities of minority: Guillebert v. Grenier, 107 La. 614, 32 South. 238.

V. Emancipation by Insolvent Parent.

An insolvent debtor may emancipate his minor children and relinquish all claim to their earnings, and a creditor of the parent, after such emancipation, has no right to the proceeds of their labor: Shortel v. Young, 23 Neb. 408, 30 N. W. 572. After an insolvent father emancipates his minor son, the latter's earnings belong to him, to dispose of as he pleases, free from the claim of the father's creditors: Trapnell v. Cinklyn, 37 W. Va. 242, 38 Am. St. Rep. 30, 16 S. E. 570. And an insolvent father may emancipate his minor child, even as against his creditors although the child remains at home and is hired by his father: Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115; McCloskey v. Cyphert, 27 Pa. St. 220. The cases seem agreed that an insolvent father has the right to emancipate his minor child and to relinquish all claim to the latter's earnings: Atwood v. Holecomb, 39 Conn. 270, 12 Am. Rep. 386; Halliday v. Miller, 29 W. Va. 424, 6 Am. St. Rep. 653, 1 S. E. 821. Thus a father, though insolvent, may, by agreement with his minor son, relinquish his right to the services of the latter, and the son may thereafter acquire property, and hold it against the father or his creditors: Wambold v. Vick, 50 Wis. 456, 7 N. W. 438; Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478. And the consent of an insolvent father that his minor son may become a partner with another is a release of the son's services and amounts to an emancipation: Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478.

VI. Emancipation by Enlistment.

The consent of a father to his minor son's enlistment in the military or naval service of the government is a virtual emancipation or discharge of the minor from all obligation of service or obedience to his father, so long, at least, as the enlistment contract exists: Commonwealth v. Morris, 1 Phila. 381; Baker v. Baker, 41 Vt. 55. And a minor who has enlisted into the military service of the government, with the consent of his father, is entitled to receive and control such compensation as he is entitled to from the government or otherwise, under his enlistment contract. A town bounty paid by a town to

which he gave his credit belongs to him and not to his father: *Baker v. Baker*, 41 Vt. 55.

VII. Emancipation by Arriving at Majority.

A child, upon arriving at full age, unless an imbecile, will be deemed *prima facie* to be emancipated, notwithstanding the fact that he continues to be a member of his father's family. Such presumption, however, may be rebutted: *Town of Poultney v. Town of Glover*, 23 Vt. 328; *Baldwin v. Town of Worcester*, 66 Vt. 54, 28 Atl. 633. Thus, if a daughter, after arriving at full age, resides out of her father's family a greater part of the time, free to go where she pleases, and controlling her own wages, she will be presumed to be emancipated, though she continues to have a home at her father's house in the ordinary way of an unmarried daughter: *Hardwick v. Pawlet*, 36 Vt. 320.

The right of the father to the services of his child ceases on the child's attaining the age of twenty-one years, and it is then the right of the child to receive its own wages, but arriving at the age of twenty-one years is not *ipso facto* emancipation. The child may elect to remain with the parent or be incapable of emancipation from imbecility, and in either case the parent is entitled to the child's wages: *Brown v. Ramsey*, 29 N. J. L. 117.

VIII. Effect of Emancipation.

The effect of emancipation upon a minor child is to entirely free it from parental control and make it in all respects its own master: *Lackman v. Wood*, 25 Cal. 147.

Emancipation is an entire surrender by the parent of all right to the care, custody and earnings of the child, as well as a renunciation of all parental duty toward it: *Lyon v. Bolling*, 14 Ala. 753, 48 Am. Dec. 122; *Monroe v. Jackson*, 55 Me. 55; *Lowell v. Newport*, 66 Me. 78; *Carthage v. Canton*, 97 Me. 473, 54 Atl. 1104.

The rights of an infant, after emancipation by his parent, to demand and recover his earnings, are as complete as if he had reached the age of majority. When a father has once emancipated and set his son free, he has no further pecuniary interest in his services and earnings, and cannot afterward reclaim the right to them: *Haugh Iron Works v. Duncan*, 2 Ind. App. 264, 28 N. E. 334.

After emancipation, the minor, and not his parent, is entitled to recover his earnings from his employer: *Corey v. Corey*, 19 Pick. 29, 31 Am. Dec. 117; *Pardey v. American Ship Windlass Co.*, 19 R. I. 461, 34 Atl. 737. If a minor is allowed by his father to leave home and shift for himself, he may maintain an action in his own name for the value of services rendered by him: *Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283. If a father emancipates his minor child, and such child by industry accumulates money, the money is his and not his father's. And if the father receives money from such minor child,

not due or belonging to himself, but receives and recognizes it as money belonging to his child, he cannot afterward legally claim or hold it as his own, on the ground of its being the fruits or profits of his child's labor, and more especially, if it is understood between them that the father received it either to invest or hold it for his child's benefit. And an action for money had and received will be at the suit of such son against his father to recover it, whether such money is held or invested by the father: *Farrell v. Farrell*, 3 Houst. 633.

A father may emancipate his minor child from service to him, and thereafter the child has a right to his own earnings, and if thereafter he works for his father, he may recover wages from him as from a stranger, and as if he had arrived at full age: *Phelps v. Hopkinson*, 61 Ill. App. 400; *Wright v. Dean*, 79 Ind. 407; *Engleman's Exrs. v. Engleman*, 1 Dana, 437; *Hall v. Hall*, 44 N. H. 293; *Titman's Admr. v. Titman*, 64 Pa. St. 480; *Eubanks v. Peak*, 2 Bail. 497; *Duveneck v. Kutzer*, 17 Tex. Civ. App. 577, 43 S. W. 541. But emancipation of the minor and a contract by his father to pay him wages are never presumed, and evidence of an express contract to that end will ordinarily be required: *Enger v. Loffand*, 100 Iowa, 303, 69 N. W. 526; *Engleman's Exrs. v. Engleman*, 1 Dana, 437; *Bell v. Rice*, 50 Neb. 547, 70 N. W. 25; *Hall v. Hall*, 44 N. H. 293; *Titman's Admrs. v. Titman*, 64 Pa. St. 480.

Where a parent has in good faith emancipated his minor child, and relinquished all right to his earnings, neither he nor his creditors can reach earnings thereafter acquired by such minor to apply them in payment of such parent's debts: *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Jenison v. Graves*, 2 Blackf. 440; *Dick v. Grissom*, 1 Freeman's Ch. 428; *Frost v. Brown, Smith (N. H.)*, 113; *Johnson v. Silsbee*, 49 N. H. 543; *Flynn v. Baisley*, 35 Or. 268, 76 Am. St. Rep. 495, 57 Pac. 908, 45 L. R. A. 645; *Furrrh v. McKnight*, 6 Tex. Civ. App. 583, 26 S. W. 95.

The fact that an infant is emancipated by his parent, or allowed to shift for himself, does not impart any additional validity to his general contracts, or enlarge his capacity in this respect, or, in other words, render his contracts, otherwise voidable, absolutely binding upon him. He may still take advantage of his infancy as before. The effect of the emancipation is simply to release him from the parent's control, and to give him the right to his own earnings: *Mason v. Wright*, 13 Met. 306; *Tyler v. Fleming*, 68 Mich. 185, 13 Am. St. Rep. 336, 35 N. W. 902; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

If a mother permits her infant child to receive its own wages and invest them, she cannot after such appropriation, with her consent, claim the benefit of such investment. She cannot, after such child has arrived of age, call upon him to account with her for such earnings during the child's minority: *Campbell v. Campbell*, 11 N. J. Eq. 268. Or if a minor is allowed to control his own earnings with the

paternal consent he is entitled to real estate purchased therewith for his own benefit and standing in the name of the father, as against the latter's devisee: *Crowley v. Crowley*, 72 N. H. 214, 56 Atl. 190. And if a minor son is allowed by his father to leave him and work for his own support, and make contracts for himself without interference, he may acquire and hold property in his own right and maintain actions respecting it: *Boobier v. Boobier*, 39 Me. 406.

An infant is emancipated by the death of his parent, and his obligation to perform a contract made for him by his father is, upon the death of the latter, at an end and ceases to exist: *Barnes v. Barnes*, 50 Conn. 572; *Campbell v. Cooper*, 34 N. H. 49.

If a child has been emancipated by his parents, he is, and they are not, entitled to sue for personal injury to himself: *Pecos etc. Ry. Co. v. Blasengame* (Tex. Civ. App.), 93 S. W. 187.

A father by allowing his minor child to contract for himself and hold his own wages, cannot, after they are earned, withdraw his consent, and claim them as his: *Torrens v. Campbell*, 74 Pa. St. 470. But the emancipation of a minor child by parol agreement and without consideration is revocable until acted upon: *Abbott v. Converse*, 4 Allen, 530.

MILLER v. NUCKOLLS.

[77 Ark. 64, 91 S. W. 759.]

NEW TRIAL—Assignment of Error.—If the attention of the court is not called to the particular error complained of, the assignment of error is too indefinite as a basis for a motion for a new trial. (p. 125.)

LIBEL AND SLANDER—Proof of Words as Alleged.—In an action for slander or libel the plaintiff must prove that the defendant used substantially the same words as those alleged in the complaint, and it is not sufficient to prove that the defendant made the same charge against the plaintiff in words substantially different from those alleged, even though of equivalent and similar import. (p. 126.)

TRIAL—Contradictory Instructions.—An erroneous instruction is not necessarily cured by another correctly stating the law, when the two are essentially contradictory. (p. 126.)

TRIAL—Instructions—Harmless Error.—If, in an action for libel and slander, the evidence offered by plaintiff tended only to prove that defendant used language substantially the same as that set out in the complaint, and not that he used words substantially different, an instruction justifying a finding against defendant if he falsely used words substantially different from those alleged, though of equivalent or similar import, though erroneous, is not prejudicial. (p. 127.)

LIBEL AND SLANDER—Privileged Communication.—An unverified written statement made by a person to a peace officer, informing him of a rumor connecting another with the commission of a crime, is privileged and not the subject of libel, if made in good faith with an honest desire to promote justice, but if it is made maliciously and without probable cause to believe it to be true, it is not privileged and is libelous. (pp. 127, 128.)

TRIAL—Argument of Counsel.—If, on objection to remarks made by counsel, the court “quietly” cautioned him not to make improper remarks, it is the duty of opposing counsel, if he is not satisfied, to request the court to instruct the jury to disregard such remarks, or to ask for a more emphatic reprimand. (p. 129.)

TRIAL—Argument of Counsel.—A statement by an attorney in argument to the jury that if accused was guilty of the crime charged, he ought not to be permitted to live in the county, is improper, but a subsequent statement merely that if the accused was guilty of the crime charged he was not fit to live in that county is not improper or objectional. (p. 130.)

G. Jones, for the appellant.

Wright & Reeder, for the appellee.

⁶⁵ RIDDICK, J. This is an appeal from a judgment in favor of Rhoda Nuckolls against J. T. Miller for the sum of two thousand dollars in an action for slander and libel.

The complaint contained two causes of action. The first alleged, among other matters, that the plaintiff was a single and unmarried woman, and that the defendant maliciously, intending ⁶⁶ to injure her good name and reputation in the community, did utter and publish of and concerning her certain false, defamatory and scandalous matter, to wit: “There has been a secret burial of a child at Hopewell, and there is no doubt about its being Miss Rhoda Nuckolls’.” Again, that he said, “Miss Rhoda Nuckolls has given birth to a child, and it was secretly buried at Hopewell”; and that he also said to E. J. Peters. “Did you hear of the secret burial at Hopewell? There is no doubt but what it was Rhoda Nuckolls’.”

It was further alleged that on each occasion the defendant meant by the language used to charge plaintiff with the offense of fornication, to her damage in the sum of seven thousand five hundred dollars.

For the second cause of action the plaintiff alleged that defendant, intending to injure her good name and character, published about her the following defamatory and libelous matter, to wit:

"Newark, Ark., May 18, 1903.

"Esq. C. P. Pickens, Dota, Ark.

"DEAR SIR:—You no doubt have heard before now that, agreeable to public gossip, Miss Rhoda Nuckolls did in the latter part of the winter give birth to a child, and whether you have ever learned or not that the child was destroyed and secreted about or in the old warehouse used by Mr. Nuckolls as a warehouse and bedroom. That the same child was kept secreted in the warehouse until decomposition was so far advanced that considerable stench was created about the building, so much so that questions were asked concerning the cause, and to the questions would come the answer that it was caused by rotten onions; and it was said that when it could no longer be kept about the place Nuckolls, Buck Crigler and Will Osborne taken it to the graveyard early one morning, and dug a hole as deep as they could without getting down in it, and buried it. Now, this taken place the day that Will Thornton's wife's grave was dug, and Buck Crigler still at the graveyard when the crowd got there to dig Thornton's wife's grave, and hope with the work of digging of the grave. I call your attention to this matter because you are guardian of the law; and that it should be looked into, no one will deny; and even if it was Mr. Nuckolls, ⁶⁷ the officers of the law should take the matter up and sift it, and see if there is any foundation for the report. It is a fact that the man named did go and bury a child on the morning named. Then whose child was it? If there is anything in it, I aim to see that it is dug up, if I can get it done. Not that I want to persecute the woman, but that contemptible scoundrel Nuckolls. I have almost prayed for some way that I might get revenge out of him, and I do hope that I have got it now. I have learned that that bl'ksmith there made the box the child was put in. Mr. Frank Pierce could show where it was put in the graveyard, so I am told. I think the matter should be investigated.

"Very respectfully,

"J. T. MILLER."

The defendant denied that he uttered the words alleged as slander. He admitted the writing, but claimed that it was made in good faith to an officer of the law, and was privileged.

On the trial the jury returned a verdict of one thousand dollars for slander, and one thousand dollars for libel, and judgment was rendered accordingly.

Defendant appealed.

⁶⁹ This is an appeal from a judgment in favor of Rhoda Nuckolls against J. T. Miller for two thousand dollars for slander and libel. Several grounds are urged in the brief of the appellant why the judgment should be reversed, and which we shall now notice.

First, as to certain remarks made by the presiding judge during the progress of the trial, and as to his rulings in admitting evidence offered by the plaintiff and excluding evidence offered by the defendant, it is sufficient to say that these objections are not sufficiently set forth in the motion for new trial, and must be treated as waived. No reference whatever is made to the remarks of the presiding judge in the motion for new trial, and the reference to the error in admitting and refusing evidence is as follows:

"The court erred in admitting testimony introduced by plaintiff over defendant's objection, as shown by the stenographer's transcript thereof."

"The court erred in refusing the testimony offered by defendant as shown by the stenographer's transcript thereof."

It will be seen that the particular ruling made by the court for which the new trial is asked is not shown by the motion. The attention of the court is not called to the particular error complained of, and the assignment is too indefinite: *Edmonds v. State*, 34 Ark. 720; *Choctaw etc. R. R. Co. v. Goset*, 70 Ark. 427, 68 S. W. 879.

The first instruction given by the court does not, in our opinion, state the law correctly, for it tells the jury that they should find for the plaintiff if they find from the evidence that defendant did utter and publish concerning the plaintiff the words set out in the complaint as a basis of her action for slander, or if he used such words as amount to charging the plaintiff with fornication, or with having been guilty of fornication, or did utter or publish words of or concerning the plaintiff which in their common acceptance amount to such a charge.

Now, it will be noticed that the part of this instruction which we have quoted, in effect, told the jury to find for the plaintiff if the words used by the defendant amounted

to charging plaintiff with having been guilty of fornication, without regard to whether such words were substantially the same as those set out in the complaint or not. Under this instruction, it would have been the duty of the jury to find for plaintiff if the evidence had showed that defendant had said of the plaintiff—an unmarried woman—that she had permitted a man to have sexual intercourse with her, though no such words were set out in the complaint, for such words would in effect charge the plaintiff with fornication. But in an action for slander the plaintiff must prove that the defendant used substantially the same words as those alleged in the complaint. It is not sufficient to prove that the defendant made the same charge against the plaintiff in words substantially different from those alleged, even though of equivalent and similar import: 18 Am. & Eng. Ency. of Law, 1078.

Nor do we think that it necessarily follows that the defect in this instruction was cured by the fact that the law was correctly stated in another instruction given at the request of the defendant, for the two instructions are to a certain extent contradictory. But a consideration of the evidence has convinced us that it does not show that the defendant uttered any words tending to charge plaintiff with having committed fornication except those set out in the complaint. There is evidence tending to show that the defendant did utter about plaintiff words substantially the same as those set out in the complaint. For instance, the complaint alleged that he said, "There has been a secret burial of a child at Hopewell, and there is no doubt about its being Miss ⁷¹ Rhoda Nuckolls'," and the witness testified that he said, "There has been a secret burial of a child at Hopewell, and there is no doubt about its being Miss Rhoda Nuckolls' child." The addition of the word "child" to that stated in the complaint did not alter the meaning. Again, the complaint alleged that defendant said, "Miss Rhoda Nuckolls has given birth to a child, and it was secretly buried at Hopewell," and the evidence showed the same words except those referring to the burial. But the words not proved were not essential to make out the defamatory charge. The substance of the charge was that defendant had said that "Miss Rhoda Nuckolls had given birth to a child," and, these words being shown, the others were immaterial, for the words proved, of themselves,

amount to a charge of fornication, when uttered about a single woman: 18 Am. & Eng. Ency. of Law, 1070.

Now, as there was evidence tending to show that the defendant uttered the words set out in the complaint, and as the evidence does not show that he used any other language which could be taken as charging her with fornication, we do not think that the jury could have been misled by the erroneous part of this instruction. They must have found that the defendant uttered the language set out in the complaint; otherwise, their finding should, under the instructions, have been for defendant. We are therefore of the opinion that no prejudice resulted from this instruction, though, theoretically considered, it is not accurate.

Counsel contend with much force that the writing on which the second cause of action was based was a privileged communication, and that it cannot be made the basis of an action of libel. It may be true that when a communication is made to an officer with the intention to aid him in the detection of crime, the courts will not compel the officer to disclose the name of the informer. It was so held in *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Dec. 736. When such communication is in a writing filed before the proper officer as the basis of a criminal prosecution, such as an affidavit showing the commission of a crime, then no action for libel can be based upon any pertinent matter therein contained. The remedy of the party charged, if he have any, is for malicious prosecution. The statement, being made in the course of a judicial proceeding, cannot be made the basis of an action for slander or libel, whether malicious or not: *Shoek v. McChesney*, 4 Yeates. 507, 72 2 Am. Dec. 415; *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; 18 Am. & Eng. Ency. of Law, 1023, and cases cited. But in this case the libelous matter is not contained in any affidavit or paper filed in a judicial proceeding. It is not a statement of fact within the knowledge of the defendant who made it, but is only a statement of certain rumors concerning the birth of a child, its concealment and burial, which he claims to have made to the justice of the peace that the justice might order an investigation to ascertain the facts. It is the duty of everyone to assist in the detection of crime; and if he knows facts that tend to show that a crime has been committed, it is not only proper, but it is his duty, to communicate them to the proper officer. But

while such statements are privileged, the weight of authority seems to show that they are not absolutely privileged. for charges of that kind should not be made recklessly and maliciously, but in good faith with an honest desire to promote justice. If made in good faith, they are privileged; but, on the other hand, if made maliciously, and with no probable cause to believe them to be true, they are not privileged. This point was directly decided in the old case of *Bunton v. Worly*, 4 Bibb (Ky.), 38, 7 Am. Dec. 735. where it was held that words spoken to a justice on application for a warrant for felony may be made the basis of an action for slander, when not made in good faith: See, also, *O'Donaghue v. McGovern*, 23 Wend. 26; *Howard v. Thompson*, 21 Wend. 319, 34 Am. Dec. 238; *Sands v. Robison*, 12 Smedes & M. 704, 51 Am. Dec. 132; *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205; *Pierce v. Oard*, 23 Neb. 828, 37 N. W. 677; *Ogden on Libel and Slander*, 220; *Newell on Slander and Libel*, 500; 18 Am. & Eng. Ency. of Law, 1038. There are a few cases that seem to hold that communications of this kind to an officer are absolutely privileged: *Johnson v. Evans*, 3 Esp. 32; *Vogel v. Gruaz*, 110 U. S. 311, 4 Sup. Ct. Rep. 12, 28 L. ed. 158. The first case mentioned above is a very old case. The last one was decided by the supreme court of the United States. But the decision in that case was based mainly on the ground that it was a communication made to a state's attorney, or public prosecutor of crimes, in order to ascertain whether certain facts constituted a crime. The court held that the communication was as much privileged as if it had been made to an attorney hired by him. While these cases do seem to some extent to sustain the ⁷³ contention of appellant, the weight of authority, as before stated, seems to show that a communication of the kind under consideration here is privileged only when made in good faith, but not when made recklessly, with the intention to gratify personal malice toward the plaintiff or his family. This is certainly true where, as in this case, the informant does not state facts, but mere rumors, which he might easily have ascertained to be untrue. It is doubtful if he was under any duty to voluntarily repeat mere rumors of that kind affecting the character of an unmarried woman, even to an officer of the law; and if he did so maliciously, an action would lie. The instruction given on this point was, we

think, proper; and when the instructions are considered as a whole in the light of the evidence, we find no reversible error.

Again, it is said that the judgment should be reversed on account of improper argument of counsel for plaintiff, who said to the jury in his closing argument: "Dr. Miller should thank God that the people of that community allowed him still to live." On objection being made, the court quietly said to the attorney not to make improper remarks. Afterward the attorney said: "A man who is guilty of such heinous crime ought not to be permitted to live in this county." On objection being made, the court mildly said to the attorney that the remark was improper, to which counsel for plaintiff responded: "Your honor, I say, if he is guilty, he is not fit to live in this county, and I stand on that proposition." The court overruled the objection to this remark. It will be noticed that the presiding judge sustained the objection to all the remarks of counsel except the last. It is true that his language does not appear to have been very emphatic, but the tone of the voice has much to do with a matter of that kind; and, though the record states that the court "quietly" cautioned the attorney not to make improper remarks, we are not able to say that this remonstrance did not clearly convey to the jury the idea that the argument was improper. If counsel desired to have the jury instructed to disregard the remarks, or if he wished a more emphatic reprimand, he should have asked for an instruction of that kind. That brings us to the last remark of counsel to which objection was made and overruled, in which he said that if defendant was guilty he was not fit to live in the 74 county. This was only an expression of the opinion of counsel, and intended to convey to the jury his idea of the gravity of the charge against the defendant. Now, it is often the case that expressions of that kind are made in argument of counsel. The law does not confine counsel to a cold statement of the facts of the case. He must not misstate the facts, or undertake to supply the place of a witness by stating facts not in evidence. But, to quote the language of a recent case, he is not required to forego the embellishments of oratory; for "stored away in the property-room of the profession are moving pictures in infinite variety,

from which every lawyer is expected to draw on all proper occasions": *State v. Burns*, 119 Iowa, 663, 94 N. W. 238.

Now, counsel does not say in this last remark that a man guilty of that crime ought not to be permitted to live in that county. Such a statement, whether prejudicial or not, would be out of place, and exceedingly improper in a court of justice, as it might be taken as an indorsement of mob law. But in the last statement he simply said that he was not fit to live there. In other words, he maintained that a person who would slander an innocent girl was not a fit associate of the people there. This, as we have said before, was only an attempt to impress upon the jury the gravity of the offense committed against the plaintiff, and in our opinion furnishes no ground for reversal.

There are other errors complained of, but after consideration thereof, we are of the opinion that no prejudicial error is shown that is raised by motion for new trial.

Judgment affirmed.

What Libelous Statements are Privileged is the subject of a recent monographic note to *Holmes v. Clisby*, 104 Am. St. Rep. 110-151. Words spoken before a justice of the peace on an application for a warrant for felony are not actionable, if spoken in good faith and for the purpose of instituting proceedings: *Bunton v. Wooley*, 4 Bibb, 38, 7 Am. Dec. 735.

ARKANSAS AND LOUISIANA RAILWAY COMPANY v. STROUDE.

[77 Ark. 109, 91 S. W. 18.]

TELEGRAPH COMPANIES—Limitation of Liability.—A stipulation on a blank on which a telegraph message is written that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," does not bar a right to recover, although the claim was presented after that time, if the delay was caused by the misleading statements of the company's agent. (p. 133.)

TELEGRAPH COMPANIES—Stipulation as to Notice—Excuse for Noncompliance.—A stipulation in a telegram requiring notice of a claim for damages to be given within sixty days after sending the message as a condition precedent to recovery does not require that the addressee give such notice before he could, with reasonable diligence, ascertain that the telegraph company had failed to deliver the message. (p. 133.)

TELEGRAPH COMPANIES—Damages for Mental Suffering.—

A statute declaring that all telegraph companies doing business in the state shall be liable in damages for mental anguish and suffering arising from their negligence, applies as well to corporations doing a public telegraph business as to strictly telegraph companies. (pp. 133, 134.)

NEGLIGENCE — Exemplary Damages.—Negligence, however gross, will not justify a verdict for exemplary damages, unless the negligent party is guilty of willfulness, wantonness, or conscious indifference to the consequences, from which malice may be inferred. (p. 134.)

TELEGRAPH COMPANIES—Failure to Deliver Message.—Exemplary Damages cannot be recovered against a telegraph company for its failure to deliver a telegram unless the company's employes knew where the addressee might be found and willfully and wantonly failed to deliver the message. (p. 135.)

B. S. Johnson and W. C. Rodgers, for the appellant.

Teazel & Bishop, for the appellee.

¹¹⁰ McCULLOCH, J. This is an action against appellant to recover for mental pain and anguish suffered by reason of the alleged negligent failure of the defendant to deliver a telegraphic message.

The complaint alleged that the defendant was a domestic corporation, and owned and operated for hire a telegraph line along the line of its railroad from Hope, Arkansas, to Nashville, Arkansas, and connected with the telegraph line of the Western Union Telegraph Company at Hope; that on September 30, 1903, one J. D. Carter, a relative of plaintiff, delivered to the Western Union Telegraph Company, at Mohawk, Tennessee, for transmission, a message addressed to plaintiff at Nashville, Arkansas, in the following words: "Your wife is not expected to live. Come home at once." That said message was by the Western Union Company delivered to defendant at Hope, but that defendant wantonly, willfully and negligently failed to transmit and deliver said message to plaintiff.

The defendant filed its answer, in which all the allegations of the complaint are denied. It admitted that such a message, ¹¹¹ addressed to A. G. Stroude, was delivered to it by the Western Union Company at Hope, and was promptly transmitted over the line to Nashville, and alleged that immediately upon receipt of the message at Nashville its agents at that place made diligent effort to find the addressee and deliver the message, but failed to find him. It also alleged that the contract by which the message in controversy was

transmitted provided that any claim for damages must be presented in writing within sixty days after the message is sent, as a condition precedent to the right of recovery, and that no such claim was presented in writing, as required by the terms of said contract.

The facts proved at the trial, or so much as is deemed important to mention, are recited in the opinion.

The trial of the cause resulted in a verdict in favor of the plaintiff, and the damages were assessed at five hundred dollars. The defendant filed its motion for new trial, and, after the same had been overruled, saved its exceptions to the rulings of the court, and appealed.

¹¹² 1. Appellant contends that there should have been no recovery by appellee, for the reason that he failed to give notice in writing of his claim for damages, as required by the contract. The following stipulation is printed upon the blank used in sending the message, viz.: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The blank upon which the message was originally written, when delivered to the Western Union Telegraph Company for transmission, contained a similar stipulation, and appellee gave notice to that company within sixty days.

It is argued that compliance with this stipulation was a condition precedent to the right to maintain a suit for recovery of damages.

If it be held that compliance with the stipulation was a condition precedent, and that appellant had a right to insist upon notice to it of the damage, we say that under the facts of this case, as shown by undisputed testimony, appellant waived its right to such notice. It is conceded that appellee, several days after the receipt of the message at the Nashville office, and after he had been informed by the sender of the message that it had been sent, inquired at the office of appellant, and was assured ¹¹³ by the operator that the message had never been received; and afterward appellee's attorney informed appellant's agent of his intention to file a claim for damages on account of failure in the transmission and delivery of the message, and the agent still insisted that the message had never been received. Appellee did not know until after the expiration of sixty days that the message had ever been delivered to appellant, and filed his notice of damages with, and brought suit against, the Western Union Com-

pany. It is clear that appellee and his attorneys were misled by the statement made to them by the agent of appellant, whose duty it was to deliver the message and to give information concerning it, and appellant cannot be permitted to take advantage of the failure of appellee to give the notice when such failure was caused by the misleading statements of its agent: *Joyce on Electric Law*, sec. 726; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713.

Appellee could not give the notice of the damage to appellant when he did not know, and could not with reasonable diligence ascertain, that the delay was caused by appellant's fault. A construction of the stipulation which would require the giving of the notice before appellee could, with reasonable diligence, ascertain the fault, would in effect deprive him of all redress for the injury, and would render the stipulation void: *Herron v. Western Union Tel. Co.*, 90 Iowa, 129, 57 N. W. 696.

2. It was held by this court in *Peay v. Western Union Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463, that damages were not recoverable for mental pain and anguish, unattended by physical injury, occasioned by breach of duty on the part of a telegraph company in failing to promptly deliver a telegram.

Subsequent to that decision the legislature enacted a statute declaring that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company": Act March 7, 1903; *Kirby's Digest*, sec. 7947. It is claimed that this statute is applicable only to telegraph companies organized for the purpose of doing a telegraph business, and not ¹¹⁴ to a railroad corporation, even though doing a telegraph business. We cannot uphold that contention. It is manifest that the legislature did not use the term "telegraph companies" in any technical sense, but intended to apply it to any corporation or association doing a public telegraph business. Manifestly, it was the intention of the lawmakers to change by statute the law as declared by this court in the case referred to above, and to make mental pain and anguish an

element of damages resulting from a negligent failure to receive, transmit or deliver a telegraphic message.

The evidence shows that appellant, though organized as a railroad corporation and operating a railroad, was also operating a telegraph line along the line of its railroad, and was engaged in the telegraph business, serving the public generally for pay along its said line. It is estopped to assert that it was acting beyond its power in so doing: *Minneapolis etc. Ins. Co. v. Norman*, 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229.

3. The court, at the request of the plaintiff, gave the following instruction on the subject of exemplary damages: "If the jury believe from the evidence that the message in question was promptly and correctly transmitted to the Arkansas and Louisiana Railway Company, and that it was received by the agent and operator of said company at Nashville, Arkansas, and that it was not delivered to the plaintiff, and that the failure to deliver it was because of the wanton, gross and willful negligence of the said agent, then you may add to the actual or compensatory damage which you may find for the plaintiff under the fourth instruction given at the request of the plaintiff, if you find he has sustained any damages, such exemplary or punitive damages as you may deem proper under the evidence as a punishment for the willful neglect of duty, not exceeding, however, when added to the actual damages, the amount sued for."

It is contended that exemplary damages are not recoverable in such case because the statute in question does not authorize same. It is true that this statute does not authorize such damages, but it does not follow that the same may not be recovered. The statute declares mental pain and anguish to be elements of actual damages in such cases, and, aside from the statute, in ¹¹⁵ actions for acts wantonly committed exemplary damages may be allowed where actual damages are proved.

We think, however, that the court erred in giving an instruction allowing the jury to assess exemplary damages, as there was no evidence to support a verdict of that character.

Negligence, however gross, will not justify a verdict for exemplary damages, unless the negligent party is guilty of willfulness, wantonness or conscious indifference to consequences from which malice will be inferred: *St. Louis etc. Ry. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138.

In this case no element of willfulness or conscious indifference is proved. Appellee had lived in that community only about ten months, having moved there from Tennessee. He lived outside the corporate limits of the town, but worked therein at his trade as a painter. The telegraph operator and messenger both testified that they had no personal acquaintance with him, and the latter testified that he made diligent search for the addressee named in the message, inquired of numerous persons on the street, and examined the register at the hotel, and failed to find him. It is true that appellee testified that at the time the message was sent he was at work on a building near the depot, that he had talked with both the operator and messenger since he became a resident of the community, and had, on two occasions, made inquiry of the operator, who was also express agent, for express packages, and had given his name. He does not say when this occurred. He does not show that his alleged communications with the employes of appellant were of such a character and in such close proximity in point of time to the date of this message as to indicate that they must have remembered him, known where he could be found, and willfully and knowingly failed to deliver the message to him. Nothing short of that would justify an assessment of exemplary damages. We cannot say that the evidence in this case does not sustain the verdict and the amount of damages assessed by the jury. Neither can we say to what extent the jury were influenced by the instruction as to exemplary damages. The jury might have awarded the same amount of damages if this instruction had not been given, or they might have awarded less. We cannot tell. Appellant was entitled to have the issues submitted to the jury without this erroneous instruction, and it must, therefore, be held to be prejudicial: ¹¹⁶ St. Louis etc. Ry. Co. v. Hall, 53 Ark. 7, 13 S. W. 138; Inabnett v. St. Louis etc. Ry. Co., 69 Ark. 130, 61 S. W. 570; St. Louis etc. Ry. Co. v. Townsend, 69 Ark. 380, 63 S. W. 994; Neal v. Brandon, 70 Ark. 79, 66 S. W. 200; St. Louis etc. Ry. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74, 66 S. W. 661.

For the error in giving this instruction the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

A Stipulation in a Contract to Send a Telegram that the company shall not be liable for damages in case a claim is not presented in writing

within sixty days is of doubtful validity: *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 92 Am. St. Rep. 371; *Hartzog v. Western Union Tel. Co.*, 84 Miss. 448, 105 Am. St. Rep. 459. But if regarded as valid, it may of course be waived: *Hays v. Western Union Tel. Co.*, 70 S. C. 16, 106 Am. St. Rep. 731; *Western Union Tel. Co. v. Hines*, 96 Ga. 688, 51 Am. St. Rep. 159.

A Telegraph Company is Liable in damages for mental suffering, according to the better rule, due to negligence in the transmission or delivery of a telegram, whether the suffering is accompanied by physical pain or injury or not: *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 103 Am. St. Rep. 776; *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 104 Am. St. Rep. 828; *Green v. Telegraph Co.*, 136 N. C. 489, 103 Am. St. Rep. 955; *Western Union Tel. Co. v. Wells*, 50 Fla. 474, 111 Am. St. Rep. 129.

WALTERS v. BRISTOW.

[77 Ark. 182, 91 S. W. 305.]

POWERS, EXECUTION OF.—The question whether a deed was made in execution of a power contained in a will is one of intention, to be gathered from the terms of the deed and the circumstances under which it was made. (p. 138.)

POWERS, EXECUTION OF.—If a deed is executed under a power contained in a will, it is not absolutely essential that the deed should refer to the power, but when the deed is silent on that point, and the maker has an interest in the land that will pass by the deed, without regard to the power, this, though not conclusive, is a circumstance tending strongly to show that there was no intention to execute the power. (p. 138.)

POWERS—Execution of.—If a widow and devisee join in a deed in their individual capacity and convey land by warranty for less than its real value, and such deed makes no reference to a power in a will giving the widow authority to convey, it must be deemed that they conveyed only their individual interest in the land and had no intention to execute the power contained in the will. (p. 139.)

G. J. Crump, for the appellant.

J. W. Story and B. B. Hudgins, for the appellee.

183 RIDDICK, J. In 1876 Matthew Bristow died in Boone county, being at his death the owner of personal and real property in that county. He left a will containing, among others, the following provisions, to wit:

“ITEM 1.

“I give, devise and bequeath to my beloved wife, Martha Jane Bristow, all my estate, both real and personal, that I may be seised and possessed of at the time of my decease, to

be hers her natural life or widowhood, for the purpose of her support and for the raising and support and educating my two youngest daughters, Margaret Ann and Belzora C. Bristow, my said estate to be disposed of as my executors hereinafter mentioned shall think proper and right for the purposes above mentioned.

“ITEM 2.

“At the death or marriage of my beloved wife, Martha Jane, I will and direct that my executor, as soon as convenient, expose either at public or private sale the remainder of my estate, both real and personal, and the proceeds of the same, after paying all necessary expenses, be by them equally divided and distributed among my heirs.”

The will directed that Caladonia F. Anderson and John T. Anderson, stepdaughter and stepson, share equally with the children of the testator as devisees under the will, and appointed one Ruble and Mrs. Bristow as executor and executrix, respectively, ¹⁸⁴ of the will. Ruble declined to act as executor, and Mrs. Bristow qualified as executrix alone, and took charge of the estate as such.

Afterward Mrs. Bristow and John T. Anderson and his wife, for the consideration of three hundred and twenty-five dollars, sold and conveyed the land owned by Bristow to L. L. Lee. They executed a deed in the following words (omitting description of land and other parts not material here):

“Know all men by these presents that we Jane Bristow and J. T. Anderson and A. A. Anderson, his wife, of the county of Boone in the State of Arkansas, for and in consideration of the sum of \$325 to us in hand paid by L. L. Lee, of same county and State, the receipt of which is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said L. L. Lee and unto his heirs and assigns the following described land. . . . To have and to hold the same to the said L. L. Lee and unto his heirs and assigns in fee simple. We covenant to and with the said L. L. Lee that we are lawfully seised of said land, as heirs and legatees of Matthew Bristow, deceased; that we have a right to sell and convey the same, and that we will, and our heirs and legal representatives shall and will, warrant and forever defend the title thereto against all lawful claims and demands whatsoever. In testimony

whereof we have hereunto set our hands this 22d day of January, 1887.

(Signed) "JOHN T. ANDERSON.

"A. A. ANDERSON.

"M. J. BRISTOW."

Lee sold the land to J. H. Walters. Walters brought this action to quiet his title to the land. The heirs of Matthew appeared and filed an answer, denying that plaintiff was the owner of the land, except the life estate of Mrs. Bristow, and the interest of Anderson as devisee under the will.

The chancellor found in favor of the defendants, and dismissed the petition for want of equity, and Walters appealed.

¹⁸⁵ This is an appeal from a judgment of the Boone chancery court. The two questions discussed by counsel are, first, did the executrix under the will of Matthew Bristow have power to convey a fee in the land, and, second, if she had such power, was the deed made by her and Anderson made under such power? Or, in other words, did she by such deed execute the power?

It is very clear that Mrs. Bristow took only a life estate under the will. But whether she had under the will power to convey the fee for the purposes therein named, we need not determine, for to our minds it is plain that, if such power existed, it was never executed.

The question of whether a deed is made in execution of a power contained in a will is one of intention, to be gathered from the terms of the deed and from the circumstances under which it was made. It is not absolutely essential that a deed should refer to the power in order to execute it; but when the deed is silent on that point, and the maker has an interest in the land that will pass by the deed, without regard to the power, this, if not conclusive, is a circumstance tending strongly to show that there was no intention to execute the power: *Ridgely v. Cross*, 83 Md. 161, 34 Atl. 469; *Patterson v. Wilson*, 64 Md. 193, 1 Atl. 68; *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. Rep. 631, 33 L. ed. 1038; *Blake v. Hawkins*, 98 U. S. 315, 28 L. ed. 139; *Lanigan v. Sweany*, 53 Ark. 185, 13 S. W. 740.

Now, in this case Anderson, one of the devisees under the will, joined in the deed with Mrs. Bristow. If the intention was to execute the power in the will, there was no occasion for one of ¹⁸⁶ the devisees to join in the deed. The fact that

one of the devisees joined in the deed with the widow, taken in connection with the fact that they sold the land for about one-third of its actual value, that the widow did not convey as executrix, and that the deed makes no reference whatever to the power, goes to show that they were only selling their individual interests in the land, and that there was no intention to execute the power. The language of the deed clearly indicates this, for the grantors therein covenant that they are "lawfully seised of said land as heirs and legatees of Matthew Bristow, deceased."

On the whole case, we are of the opinion that there was no execution of the power contained in the will, and that the grantee under the deed took only the individual interests of Mrs. Bristow and Anderson in the land. It follows that the judgment of the chancellor was right, and it is therefore affirmed.

It is Not Necessary that the Intention to Execute a Power should expressly appear upon the face of the instrument: Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117, 90 Am. St. Rep. 22; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420. It has been affirmed, however, that an instrument cannot be given effect as an execution of a power, unless the intention of the donee of the power to execute it is so apparent that the instrument is not fairly susceptible of any other interpretation: Mason v. Wheeler, 19 R. I. 21, 61 Am. St. Rep. 734.

When a Donee of a Power to Sell Land possesses also an interest in the subject of the power, a conveyance by him in his own name without reference to the power will be deemed an execution of it, if such an intention is made to appear: McCreary v. Bomberger, 151 Pa. 323, 31 Am. St. Rep. 760; Gulf Red Cedar Lumber Co. v. O'Neal, 131 Ala. 117, 90 Am. St. Rep. 22.

WOLFORT v. DIXIE COTTON OIL COMPANY.

[77 Ark. 203, 91 S. W. 306.]

CORPORATIONS—FOREIGN—Contracts of—Compliance With Statute.—A contract made by a foreign corporation before compliance with the terms of a statute authorizing or permitting it to do business within the state is not void, but may be enforced in the courts of that state after such corporation has duly complied with the statutory requirements. (p. 142.)

Bradshaw, Rhoton & Helm, for the appellant.

Marshall & Coffman, for the appellee.

205 McCULLOCH, J. The only question raised by this appeal is whether a foreign corporation doing business in this state can recover upon a contract made by it without having complied with the statute requiring that such corporations, before attempting to do business in the state, shall file with the Secretary of State and county clerk a certified copy of their articles of incorporation.

Kirby's Digest, sections 825, 826, 827, 828, 829, and 830, provide that a foreign corporation shall, before doing business in the state, file in the office of the Secretary of State a copy of its charter and a certificate designating an agent upon whom process may be served, and declare that if any corporation shall fail to comply with the statute, it shall be subject to fine, and that no suit can be maintained to enforce its demands.

Appellee complied with this statute before entering into the contract sued on.

The legislature enacted a statute May 23, 1901 (Kirby's Digest, sections 832, 833), section 1 of which provides that a foreign corporation, before it shall be authorized or permitted to establish or continue its business in this state, shall file with the Secretary of State and county clerk a copy of its articles and a statement of the proportional part of capital stock in its business in the state and county. The second section of said act is as follows: "That no corporation formed or organized in another state, territory, county or country, shall be authorized or entitled to make any contract in this state until it has complied with the provisions of the foregoing section, nor shall it be authorized to sue on any contract made in this state until the provisions of section one (1) of this act are complied with; provided, that corporations now doing business in this state may have sixty (60) days to comply with this act."

This act was not complied with* until after the commencement of this suit to enforce the contract, which was entered into on March 8, 1902.

In the two cases of *Buffalo Zinc etc. Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, and *Sutherland-Innes Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152, it was held **206** that a foreign corporation which complied with the first-named statute after it had commenced an action was entitled thereafter to maintain it. In each of those cases the contract sued on was entered into prior to the enactment of the first-named

statute (February 16, 1899), and the suit commenced after its enactment.

In the case first cited above the court said: "The penalties of the act in question are, doubtless, intended to compel an observance of its terms. When that is done, its purpose is accomplished, the condition upon which the right to maintain an action depends is performed, and the plaintiff can in the future prosecute it to a final judgment."

It will be observed that there is a substantial difference between the provisions of these two statutes. In addition to requiring, as a prerequisite to doing business in the state, the performance of entirely different acts on the part of the corporations, the first-named statute expressly provides that in the event of failure to comply therewith it shall be subject to fine of one thousand dollars. It is noteworthy also that a prior statute on the subject (Act of April 4, 1887) provided that in the event of a failure of a corporation to comply with its provisions all contracts made with citizens of the state shall be void. The statute now under consideration contains no such provision. It merely declares that "no foreign corporation shall be authorized or entitled to make any contract in this state, nor to sue on any contract made in this state, until it has complied with the foregoing section."

Professor Beale in his late work on Foreign Corporations (section 213) says: "The weight of authority supports the view that contracts made by foreign corporations within the state before compliance with the statute are not void, and that suit may be brought upon them either by the other party or (after compliance, if that is, as often happens, made a condition of suing) by the corporation." While there is much conflict in the authorities, they seem to sustain the statement of the author: *Wright v. Lee*, 2 S. Dak. 596, 51 N. W. 706; *Security Savings etc. Co. v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Neuchatel Asphalte Co. v. City of New York*, 155 N. Y. 373, 49 N. E. 1043; *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736; *Blelgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 L. R. A. 79; *Alleghany Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

²⁰⁷ The New Jersey court of errors and appeals in the case cited above said: "The tendency of judicial decisions on this subject, where the statute does not declare the contract to be void, is to a strict construction, maintaining the

validity of the contract and holding that the only effect of such legislation in the state where it is enacted is to impose the prescribed penalties and the expressed disability."

This court, in the case of *State Mutual Ins. Assn. v. Brinkley Stave Co.*, 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. 157, 29 L. R. A. 712, held that the contract of a foreign insurance company which had not complied with the requirements upon which such corporations could do business in the state was not void, for the reason that the statute did not in terms declare such contracts to be void. That decision seems conclusive of this case. The only distinction between the two cases is that the insurance statute imposes a penalty for doing business in the state without having complied with its terms, whilst the statute under consideration imposes no penalty further than to declare that no suit may be maintained by the corporation until the terms of the statute be complied with. We do not think this alters the rule. The statute does plainly prohibit the maintenance of a suit until its terms are complied with, and, in the absence of a provision expressly declaring the contract to be void, we do not feel at liberty to say that the legislature intended to fix the latter penalty. If it had been intended to declare the contract absolutely void and of no effect, the further provision that no suit should be maintained thereon was superfluous. Learned counsel for appellant contend that the latter provision was, however, intended to apply only to contracts made before the passage of the statute, so as to enable the corporation to qualify itself to enforce valid contracts entered into before its passage. We do not agree with them that the provision is so limited in its operation. It manifestly and in express terms applies to "any contract made in this state."

We, therefore, hold that a contract made by a foreign corporation before compliance with the terms of the statute is not void, but may be enforced in the courts of the state after it has duly complied with the statutory requirements.

Judgment affirmed.

Foreign Corporations which have not complied with the statutes of a state have nevertheless been permitted in some instances to maintain suits in its courts for the recovery of debts: *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852; *Tri-State Amusement Co. v. Forest Park etc. Amusement Co.*, 192 Mo. 404, 111 Am. St. Rep. 511.

GEORGE v. NORWOOD.

[77 Ark. 216, 91 N. W. 557.]

JUDICIAL SALES—Inadequacy of Price.—A judicial sale will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience, or unless there are additional circumstances against its fairness. (p. 144.)

JUDICIAL SALES—Setting Aside for Advanced Bid.—In the absence of fraud, irregularity or misconduct affecting the validity of a judicial sale, it will not be set aside and confirmation refused in order to allow the bid of the purchaser to be advanced by another person. (p. 144.)

JUDICIAL SALES—Discretion of Court.—An accepted bidder at a judicial sale acquires no independent rights until the sale is confirmed by the court, and while the court may exercise discretion in confirming or rejecting the sale, yet such discretion must be exercised according to fixed rules, and not arbitrarily, and the bidder has the right to insist upon the exercise of such discretion in such proper manner. (p. 145.)

JUDICIAL SALES—Duty to Ratify.—If a judicial sale is made in all respects according to the terms of the decree, and neither fraud, mistake, nor misrepresentation can be alleged against it, the faith of the court is pledged to ratify and confirm it. (p. 146.)

George & Butler and R. E. Craig, for the appellant.

Hooker & Cone, for the appellee.

217 McCULLOCH, J. Appellant G. P. George, Jr., became the purchaser of land at a sale made by commissioner in chancery, and appeals from a decretal order of the court setting aside the sale and refusing to confirm it.

The land was advertised and exposed to sale by the commissioner in accordance with the decree of court. Appellant bid the sum of four thousand dollars therefor, and, being the highest bidder, the commissioner knocked the same off to him at that price, and reported the sale to the court. One of the parties to the suit filed exceptions to the report on the alleged ground that the price was grossly inadequate, and appellee W. T. Cone offered an advance bid of five thousand dollars for the land. The court made a finding that the price for which the land was sold—four thousand dollars—was grossly inadequate, offered to permit appellant to advance his bid to five thousand dollars, which appellant refused to do, and then set the sale to appellant aside, and accepted the bid of appellee Cone, and

directed the commissioner ²¹⁸ to make a deed to the latter upon payment of said sum of five thousand dollars.

The fairness and regularity of the sale is unimpeached by evidence. Appellees introduced no proof to establish the market value of the land except the offer of appellee Cone to pay five thousand dollars for it, and appellant introduced four witnesses who testified that the fair market value of the land at the time of the sale was three thousand five hundred dollars to four thousand dollars.

The questions which we are called upon to decide are, in the first place, whether an appellate court should under any circumstances disturb the order of a chancery court refusing to confirm a sale by its commissioner, and, second, whether the chancellor is sustained by the evidence in his conclusion that the price offered by appellant was grossly inadequate.

In the case of Colonial etc. Mtg. Co. v. Sweet, 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60, this court affirmed the order of the chancellor confirming a sale of land for two thousand five hundred dollars, and refusing to accept an advance bid of three thousand nine hundred and eighty-one dollars and sixty-seven cents made by one of the parties to the original decree. The proof was conflicting as to the market value, and the court found that the price at which the sale was made—two thousand five hundred dollars—was a fair one. The court quoted with approval language of the supreme court of the United States in *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29 L. ed. 839, as follows: "In this country, Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, or unless the inadequacy be so great as to shock the conscience, unless there be additional circumstances against its fairness; being very much the rule that always prevailed in England as to setting aside sales after the master's report had been confirmed."

It may be therefore treated as settled in this state, following the rule adopted by a large majority of the American courts, that, in the absence of fraud, irregularity or misconduct affecting the validity of a judicial sale, the sale will not be set aside and confirmation refused in order to allow the bid of the purchaser to be advanced by another person.

It is equally well settled, here and elsewhere, that a judi-

cial sale will not be set aside on account of mere inadequacy of price, unless the inadequacy be so gross as to shock the conscience or ²¹⁹ raise a presumption of fraud or unfairness: *Nix v. Draughon*, 56 Ark. 240, 19 S. W. 669; *Fry v. Street*, 44 Ark. 502; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29 L. ed. 839; *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140, 18 South. 938; *Stump v. Martin*, 9 Bush (Ky.), 285; *Allen v. Martin*, 61 Miss. 78.

The chancellor found in this case that the price was grossely inadequate, but his finding was contrary to the decided preponderance of the evidence. Four witnesses introduced by appellant testified that the amount of his bid was a fair market value of the land. Some of them testified that it was above the market value. No other witness testified on the subject. But conceding that the advance bid of appellee Cone fixed the value of the land at five thousand dollars, we do not think that establishes such gross inadequacy in the price as, of itself, to afford grounds for setting aside the sale.

Courts have adopted, as a wise public policy, the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that, in the absence of fraud or misconduct, the highest bidder will be accepted as the purchaser of the property offered for sale. And while it is often said that the accepted bidder at such a sale acquires no independent rights until the sale be confirmed by the court, and that the court may exercise a discretion in either confirming or rejecting the sale, yet this discretion must be exercised according to fixed rules, and not arbitrarily, and the bidder has the right to insist upon its exercise in this manner only. He can insist that his purchase be not set aside by the court upon reasons which are condemned.

"Considerations of public policy demand," say the court of appeals of Kentucky, "that some confidence should be had in the stability of judicial sales, so as to invite competition in bidders by an assurance to men of fidelity and promptness in their business habits that the chancellor is at least bound by the same rules of fair dealing that such men are in their business transactions with each other":

Stump v. Martin, 9 Bush (Ky.), 285. And the appellate court in that case reversed the decision of the lower court refusing to confirm a sale and accepting the advanced bid of another person.

In a similar case the supreme court of Mississippi, on **220** appeal prosecuted by the purchaser, reversed the ruling of the chancellor refusing to confirm a sale because the bid had been advanced: *Allen v. Martin*, 61 Miss. 78. The court, by Mr. Justice Cooper, said: "Until confirmation, the sale is in fieri and subject to the control of the court, but this control is a judicial, not an arbitrary, one, and confirmation must follow unless there exist some reason recognized by law as warranting a refusal to confirm. A bidder at a sale in chancery assumes certain obligations which he must discharge, he submits himself to the jurisdiction of the court, and becomes a party to the cause in which the sale has been decreed, and he may be compelled to stand by the offer he has made. On the other hand, he acquires certain legal rights which are to be as much protected and enforced as are other rights of other persons. He is entitled not only to ask but to have confirmation if there is no reason valid in the law for refusal."

"When a sale is made in all respects according to the terms of the decree, and neither fraud, mistake nor misrepresentation can be alleged against it, the faith of the court is pledged to ratify and perfect it": *Latrobe v. Herbert*, 3 Md. Ch. 375.

The New Jersey court of errors and appeals, in the case of *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16, reversed the decree of the chancellor setting aside a sale made by the master because the bid of the purchaser was advanced by another. The court said: "There is a uniform current of decisions settling that official sales will not be opened on mere representations that more may be obtained for the property. This well-known practice is in accord with the policy of our law respecting such sales, which are required to be made after advertisement sufficient to give publicity by public outcry to the highest bidder. It is of the greatest importance to encourage bidding by giving to every bidder the benefit of bids made in good faith and without collusion or misconduct, and, at least, when the price offered is not unconscionably below the market value of the property. Nothing could more evidently tend to

discourage and prevent bidding than a judicial determination that such a bidder may be deprived of the advantage of his accepted bid, whenever any person is willing to give a larger price. The interest of owners in particular cases must give way to the maintenance of a practice which, in general, is in the highest degree beneficial." To the same effect are *Comstock v. Purple*, 49 Ill. 158; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Page v. Kress*, 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052.

If the chancellor had, under the proof, approved this sale, our duty to affirm his decision would be plain, for it is undisputed that the sale was regularly made in accordance with the order of the court, and was free from any fraud or misconduct, and the evidence shows that the price bid was not inadequate.

That being true, the purchaser had the right to insist upon a confirmation of the sale, and it is equally our duty to protect that right and to reverse a decision of the chancellor denying it. In other words, the decision refusing to confirm the sale under the proof presented by the record cannot be said to be proper exercise of the discretion of the court, and must be reversed.

The decree is therefore reversed and the cause remanded, with directions to confirm the sale to appellant upon compliance by him with the terms of his bid.

OPENING JUDICIAL SALES FOR ADVANCED BIDS.

I. English Practice of Opening Chancery Sales, 147.

II. American Courts Adopting English Practice.

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I. English Practice of Opening Chancery Sales.

It was formerly the rule in England in chancery sales, that until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten per centum. So much dissatisfaction, however, was expressed with this practice, as calculated to impair the confidence of bidders and thereby diminish rather than increase the proceeds of judicial sales, that it has been abolished by parliament: *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686, 29 L. ed. 839. "In England," to quote from *Blackburn v. Selma R. R. Co.*, 3 Fed. 689, "before the new practice was adopted, a third person could, upon no other ground than that he offered an advance of price, pro-

vided it were a considerable advance, intervene and set the sale aside, he paying all the expenses which the previous purchaser had incurred, and the property was put up for sale upon the advance price. There was no rule as to the amount of the advance required, and no one had any right to open the biddings, since it was always in the discretion of the court to grant the application or refuse it."

II. American Courts Adopting English Practice.

a. In General.—The old English practice has obtained some foothold in America, and in quite a number of our states it is not uncommon to open judicial sales for perhaps no other reason than that an advance bid has been made for the property: *Hinson v. Adrian*, 92 N. C. 121; *Childress v. Hart*, 32 Tenn. (2 Swan) 487; *Wilson v. Shields*, 62 Tenn. (3 Baxt.) 65; *Reese v. Copeland*, 74 Tenn. (6 Lea) 190; *Dupuy v. Gorman*, 77 Tenn. (9 Lea) 144; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *National Bank v. Jarvis*, 28 W. Va. 805. "All the cases agree," to quote from the supreme court of Virginia, "that the court must sell at the best price obtainable, and when a substantial upset bid, well secured and safe, for ten per cent advance, is put in before confirmation, it is as much a valid bid as if made at the auction. This is the settled law of this court, and will doubtless so remain until the legislature shall otherwise provide by law, as has been done by the English parliament": *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882, 32 S. E. 50.

"We think it best to announce," said the supreme court of Tennessee in *Click v. Burris*, 53 Tenn. (6 Heisk.) 539, "as a rule for the future action of this court, but not to govern sales which have already been made, that we will adopt the English practice, and when it appears that an increased bid of ten per cent has been offered, the bidding will be opened. This rule will be applied in cases where the proposal to open the biddings is made at the term of the court to which the report of sale is made, and where it appears that notice of the intention to make the offer has been given to the first bidder, or purchaser; and where the rule is applied, the property will be put to sale at the increased bid, and with open competition to all other bidders; and when the resale is made, the biddings will not again be opened, except under extraordinary circumstances."

b. With What Limitations.—But even in those jurisdictions where the practice prevails of opening a judicial sale upon the making of an advanced bid, the court will not open a sale to receive such bids as a matter of course, but will exercise a sound discretion in the premises, and perhaps reject the offer of an advance and confirm the sale. The exercise of this discretion in rejecting a bid will not, in the absence of special circumstances, be reviewed by an appellate court: *Owen's Admr. v. Owen*, 24 Tenn. (5 Humph.) 352; *Johnson v. Quarles*, 44 Tenn. (4 Cold.) 615; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882, 32 S. E. 50; *Blackburn v. Selma R. R. Co.*, 3 Fed. 689. In the last case cited it is held that one who was a bidder at a judi-

cial sale by himself or agent, or who was present and had the opportunity to bid, will not, as a general rule, be permitted to put in an "upset" bid. He should have bidden at the sale, in open competition with all others, what he was willing to give for the property. And in *Bright v. Bright*, 80 Tenn. (12 Lea) 630, it is affirmed that the biddings at judicial sales are opened for the benefits of the litigants, not of third persons, and therefore an application is properly refused where the complainant's debt is paid by the bid and the purchaser is the owner of the property.

No fixed rule has been laid down as to the amount of an upset bid which will move the court to set aside a sale, except that the advance must be a substantial and material one: *Hodgins v. Lanier*, 23 Gratt. 494; *Hansucker v. Walker*, 76 Va. 753. An advance of ten per cent is generally regarded as sufficient to authorize the opening of a sale: *Pritchard v. Askew*, 80 N. C. 86; *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549; *Irby v. Irby*, 79 Tenn. (11 Lea) 165; *Ewald v. Crockett*, 85 Va. 299, 7 S. E. 386. In *Cole's Heirs v. Cole's Exr.*, 83 Va. 525, 5 S. E. 673, where the court refused to accept an advanced bid of thirty per cent of the price for which land had been sold, and confirmed the sale, the decree was reversed on appeal and a resale ordered.

An advanced bid, although it need not be paid into court, must be absolute and unconditional, and such as can be considered safe and secured: *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *Stewart v. Stewart*, 27 W. Va. 167; *Blackburn v. Selma R. R. Co.*, 3 Fed. 689.

If a judicial sale has been set aside and a resale ordered, on an advanced bid, the resale should be started on such bid and be open to all: *Marsh v. Nimocks*, 122 N. C. 478, 65 Am. St. Rep. 715, 29 S. E. 840; *Ewald v. Crockett*, 85 Va. 299, 7 S. E. 386. In default of other bidders, the person making the advanced bid will be declared the purchaser; and upon his failure to comply with his purchase, a motion should be made in the pending action for him to show cause why judgment should not be rendered against him: *Marsh v. Nimocks*, 122 N. C. 478, 65 Am. St. Rep. 715, 29 S. E. 840. In *Allen v. East*, 63 Tenn. (4 Baxt.) 308, where one making an advanced bid failed to comply with it, the court ordered a resale and charged him with the deficit.

After a sale has been confirmed it will not be opened upon an offer of an advance, in the absence of fraud, accident, mistake, or some other special circumstance: *Houston v. Aycock*, 37 Tenn. (5 Sneed) 406, 73 Am. Dec. 131; *Coffin v. Corruth*, 41 Tenn. (1 Cold.) 194; *Langyher v. Patterson*, 77 Va. 470; *Yost v. Porter*, 80 Va. 855.

And a sale will not be opened a second time for advanced bids, except under extraordinary circumstances: *Click v. Burris*, 53 Tenn. (6 Heisk.) 539; *Collins v. Wood*, 88 Tenn. 779, 14 S. W. 221.

III. Courts Rejecting English Practice.

a. In General.—Many of the American courts, probably a majority of them, have rejected the ancient English practice of opening judicial sales merely to receive advanced bids, and have affirmed that special circumstances in addition to the offer of a better price for the property must ordinarily be present in order to justify a refusal to confirm the sale, or to authorize setting it aside and reopening the bidding: See the principal case, ante, p. 143; *Glennon v. Mittenight*, 86 Ala. 455, 5 South. 772; *Parker v. Bluffton Car-Wheel Co.*, 108 Ala. 140, 18 South. 938; *Penn's Admr. v. Tolleson*, 20 Ark. 652; *Colonial etc. Mtg. Co. v. Sweet*, 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60; *Ayers v. Baumgarten*, 15 Ill. 444; *Coffey v. Coffey*, 16 Ill. 141; *Harris v. Gunnell (Ky.)*, 95 S. W. 376; *Lawson v. Hill (Ky.)*, 11 S. W. 606; *Cohen v. Wagner*, 6 Gill (Md.) 236; *Page v. Cress*, 80 Mich. 85, 20 Am. St. Rep. 504, 44 N. W. 1052; *State Bank v. Green*, 11 Neb. 303, 9 N. W. 36; *Conover v. Walling*, 15 N. J. Eq. 173; *Fiske v. Weigle (N. J. Eq.)*, 21 Atl. 452; *Bethlehem Iron Co. v. Philadelphia etc. Ry. Co.*, 49 N. J. Eq. 356, 23 Atl. 1077; *Le Fevre v. Laraway*, 22 Barb. 167; *Adams v. Haskell*, 10 Wis. 123; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887, 36 L. ed. 732; *Auerbach v. Wolf*, 22 App. D. C. 538.

b. For What Reasons.—"The practice of the English court of chancery," said the court in *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16, "in opening sales, whenever an offer of a greater amount for the property was made, was early declared not to have been adopted in this state. There is a uniform current of decisions settling that official sales will not be opened on the mere representation that more may be obtained for the property. This well-known practice is in accord with the policy of our law respecting such sales, which are required to be made after advertisement sufficient to give publicity, by public outcry to the highest bidder. It is of the greatest importance to encourage bidding by giving to every bidder the benefit of bids made in good faith and without collusion or misconduct, and, at least, when the price offered is not unconscionably below the value of the property. Nothing would more evidently tend to discourage and prevent bidding than a judicial determination that such a bidder may be deprived of the advantage of his accepted bid, whenever any person is willing to give a larger price. The interest of owners in particular cases must give way to the maintenance of a practice which, in general, is in the highest degree beneficial."

Speaking of the duty of the chancellor in case of an advance bid, the court in *Stump v. Martin*, 72 Ky. (9 Bush) 285, said: "While it is his duty to look to the rights and interests of the parties litigant, and, where there has been fraud, accident, mistake, or surprise, to disregard the act of his agent and order a resale, where there is an entire absence of unfair dealing, and the sale has been conducted pursuant to the judgment, good faith requires that the

rights of the purchaser, as well as of the parties to the original proceeding, should be protected. It would be trifling with the stability of judicial sales, as well as the rights of purchasers, to permit those who were present at the sale, or who ought to have been present, to interfere after the sale is made, and after the bidding, for no other reason than that, since the sale, an advanced price has been offered for the property. . . . Considerations of public policy demand that some confidence should be had in the stability of judicial sales, so as invite competition in bidders by an assurance, to men of fidelity and promptness in their business habits, that the chancellor is at least bound by the same rules of fair dealing that such men recognize in their business with each other": *Alms & Doepke Co. v. Gates* (Ky.), 32 S. W. 1088.

MOORE v. WILLEY.

[77 Ark. 317, 91 S. W. 184.]

PARTITION—Proof of Default.—Failure of defendant in a partition suit to answer does not dispense with the necessity for proof when the statute provides that "the petitioner shall nevertheless make out his case by exhibiting to the court his evidences of his title." (pp. 152, 153.)

PARTITION—Procedure.—While the statutory procedure in partition must be followed in suits at law, such is not the case in equity. The remedy provided by the statute is cumulative only. (p. 153.)

PARTITION—Sale of Property.—If a complaint in partition in equity asks "that the land be partitioned as the law in such case provides, and if not susceptible of division, that the same be sold, a finding that a sale is necessary, not based on the consent of the parties or the report of commissioners or on evidence heard by the chancellor, will not support the order of sale. (pp. 153, 154.)

PARTITION—Parties.—One who holds a vendor's lien on land held in common is not a necessary party to a suit to partition the land. (p. 154.)

Taylor & Jones, for the appellant.

Austin & Danaher, for the appellees.

317 RUDDICK, J. G. F. Willey and others brought a suit in equity in the chancery 318 court of Arkansas county against Mary K. Moore, for the partition of certain lands in that county owned jointly by plaintiffs and defendant as tenants in common. The defendant filed no answer, and the court heard the case on the complaint and the deeds exhibited therewith, and found that two of the plaintiffs were each the owner of an undivided eleven-thirtieths in-

terest in the land, another plaintiff the owner of one-fifteenth interest, and that the defendant was the owner of an undivided one-fifth interest in the land; that the land was "not susceptible of division among the respective parties according to their respective interests therein without great prejudice to said owners." He therefore ordered, in substance, that the lands, for the purpose of division, be sold in bulk on a credit of three months, and that the sale be reported to the court for confirmation, and that the commissioner hold the proceeds subject to the further orders of the court. The defendant appealed from the judgment.

This is an appeal from a judgment ordering lands sold for the purpose of partition. It was alleged in the complaint that the lands could not be partitioned in kind without great prejudice to the owners thereof. The defendant filed no answer, and the chancellor, without referring the question to commissioners, found from the allegations in the complaint alone that partition could not be made in kind without great prejudice, and ordered a sale, and the question before us is whether the undenied allegation in the complaint is ³¹⁹ sufficient to justify the court in making the order for a sale of the premises. We may admit that the court had jurisdiction, and that the order was not void, but this is a direct attack by appeal, and the question is, Was there error in the proceeding?

The question is not free from doubt. As the code provides that material allegations in a complaint which are not denied by the answer are to be taken as true, and as no answer was filed in this case, we were first inclined to the opinion that the judgment of the chancellor was right.

But the procedure in proceedings for partition is regulated by statute in this state. An examination of the statute will show that the failure of the defendant to answer does not dispense with the necessity of further proof, for it provides that, if default be made, "the petitioner shall nevertheless make out his case by exhibiting to the court the evidences of his title": Kirby's Digest, sec. 5775. Again, the statute provides that, if judgment for partition be rendered, no sale shall be made unless the commissioner appointed to make partition report that partition of the land cannot be made without great prejudice to the owners thereof. If they make such report, "the court

may, if satisfied that the report is just and correct," order a sale of the premises for partition: Kirby's Digest, secs. 5779-5785.

Now, while the procedure required by this statute must be followed by the law courts in partition proceedings before them—for in the absence of the statute such courts would have no jurisdiction to entertain such cases—with the courts of equity this is not altogether true, for it was long ago decided that these statutes do not take away the original jurisdiction of the chancery courts. The remedy provided by the statute is cumulative only: *Patton v. Wagner*, 19 Ark. 233. For this reason we do not think the mere failure of the chancery court in this case to appoint commissioners to ascertain whether the land could be divided rendered its judgment void. In cases where there is doubt as to whether partition can be made we think it is well to appoint commissioners who can examine the premises and ascertain the facts and make report. But there may be cases where the facts show plainly that no partition in kind could be made without prejudice to the owners. For instance, suppose a brick store and the lot on which it is located is owned by several ³²⁰ parties jointly. In such a case, where proper allegations are made in the complaint, we think that the chancellor might well hear the evidence and make the order for a sale without a reference or the appointment of commissioners. But while it was not absolutely necessary for the court to appoint commissioners to ascertain whether partition could be made without a sale, we think that the court should have required some further showing before ordering the sale. We have already called attention to the fact that our statute in reference to partition does not allow the failure of the defendant to answer to dispense with proof on the part of the plaintiff. Now, at common law, while courts of equity had jurisdiction to order a partition of land, they had no power to order a sale of the land for that purpose, unless by consent: *Freeman on Cotenancy and Partition*, sec. 15; 15 *Ency. of Pl. & Pr.*, sec. 813. Some of the American courts hold that courts of equity in this country have that power, independent of statute. But the order to sell the premises, says Mr. Freeman, "should not be made until the court has entered its interlocutory judgment determining that the parties are entitled to partition, and has also,

after making the proper inquiries, decided that a partition cannot be made without prejudice to the owners. An order of sale, where the record fails to show the existence of these preliminary steps, cannot support a sale made thereunder, when exceptions are taken and interposed to its confirmation": Freeman on Cotenancy and Partition, sec. 543.

The prayer of the complaint in this case seems to recognize the fact that some investigation should be made as to whether a sale was necessary, for it asks "that the lands be partitioned as the law in such cases provides, and, if not susceptible of division, **that the same be sold,**" etc. In other words, it asks for a sale only in event it be found that a partition in kind cannot be made without prejudice. Something more under our statute than the allegations of the complaint should be required to show this. The finding that a sale is necessary should be based on the consent of parties, the report of commissioners, or upon evidence heard by the chancellor.

The fact that Mr. Danaher, as trustee, held a vendor's lien on the land did not make him a necessary party to the proceedings for partition. The proceedings for partition did not affect his lien. Besides, the court ordered the sale made subject to his lien.

³²¹ We are of the opinion that the chancellor in this case should have referred the matter to commissioners, as provided by statute, or should have himself heard evidence and determined whether the lands could be partitioned in kind or not. We therefore conclude that so much of the decree as directed a sale of the land in this case is erroneous. The judgment as to the sale is therefore reversed, with an order that the court hear evidence or refer the question to commissioners to examine the lands and determine whether partition in kind can be made without prejudice, and for other proceedings.

In a Partition Suit a mortgagee of one of the cotenants would seem to be a necessary party, but the authorities do not in all cases so hold: Colton v. Smith, 11 Pick. 311, 22 Am. Dec. 375; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163. The rights of parties cannot be adjudicated in a partition suit, when they are not properly before the court: Camp Phosphate Co. v. Anderson, 48 Fla. 226, 111 Am. St. Rep. 77.

Partition May be by Sale and a division of the proceeds in a proper case: See Croston v. Male, 56 W. Va. 205, 107 Am. St. Rep. 918, and cases cited in the cross-reference note thereto.

NELSON v. COWLING.

[77 Ark. 351, 91 S. W. 773.]

EQUITY PLEADING.—A complaint charging a guardian with having failed to account for money he has received as guardian states a good cause of action within the jurisdiction of a court of equity. (p. 157.)

EQUITY JURISDICTION—Fraud of Guardian.—An omission to account for money actually received by a guardian is a legal fraud which a court of chancery will correct, whether the omission was intended or by mistake. (p. 157.)

EQUITY JURISDICTION—Fraud of Guardian.—A complaint in equity seeking to charge a guardian with rents which he could have collected by ordinary prudence and loyalty to his ward does not state fraud as a cause of action. (p. 157.)

EQUITABLE RELIEF from Guardian's Settlement.—While guardian's settlements in the probate court, when confirmed, have the force and effect of judgments, which, if erroneous, may be corrected on appeal, yet courts of equity may interfere to correct fraud therein, or relieve against accident, or upon some other ground of acknowledged equity jurisdiction, to prevent immediate mischief. (p. 158.)

EQUITABLE RELIEF from Guardian's Settlement—Fraud.—If fraud is the ground set up for impeaching a guardian's settlement, actual or constructive fraud will suffice, but the acts constituting it must be specifically alleged and proved. (p. 158.)

FRAUD—Burden of Proof.—One alleging fraud has the burden of proof to establish it. (p. 159.)

D. B. Sain, for the appellant.

Feazel & Bishop, for the appellee.

³⁵¹ WOOD, J. This suit is by appellee and cross-appellant, present guardian, ³⁵² against appellant, former guardian, of Bettie M. Jones, an insane person, to surcharge and falsify the settlements of appellant with his ward which had been approved by the probate court. The issue is narrowed here by briefs of counsel to the question of whether or not the settlements should be set aside in the matter of rents received by appellant from lands of his ward. The complaint concerning this charged: "That, during the administration of the said defendant, she (his ward) owned and was possessed of a large portion of very valuable real estate of the rental value of \$150 per year; that said defendant did collect, or by the exercise of ordinary prudence and loyalty to his ward could have collected, \$150 per annum for fourteen years, amounting in the aggregate to \$2,100, whereas the said defendant in his said pretended settlements only accounts for \$864, leaving a balance due

his ward of \$1,236, if defendant had been loyal to her interest." The above was a portion of paragraph 3 of the complaint. The appellant "denied each and every allegation in paragraph three of plaintiff's complaint," etc. He further denied generally "that he failed and neglected to charge himself with all amounts received by him for his ward."

Upon the issue thus formed depositions were taken, and the cause heard. The settlements of appellant, as approved by the probate court, show that he received as rents, after making allowances for improvements, the following:

From E. K. Walden for 1888.....	\$124.00
From W. H. Lindsay, subtenant of Joe Cowling, 1889.....	150.00
From Joe Cowling, Jr., 1890.....	115.00
From Joe Cowling, Sr., 1891.....	75.00
Rented to Ike Read for 1895.....	50.00
Rented to Ike Read for 1896.....	70.00
Rented to Ike Read for 1897.....	60.00
Rented to Ike Read for 1898.....	70.00
Rented to Ike Read (Hipp subtenant), 1899	70.00
Rented to Sam Hooker for 1900.....	80.00
Rented to D. B. Smith for 1901.....	231.80
From Alex May (part of year 1902).....	32.75

In the probate settlements appellant was not charged with the rents of 1892, 1893, and 1894.

³⁵³ The settlements of appellant were set aside as fraudulent, and the chancellor restated them as follows:

To rent for year 1888	\$135.00
" " 1889	150.00
" " 1890	150.00
" " 1891	100.00
" " 1892	100.00
" " 1893	100.00
" " 1894	100.00
" " 1895	150.00
" " 1896	150.00
" " 1897	100.00
" " 1898	100.00
" " 1899	100.00
" " 1900	100.00
" " 1901	231.80
" " 1902	26.50

The chancellor, in restating the account of the appellant with his ward, found a balance due the estate of \$780.52.

The court allowed appellant \$180 for clearing land and \$100 as compensation for his services, leaving a balance due the estate of \$500.52, and decreed accordingly.

³⁵⁴ Appellant challenges the jurisdiction. In *McLeod v. Griffis*, 45 Ark. 505, it is said: "An omission to account for moneys or other assets actually received by the administrator has been by this court held to be a legal fraud which the chancery court will correct, whether the omission was intended or by mistake."

In *Campbell v. Clark*, 63 Ark. 450, 39 S. W. 262, we held (quoting syllabus) that "for a guardian to obtain credits in his final settlement with the probate court for sums not expended by him for the benefit of the ward is such a fraud as will justify a court of equity in restating and correcting the settlement."

The appellant did not demur to the complaint nor move to make more specific. He answered, and treated the complaint as charging him with a failure to account in his settlements for money which he, as guardian, had received as rent for the land of his ward. He took proof on this issue. Appellee and cross-appellant evidently intended that his complaint should charge appellant with a failure to account for rent money which he had received as guardian. While the allegations are inartistic and indefinite, they are sufficient, according to the principles of the above and other cases, to state a cause of action within the jurisdiction of a court of chancery. The facts showing that appellant failed to account for rent during the years he collected same are stated with enough precision to constitute a cause of action. From these allegations fraud follows as a legal conclusion. Had appellant desired a more definite statement as to the years and the amounts for each year, a motion to make more specific was his remedy: *Choctaw etc. R. Co. v. Doughty*, 77 Ark. 1, 91 N. W. 768, and the authorities cited. But the complaint is good only in so far as it may be considered as charging appellant with a failure to pay over the money which he had actually collected. That part of the complaint which seeks to charge appellant with rents which "he could have collected by ordinary prudence and loyalty to his ward" states no facts which

constitute a fraud: Conway ³⁵⁵ v. Ellison, 14 Ark. 360; Ringgold v. Stone, 20 Ark. 526; Reinhardt v. Gartrell, 33 Ark. 727; Mock v. Pleasants, 34 Ark. 63.

Under article 7, section 34, of the constitution, and section 4002 of Kirby's Digest, probate courts have exclusive original jurisdiction of the estates of insane persons and of the settlements of the accounts of the guardians of such persons. When these "settlements have been duly confirmed, the orders of confirmation have the force and effect of judgments, which, if erroneous, may be corrected by appeal. . . . Courts of chancery, however, may interfere to correct fraud, or relieve against accident, or upon some other ground of acknowledged equity jurisdiction, to prevent irremediable mischief": Trimble v. James, 40 Ark. 393; McLeod v. Griffis, 45 Ark. 505, and authorities cited; also McLeod v. Griffis, 51 Ark. 1, 8 S. W. 837.

Where fraud is the ground for impeaching such settlements, actual or constructive fraud will suffice. But the acts constituting it must be specifically alleged and proved: McLeod v. Griffis, 45 Ark. 505, 51 Ark. 1, 8 S. W. 837; Dyer v. Jacoway, 42 Ark. 186; Mock v. Pleasants, 34 Ark. 63; Reinhardt v. Gartrell, 33 Ark. 727.

The fact that appellant may not have exercised that care in renting the lands of his ward that "ordinary prudence and loyalty to her interest" required would afford no ground for a court of chancery to set aside and restate settlements which had been duly confirmed by the probate court: Authorities, *supra*. Yet a careful scrutiny of the testimony touching only the matter of rents in each settlement discovers at most only a negligent failure to rent the land for certain years, and in other years a negligent failure to rent the land for as much as it was worth. For instance, the failure to rent the land for the years 1892 and 1893 and the renting of same for the improvements put on it in 1894. And the renting of the land in other years for a less sum than appellant could, with ordinary prudence, have got for it—these were matters for, and were considered by, the probate court. An exhibit in the record shows that exceptions were filed to the tenth settlement of the guardian, in which all the matters here complained of were specifically called to the attention of that court. If the court ruled erroneously in confirming the settlements in the particulars

named, ³⁵⁶ they were such errors as should have been corrected on appeal: Authorities, *supra*.

The burlen of proof was upon appellee and cross-appellant to make good the charges of fraud, and we are of the opinion that there is no direct proof to show it, and no facts and circumstances shown from which the law would raise the presumption of fraud. The conduct of appellant, as shown by the proof, even though it may have been negligent, was nevertheless consistent with honest purpose.

Taking up the items separately, the testimony of Walden shows that he paid in cash for rent of the land for the year 1888 \$135, and that he also paid \$15 in work. The guardian charged himself with only \$124, making a difference of \$11. But appellant says that he paid \$25 or \$30 for improvements that year, which would account for the difference. For the years 1889 and 1890 the appellant charged himself with rent received \$265, while two witnesses testify that they paid \$300 for the rent of those years. But these witnesses were subtenants of Joe Cowling, Sr., and paid the rents to him. The appellant explains this by saying that while the place was rented to Joe Cowling, Sr., for \$300 for the years 1889 and 1890, yet he had to make allowances to Cowling for improvements, and that the record of his settlement in the probate court showed what he received. The chancellor erred in setting aside the settlement for \$265 and restating the account, and in charging appellant \$300 for the rent of those years. The evidence was not sufficient to show fraud in this settlement. For the year 1891 the guardian charges himself with rent \$75. The chancellor set it aside, and charged him \$100. Nelson says of this that, while he was to get \$150 rent for the place during that year, he also made allowances for improvements, and that the record of the accounts would show what he received; that he accounted for everything. There is no other evidence than his to show just what was received for the year 1891, and certainly fraud could not be predicated upon his testimony as to this settlement.

The testimony shows that for the years 1892 and 1893 the place was not rented, and for the year 1894 it was rented for the repairs. For these years and the years succeeding down to 1901, inclusive, the chancellor set aside the settlements and charged the ³⁵⁷ guardian, not what he actually received, but according to what, in the judgment of the chancellor

under the proof, he should have received. This was error, as we have already shown. There was no fraud in the mere mismanagement or negligent management of appellant as to renting the land.

The allowances for interest and services and for improvements made by appellant were likewise matters for the probate court, subject to correction, if erroneous, on appeal.

There was nothing in any of these upon which to base a charge of fraud, and the chancery court erred in taking original jurisdiction over them. For the errors indicated, the decree will be reversed, and decree will be entered here dismissing the complaint for want of equity.

Relief in Equity from the Orders and Decrees of Probate and other courts having exclusive jurisdiction over the estates of decedents and minors and other incompetent persons is the subject of a recent note to Froebrieh v. Lane, 106 Am. St. Rep. 639-647. A court of equity having jurisdiction to compel the settlement of a guardianship may, under a general prayer in a bill for that purpose, set aside a decree of the probate court discharging the guardian, if the decree was obtained by him through fraud or other improper conduct: Willis v. Rice, 141 Ala. 168, 109 Am. St. Rep. 26. As to the jurisdiction of equity to purge the account of a guardian or administrator of fraud and the like, see Wallace v. Sweptston, 74 Ark. 520, 109 Am. St. Rep. 94.

ARKANSAS SOUTHERN RAILWAY COMPANY v. GERMAN NATIONAL BANK.

[77 Ark. 482, 92 S. W. 522.]

BILLS OF LADING—Assignment of.—At common law the indorsement and delivery of a bill of lading with intent to pass title to the goods therein specified constitute a constructive delivery of the goods themselves, and the carrier having notice of the assignment is bound to deliver the goods to the assignee. (p. 164.)

BILLS OF LADING—Assignment of—Stipulation as to Delivery.—If goods by the terms of a bill of lading are deliverable to the order of the shipper, the carrier should not deliver to another except upon production of the bill of lading properly indorsed by the shipper, for such a stipulation is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods. (p. 164.)

CARRIERS—LIABILITY Until Delivery.—The responsibility of the carrier for the goods continues after their arrival at the place of destination until they are ready to be delivered and the owner or consignee has had a reasonable opportunity to examine them and take them away. After such time the liability of the carrier as carrier ceases, but it is his duty to retain them until they are claimed or store them prudently for and on account of their owner. (p. 164.)

CARRIERS—LIABILITY as Warehousemen.—When the responsibility of a carrier as such ceases, he becomes liable for the goods carried as a warehouseman, until the goods are properly delivered and the bill of lading is evidence of such obligation. (p. 164.)

BILLS OF LADING—Statutory Regulation—Constitutional Law—Interstate Commerce.—A statute providing that warehouse receipts and bills of lading may be transferred by written indorsement, that the transferee thereof shall be deemed the owner of the property stored, that no property so stored shall be delivered except on surrender of such receipt or bill of lading, and imposing a penalty for violation of its provisions, is not unconstitutional as imposing a burden on interstate commerce, but is valid as to such commerce in the absence of national legislation inconsistent therewith. (p. 165.)

CARRIERS—Liability Under Bill of Lading.—If a railway company agrees to carry goods, and issues bills of lading therefor to the shipper's order in care of a third person, at the place of destination, its duty as carrier is not discharged merely by delivering the goods to such third person without the production of such bills of lading properly indorsed, and if after delivery to such third person he delivers the goods to one not entitled to receive them, the railroad company is liable to the indorsee of the bills of lading for the value of the goods. (p. 169.)

Gaughn & Sifford and Rose, Hemingway & Rose, for the appellant.

Smead & Powell, Ratcliffe & Fletcher, and Moore & Smith, for the appellee.

⁴⁸⁴ **BATTLE, J.** The German National Bank brought an action against the Arkansas Southern Railway Company to recover the value of cotton on bills of lading issued by the company for the cotton and assigned to the bank, the cotton never having been delivered.

The facts in the case are substantially as follows: Alphin & Lake Cotton Company were dealers in cotton at Little Rock, Arkansas, and were the principal owners of a compress at El Dorado. They purchased cotton at Bernice, Louisiana, and at Junction ⁴⁸⁵ City, Arkansas, and at other places along the road of the railroad company. At Bernice the cotton purchased was paid for by the Bank of Bernice and shipped in its name over the railroad of the defendant to El Dorado, a terminus of the railroad, about thirty miles from Bernice. Bills of lading were issued to the shipper in which it undertook to deliver the cotton to shipper's order at its destination. They were forwarded to the Bank of Little Rock with drafts on Alphin & Lake Cotton Company attached for collection. Nine hundred and fifty-one bales of cotton were purchased by Alphin & Lake, and shipped in

the name of the Bank of Bernice over defendant's road from Bernice to El Dorado. Bills of lading were issued for all of them, and forwarded to the Bank of Little Rock with drafts attached in the manner indicated.

"Cotton at Junction City was handled very much in the same way, except that the bills of lading showed Alphin & Lake Cotton Company as consignor, and the bills of lading, with drafts for price attached, were forwarded to the Bank of Little Rock.

"When the drafts and bills of lading arrived at Little Rock, Alphin & Lake Cotton Company would draw drafts for the amount on the Bank of Little Rock, which would pay the same by taking up the original drafts for the price of the cotton, and would retain the bills of lading as security for the amounts and all other indebtedness Alphin & Lake Cotton Company owed that bank.

"The bills of lading were all to shipper's order, care of compress, El Dorado, Arkansas, notify Alphin & Lake Cotton Company. The cotton was usually loaded on the cars before the bills of lading were signed, and usually left the shipping station the same or next day after the bills of lading were signed up, and reached El Dorado within twenty-four hours after it left Bernice, and was delivered to the compress company for account of Alphin & Lake Cotton Company.

"The railroad had no warehouse or place for delivery or storage at El Dorado. It only had a joint track with the St. Louis, Iron Mountain and Southern Railroad Company, and the two roads maintained a joint agent, Hutchinson, at that place. The Arkansas Southern Railroad Company delivered all cotton which came in over its road at the compress. It had no cotton platform, and the compress was the only place it had for the delivery ⁴⁸⁶ of cotton. Before the cotton was delivered to the compress a memorandum was made of it in a little book by the railroad, showing the initial and number of the car, the number of bales in the car, and the place of shipment. The cotton was checked up by Mr. Wright, assistant manager of the compress company, and if found correct, he wrote 'O. K.,' and signed his name on it with the date of his O. K.

"In delivering cotton to the compress company no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed

between the parties. It was always supposed to belong to Alphin & Lake Cotton Company by the compress and railroad, and was unloaded at once. All the compress company did was to count the cotton and O. K. the book as to the number of bales. Neither 'S. O.,' meaning shipper's order, nor 'Care of the compress company' was on this little book. 'S. O.' appears to be upon the book now, but was placed there after the cotton was delivered. It was not on the waybill from which the book was made up."

The cotton was treated as belonging to Alphin & Lake Cotton Compress Company, and was delivered without taking up the bills of lading.

"On December 6, 1902, Lake applied to the German National Bank, which advanced seventeen thousand eight hundred and six dollars on bills of lading for five hundred and fifty-eight bales of cotton, and on December 11th, the bank advanced nineteen thousand two hundred dollars on bills of lading for four hundred and forty-one bales with the understanding that the bills of lading first delivered should also stand for the last advancement. At the time Lake applied for the first advancement, the bills of lading were in the hands of the Bank of Little Rock. He stated that the Bank of Little Rock had required Alphin & Lake Cotton Company to reduce its account, and a draft was drawn by the company upon the bank in favor of the Bank of Little Rock, with the bills of lading attached, which was presented by and paid to the Bank of Little Rock. At the time the advancement for nineteen thousand two hundred dollars was made the bills of lading were the property of the Bank of Little Rock, and Lake was permitted to take them from the Bank of Little Rock to the German National Bank with the understanding that they or the money for them should be returned to the Bank of Little Rock. The German National Bank ⁴⁸⁷ issued ten thousand dollars in New York exchange in favor of the Bank of Little Rock, and paid nine thousand two hundred dollars in cash, which Lake and Perrie handed to the Bank of Little Rock in lieu of the bills of lading, and the account of Alphin & Lake Cotton Company was credited with nineteen thousand two hundred dollars by the Bank of Little Rock."

The German National Bank lost the cotton. It was delivered to other parties. The bank recovered judgment in this action, and the defendant appealed.

Is appellant responsible for the loss of the cotton?

At common law a bill of lading is a muniment of title to the goods or property therein specified; is a symbol or representative of the goods; "when properly indorsed and delivered, with the intention of passing the title to them, is a symbolic or constructive delivery of the goods themselves"; and, when assigned, the carrier, having notice of the assignment, becomes bound to deliver the goods to the assignee. If the goods, by the terms of the bill of lading, are deliverable to the order of the shipper, the carrier should not deliver except upon production of the bill of lading properly indorsed by the shipper; "for this notice is to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods": *North Pennsylvania R. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287; *The Thames*, 14 Wall. 98, 20 L. ed. 804; *Hutchinson on Carriers*, 2d ed., secs. 129, 130; *Daniel on Negotiable Instruments*, secs. 1728, 1731.

The responsibility of the carrier for the goods continues after their arrival at the place of destination, until they are ready to be delivered and the owner or consignee has had a reasonable time and opportunity to examine them and take them away. If they are not called for by the party entitled to them within that time, it is the duty of the carrier to retain them until they are claimed or store them prudently for and on account of their owner. When his responsibility as a carrier ceases, he becomes liable for the goods as a warehouseman. He is responsible, either as carrier or warehouseman, until the goods are properly delivered. The bill of lading is evidence of that obligation: *North Pennsylvania R. R. Co. v. Commercial Bank*, 123 U. S. 727, 8 Sup. Ct. Rep. 266, 31 L. ed. 287; *The Thames*, 14 Wall. 98, 20 L. ed. 804; *The Titania*, 124 Fed. 975; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350.

For the enforcement of these duties and the protection of the ⁴⁸⁸ parties in interest, the statutes of this state provide: "Warehouse receipts given by any warehouseman, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier . . . may be transferred by indorsement in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be

the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words, 'Not negotiable,' plainly written or stamped on the face thereof shall be exempt from the provisions of this act': Kirby's Digest, sec. 530.

And the act further provides: "Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this act shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisonment in the penitentiary of this state not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act may maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this act to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not": Kirby's Digest, sec. 531.

Appellant does not claim that it has delivered the cotton in question in compliance with these statutes, but contends that the statutes are in conflict with the clause of the constitution of the United States which vests Congress with power to regulate commerce among the states. But they are not in conflict. It is the duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof. The object of the statutes, ⁴⁸⁹ and the effect, if obeyed, is to enforce this duty and protect the rights of the holder. In the absence of congressional legislation upon the subject, the state can do so.

In *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. Rep. 934, 40 L. ed. 1105, the court held that a statute of the state of Georgia, "requiring every telegraph company with a line wholly or partly within that state to receive dispatches on payment of the usual charges and transmit and deliver them with due diligence, under a penalty of

one hundred dollars, is a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state." The court in construing that statute says: "The statute in question is of a nature that is in aid of the performance of duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the federal constitution under discussion? We think not."

In *Chicago etc. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. Rep. 289, 42 L. ed. 688, it was held that "a statute of a state providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made does not, as applied to a claim for any injury happening within the state under a contract for interstate transportation, contravene the provisions of the constitution of the United States empowering Congress to regulate interstate commerce." The court said: "Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its laws. It is in the law of the state that provisions are to be found concerning the rights and ⁴⁹⁰ duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligation may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in

transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate rights and duties of all persons and corporations within its limits."

We have made investigation for, and have not found, statutes of Congress upon the subject matter of sections 530 and 531 of Kirby's Digest. These statutes do not impose any burdens upon interstate commerce, but are in aid of it, to the extent that they provide for the enforcement of duties and protection of rights already existing, and are useful and necessary legislation, and are valid, in the absence of congressional legislation inconsistent with them: *Chicago etc. R. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710; *Gulf etc. Ry. Co. v. Hefley*, ⁴⁹¹ 158 U. S. 98, 15 Sup. Ct. Rep. 802, 39 L. ed. 910; *Nashville etc. Ry. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. Rep. 28, 32 L. ed. 352.

In *Central of Georgia Ry. Co. v. Murphy*, 196 U. S. 194, 25 Sup. Ct. Rep. 218, 49 L. ed. 444, cited by appellant, the state statute in question imposed upon the initial or any connecting carrier the duty of tracing freight which had been lost, damaged or destroyed on its or connecting carrier's line, and of informing the shipper, in writing, when, where, how and by which carrier it was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established; and provided that "if the carrier to which application is made shall fail to trace said freight and give said information, in writing within the time

prescribed, it shall be liable for the value of the freight lost, damaged or destroyed, in the same manner and to the same amount as if said loss, damage or destruction occurred on its line." The court held that statute was a violation of the interstate commerce clause of the federal constitution and void. The court, in considering this statute, said: "Without the provisions of the statute in question, the plaintiff in error would not be liable to the shippers in this case, if, without negligence, they delivered the consignment in good condition to the succeeding carrier. This they offered to prove was the case. But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with the provisions. In other words, before it can avail itself of the exemption from liability beyond its own line, provided by its valid contract, the initial or any connecting carrier must comply with the terms of the statute, and must, within thirty days after notification, obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce. . . . The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce; ⁴⁹² it prevents a valid contract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet, if the information is not obtained, the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it." No such objections can be urged against sections 530 and 531 of Kirby's Digest. The statutes in the two cases are wholly unlike.

Appellant failed to deliver the cotton on the surrender and cancellation of the bills of lading issued therefor, and under the statutes of this state is liable to appellee for damages. But appellant insists that, according to the bills of lading, it was to transport the cotton to El Dorado and deliver it to the care of the compress company, and that when it did so it discharged its whole duty, and was thereby relieved of further responsibility. If this contention be correct, the stipulation in the bills of lading by which appellant undertook to deliver the cotton to the order of the shipper was meaningless. According to the stipulation, it could not have delivered the cotton except upon the production of the bills of lading properly indorsed; for this was notice to the carrier that the shipper intended to retain in his power the ultimate disposition of the goods (cotton). The failure of the legal holder of the bills of lading to appear for the purpose of receiving the cotton when it reached its destination did not relieve appellant of further responsibility. But under the contract and the law it had the right to store the cotton with the compress company with authority and directions to deliver it to the person entitled to it upon the production of the bills of lading properly indorsed. Under the contract as shown by the bills of lading, it was relieved of liability on account of the storage, but not of the failure to deliver according to law: See *Midland Nat. Bank. v. Missouri Pac. R. Co.*, 132 Mo. 492, 55 Am. St. Rep. 505, 33 S. W. 521.

Judgment affirmed.

Mr. Justice McCulloch Dissented, and in the course of his opinion said: "I do not agree with the majority of the court in holding that the liability of the railway company for the loss of the cotton is established by undisputed evidence, and that the trial court was correct in directing a verdict for the plaintiff. The cotton was consigned to the shipper's order, care of the compress company at El Dorado. The railway company complied with the contract by delivering it to the compress company. The language of the contract was, in effect, a selection in advance by the consignee of a place of delivery and a designation of an agent to accept delivery for him. The consignee cannot complain because the carrier delivered the cotton at the place and to the agency designated, without requiring a surrender of the bill of lading, nor can the assignee of the consignee complain, unless the statute quoted in the majority opinion prohibits a delivery by the carrier, under the circumstances of this case, without requiring a sur-

render of the bill of lading. I do not think that the statute in question has any application to the facts.

"In the absence of any statute on the subject, it is the duty of a common carrier of freight, either by land or water, when the point of destination is reached, and the consignee fails to call for the property or refuses to accept it, not to abandon it, but to properly store it for the benefit of the consignee; and the carrier may, when it has no warehouse of its own for bulky freight such as cotton, grain and the like, discharge itself from further liability by placing the goods in store with a responsible warehouseman for the benefit of the owner. When thus delivered, the warehouseman so selected becomes the agent and bailee of the owner. The carrier is not bound to provide storage of its own for bulky freight of that character: 2 Rorer on Railroads, p. 1286; *Fisk v. Newton*, 1 Denio, 45, 43 Am. Dec. 149; *Alabama etc. R. Co. v. Kidd*, 35 Ala. 209; *Green etc. Nav. Co. v. Marshall*, 48 Ind. 596; *Merchants' Dispatch Co. v. Hallock*, 64 Ill. 284."

The Effect of an Assignment of a bill of lading on the rights and liabilities of the parties is the subject of an extended note to *National Bank v. Baltimore etc. R. R.*, 105 Am. St. Rep. 332-375. The question is also considered in the case of *Haas v. Citizens' Bank*, 144 Ala. 562, ante, p. 61.

DICKINSON v. ARKANSAS CITY IMPROVEMENT COMPANY.

[77 Ark. 570, 92 S. W. 21.]

EQUITY PLEADINGS.—Although a complaint in equity fails to state a cause within equity jurisdiction, it should not be dismissed if defendant's cross-complaint states a cause within such jurisdiction. (p. 174.)

EQUITY JURISDICTION.—Equity has jurisdiction of a cross-complaint seeking to restrain plaintiff from obstructing streets and alleys upon which the defendant's land abuts. (p. 174.)

EQUITY JURISDICTION—Extent of Relief.—If a court of equity rightfully assumes jurisdiction for one purpose, it may grant all the relief, whether legal or equitable, to which any of the parties show themselves entitled in the subject matter of the controversy. (p. 174.)

TAX DEEDS—Description.—A tax deed describing the land as "part E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, Sec. 32," is void for insufficiency of description. (p. 175.)

TAX DEEDS—Limitation of Actions.—A tax deed, void for uncertainty of description of the land intended to be conveyed does not set the statute of limitations in operation. (p. 175.)

TAX DEEDS—Sale for Excessive Sum.—The sale of an entire tract of land for the whole of the taxes assessed, when part of the

taxes thereon have been paid, renders the sale and tax deed void. (p. 175.)

LANDLORD AND TENANT—Adverse Possession.—One occupying land as a tenant cannot acquire title by limitation against his landlord. Possession thus held is not adverse. (p. 176.)

DEDICATION—Streets.—If cotenants plat the common land into lots and blocks, with streets intervening, and divide it among themselves, the fact that the land so divided remains in the ownership of such cotenants or their privies will not prevent the dedication from being effective among themselves. (p. 176.)

DEDICATION—Revocation of.—If tenants in common plat the common land into lots and blocks, with streets and alleys intervening, but none of the blocks or lots are ever sold to third persons, and the streets and alleys are never thrown open to the public, neither the public nor third persons have any right therein, and it remains within the power of the owners to revoke the dedication. (p. 176.)

DEDICATION.—Revocation of a dedication of land may be accomplished either by an affirmative act in recalling it or by an abandonment of the scheme, and abandonment occurs where the object of the use for which the property is dedicated wholly fails. (p. 176.)

DEDICATION—Revocation—Abandonment.—If for twenty years after land has been platted into blocks, lots and streets, and dedicated as an addition to a city, the land is used solely for farming purposes without the sale of any part of it as lots, the dedication must be deemed to have been abandoned and may be revoked. (p. 177.)

DEDICATION—Effect of Abandonment.—A conveyance of blocks and lots, describing them by numbers only, passes the fee to the center of the streets and alleys on which they abut, subject only to the right of the public to use the streets as highways, and when the streets are vacated or the use abandoned, they revert to the owners of the adjoining lots. (p. 178.)

LANDLORD AND TENANT—Renewal of Lease.—If a tenant holds over, and he and the landlord are unable to agree upon the terms of the renewal of the lease, and the landlord claims that the tenant agreed to pay a certain amount as rent, this may be taken as an admission by the landlord as to the amount of rent due. (p. 179.)

J. W. Dickinson, for the appellant.

F. M. Rogers and W. C. McCain, for the appellee.

571 **McCULLOCH, J.** In 1881 John D. Adams, Mrs. M. L. Dickinson, wife of J. W. Dickinson, and Mrs. M. W. Lewis, wife of E. C. Lewis, owned, as tenants in common, a large body of land situated near the corporate limits of the town of Arkansas City. Mrs. Dickinson also owned separately an adjoining tract containing eighty acres. Anticipating a rapid growth of the town so as to encompass the land, the parties named laid off the said land into blocks and lots with streets, avenues and alleys intervening, and platted them as an addition to the town. There were three separate plats,

one called "Highland Addition," another "North Highland Addition" and the other "Dickinson's Addition." Two of the plats were never placed of record, and the other was recorded since the commencement of this litigation. Nor have the corporate limits of the town ever been extended so as to embrace any part of the land in question. After platting the lands, the parties partitioned among themselves the lands held in common, and executed partition ⁵⁷² deeds describing the lots and block by numbers and reciting the fact that they dedicated to the public use all the streets and alleys (except certain therein named), and reserved two blocks to be held in common "for park purposes and other uses as they may hereafter determine."

On June 15, 1882, they formed a domestic corporation called the Arkansas City Real Estate and Improvement Company, and each conveyed to said corporation certain lots and blocks embraced in said additions. The plaintiff herein, Arkansas City Improvement Company, a foreign corporation, acquired title to said lots and blocks under mesne conveyances from said Arkansas City Real Estate and Improvement Company, as recited in the opinion of this court in the case of *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050, wherein the title was adjudged to be in said Arkansas City Improvement Company. Appellants Lewis and Mrs. Dickinson acquired title to all the lots and blocks not conveyed as aforesaid to said corporation. In all the conveyances referred to, the property conveyed is described by lot and block numbers and without any other description.

None of the streets, avenues and alleys marked on the plats were ever thrown open to public use or opened at all, and no effort has ever been made, before the commencement of this suit, to have them thrown open to use. Some of the land embraced in the so-called addition has, up to the trial of this case below, been in cultivation as a farm, and a considerable portion of it is woodland and thickets of undergrowth. Farm-houses remain in the platted streets, farm fences cross them, and the land is intersected by two public roads running irregularly without regard to the platted streets.

In the case of *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050, a receiver was appointed by the court, who took charge of the lots and blocks owned by the Arkansas City Improvement Company, and rented the same as a farm to J. W. and M. L. Dickinson from the year 1896 until the termination of that

suit in 1900, and from then up to and including the year 1902, Dickinson and wife rented the land from the Arkansas City Improvement Company. The leases to Dickinson and wife were in writing, and some of them stipulated that said lessees should keep up the fences and other improvements; and they rebuilt fences which had been washed away by **573** overflows, and in doing so fenced up blocks, streets, alleys, etc., into a farm.

At the expiration of the year 1902 the parties were unable to agree upon terms of lease for the succeeding year, and the present controversy then arose. The Dickinsons claimed that the streets, avenues and alleys had been dedicated to the public use, demanded that the same be thrown open to such use, and threatened to tear down the fences obstructing the platted streets and alleys. This suit was then commenced in the chancery court of Arkansas county by the Arkansas City Improvement Company against the Dickinsons to restrain the latter from tearing down the said fences and from interfering with plaintiff in renting the land.

It is also alleged in the complaint that the Dickinsons were claiming title to fifty-five acres of said land owned by plaintiff under tax sales alleged to be void, and the prayer is also for a cancellation of said tax deeds. A part of the land was assessed for taxation in the name of M. L. Dickinson as owner for the year 1895 under the following description: "Part E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32, T. 12 S., R. 1 W., 55 acres"; and was sold under that description by the collector of taxes on June 8, 1896, to F. N. Thane, wife of the receiver, H. Thane, who assigned the certificate of purchase to C. F. Dickinson, son of J. W. and M. L. Dickinson. Pursuant to the tax sale a deed was executed by the clerk to C. F. Dickinson according to the above description, who conveyed to J. W. Dickinson. The same land was assessed for taxation in the same name for the year 1897 under the following description: "Frl. E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32, T. 12 S., R. 1 W.," and was sold under that description by the collector to J. W. Dickinson, who received a clerk's tax deed therefor. For the same years a part of the same sectional subdivision was assessed for taxation in the name of Arkansas City Improvement Company under the following description: "Pt. E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, sec. 32, T. 12 S., R. 1 W., 25 acres"; and the taxes extended against it were paid by that company.

The defendants filed an answer and cross-complaint, claiming title to fifty-five acres in the east half of northeast quarter of section 32 under said tax deeds, and asserting a right to have all of said platted streets, avenues and alleys in said addition thrown ⁵⁷⁴ open in accordance with said alleged dedication, and they prayed that the plaintiff be restrained from obstructing the same with fences. They also pleaded title by adverse possession of the fifty-five acres for a period of two years under said tax deeds. Subsequently M. W. and E. W. Lewis were made defendants on their own motion, and filed answer adopting the answer and cross-complaint of their codefendants, and joined in the prayer for affirmative relief as to the opening of the streets, etc.

The cause was heard upon the pleadings and exhibits, deeds, plats and other documentary evidence, and the depositions of witnesses taken by both sides, and a final decree was rendered, dismissing the cross-complaint for want of equity and granting the relief prayed for in the complaint.

All of the defendants appealed.

⁵⁷⁵ Upon the threshold of the case here, appellants present the question that the cause of action stated in the complaint, and the relief prayed for, are not within the jurisdiction of a court of equity, and that for that reason the complaint should have been dismissed. Conceding that the complaint stated no grounds for the exercise of equity jurisdiction, the cross-complaint of the defendants, in seeking to restrain the plaintiff from obstructing the streets and alleys upon which the lots and blocks owned by defendants abutted, stated a ⁵⁷⁶ cause of action clearly cognizable in equity (*Davies v. Epstein*, 77 Ark. 221, 92 N. W. 19; *Texarkana v. Leach*, 66 Ark. 40, 74 Am. St. Rep. 68, 48 S. W. 807; *Packet Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683), and thus supplied the defects in jurisdiction: *Radeliffe v. Scruggs*, 46 Ark. 96; *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196.

Where the court of equity rightfully assumes jurisdiction for one purpose, it may grant all the relief, either legal or equitable, to which any of the parties show themselves entitled in the subject matter of the controversy: *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196; *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *Apperson v. Burgett*, 33 Ark. 328; *Conger v. Cotton*, 37 Ark. 286; *Bonner v. Little*, 38 Ark. 397.

There remain two questions to dispose of, viz., the claim of title of the Dickinsons, appellants, under the tax deeds and

by adverse possession for the statutory period of limitation, and the right of appellants to require the opening of the streets and alleys laid out on the plat of the three additions.

The tax sale of 1896, and the deed executed pursuant thereto, describing the land as "part E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32, T. 12 S., R. 1 W.," were void because of the imperfect and uncertain description: *Schattler v. Cassinelli*, 56 Ark. 172, 19 S. W. 746; *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970; *Little Rock etc. Ry. Co. v. Huggins*, 64 Ark. 432, 43 S. W. 145; *Rhodes v. Covington*, 69 Ark. 357, 63 S. W. 799.

Nor does the two years statute of limitation run under a deed containing such description. A deed failing to describe the land is equivalent to no deed at all. In order to put this statute in operation, the adverse holding must be under a deed purporting to convey the land pursuant to a tax sale. The deed under which appellants claim to have held does not purport to convey the title to any land, because none is described therein: *Rhodes v. Covington*, 69 Ark. 357, 63 S. W. 799.

The second tax deed under which appellants claim title is void for a different reason. Conceding that the description "Frl. E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32, T. 12 S., R. 1 W.," where the section is not in fact fractional, is sufficient to describe the whole of the east half of the northeast quarter, the record shows that appellee paid taxes for the same year on part of the same subdivision, and this being true, a sale of the tract for the whole of the taxes assessed, when part of the taxes thereon had been paid, renders the sale void. A tax sale made for an excessive amount is void: ⁵⁷⁷ *Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97; *Cooper v. Freeman L. Co.*, 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; *Kirker v. Daniels*, 73 Ark. 263, 83 S. W. 912.

Appellant's plea of the statute of limitation under this deed cannot be sustained, for the reason that they were in possession of the land as tenants of appellee, and the possession was not adverse. They could not acquire title by limitation while occupying the lands as tenants of appellee. Possession thus held was not adverse to the rights of the landlord.

Did appellants have the right to require the opening of the streets and alleys indicated on the plats of the several additions?

In the recent case of *Davies v. Epstein*, 77 Ark. 221, 92 N. W. 19, we approved the generally established doctrine that

"an owner of land, by laying out a town upon it, platting it into blocks and lots intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable." It is equally well established that "merely laying out grounds, or merely platting and surveying them, without actually throwing them open to public use or actually selling lots with reference to the plat, will not, as a general rule, show a dedication": *Holly Grove v. Smith*, 63 Ark. 5, 37 S. W. 956; *Elliott on Roads*, sec. 117; *United States v. Chicago*, 7 How. 185, 12 L. ed. 660.

In the case at bar none of the streets and alleys were actually thrown open to use, and no sales of lots to third parties are shown to have been made. However, we think that the fact that lots and blocks are still owned by the several alleged dedicators, or their privies, is of the same force in effectuating the dedication *inter sese* as if sales of lots had been made to third parties. Either may object to a revocation of the dedication, if the objection be manifested in apt time.

The question presented now is not so much that of the original intention on the part of the owners to dedicate to the public use, but whether the dedication has been revoked by the dedicators by an abandonment of the scheme in furtherance of which the original dedication was intended. None of the lots and blocks having been sold to third parties, and the streets and alleys never having been thrown open to public use, neither the public nor any third parties have rights in the dedication. It therefore remained within the power of the owners to revoke the dedication: *Elliott* ⁵⁷⁸ *on Roads*, sec. 150; *Holly Grove v. Smith*, 63 Ark. 5, 37 S. W. 956; *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333; *Steinauer v. Tell City*, 146 Ind. 490, 45 N. E. 1056.

The revocation may be accomplished either by an affirmative act in recalling it or by an abandonment of the scheme. The question of abandonment is one of fact, and may be said to occur where the object of the use for which the property is dedicated wholly fails: *Bayard v. Hargrove*, 45 Ga. 342; *Board of Education v. Edson*, 18 Ohio St. 221, 98 Am. Dec. 114; *Campbell v. Kansas City*, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; *Board of Commissioners Mahoning County v. Young*, 8 C. C. A. 27, 59 Fed. 96; *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029.

It has been often said that the fact of dedication depends wholly upon the intent, as manifested by open and visible acts, to appropriate the land to public use; and it is equally true that the fact of revocation by abandonment depends upon the intent, as manifested by open and visible acts, to abandon the purpose in furtherance of which the dedication was designed. Now, in this case not a single lot has been sold in this "paper city," nor a single one of the streets thrown open to public use. For more than twenty years since the alleged dedication no effort has been made by the owners or anyone else, so far as the proof discloses, to bring the land within the limits of the incorporated town of Arkansas City. On the contrary, the land has been continuously fenced and cultivated as a farm. Where the fences were washed away by overflow they were rebuilt, and the platted streets again obstructed thereby. The conclusion is irresistible from these circumstances that the whole scheme for making the additions to the town of Arkansas City has failed, and has been abandoned. It is true that one of the appellants testifies that he expects, at some time, to sell the lots and to have the territory added to the town, but there is nothing in the testimony to warrant a definite or reasonable expectation that such scheme may soon be accomplished. It appears to be more a hope for future results rather than a definite present intention to bring about the result. There is nothing shown to manifest such intent until the parties had disagreed about the terms of renting the lands again for farm purposes, and this suit resulted. It was then too late, after the abandonment of the scheme, for either of the owners to insist upon a dismemberment of the farm property by throwing open the streets and alleys intersecting it.

579 We think the chancellor was correct in holding that the alleged dedication was not still in force, and that appellants could not demand the opening of the platted streets, avenues and alleys.

It is contended by appellants that no title passed to the streets and alleys on which the lots and blocks of appellee abutted because the conveyances under which appellee holds describes the property conveyed only by lot and block numbers.

A conveyance of lots and blocks, describing them by numbers only, passes the fee to center of the streets and alleys on which they abut, subject only to the rights of the public to

use the same as highways; and when the streets are vacated or the use abandoned, they revert to the owners of abutting lots: *Taylor v. Armstrong*, 24 Ark. 102; *Packet Co. v. Sorrels*, 50 Ark. 466; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373; *Bayard v. Hargrove*, 45 Ga. 342; *Harrison v. Augusta Factory*, 73 Ga. 447; *Elliott on Roads*, sec. 886; *Banks v. Ogden*, 2 Wall. 57, 17 L. ed. 818, 13 Cyc. 492.

It follows that the dedication never having been in any way accepted by the public, and having been revoked by abandonment of the scheme for converting the lands into additions to the adjacent town, the title to the streets, avenues and alleys passed to the owners of abutting platted lots and blocks as grantees of the original dedicators; that is to say, they own to the center of the platted streets, etc., and of course where they own the lots on both sides it carries the title to the whole street.

This applies also, of course, to appellants as owners of some of the lots and blocks and their title to the center of the streets on which their lots abut is not disputed. Nor is their right to reasonable means of ingress and egress to and from their property disputed. That is expressly recognized, and not involved in this litigation. It is only their right to have the streets and alleys, as such, thrown open to use which is denied by appellee, and which by this decision is denied to them.

The decree is therefore affirmed.

ON REHEARING.

McCULLOCH, J. The court rendered a personal decree against J. W. Dickinson, one of the defendants, for the sum of ⁵⁸⁰ one hundred and fourteen thousand dollars for rent for the year 1903 for thirty and two-fifths acres of the land in controversy, referred to as a part of the southeast quarter of section 29 lying west of John's Bayou. The evidence supports the finding of the chancellor as to the number of acres cultivated by Dickinson, but there is no satisfactory showing as to how much of it was owned by appellants and how much by appellee. Counsel for appellee in their original brief, as well as the brief on petition for rehearing, do not point out the evidence sustaining the finding, and we are unable to discover any in the record.

Appellant J. W. Dickinson, in his petition for rehearing, contends that appellee agreed with him upon a rental of fifty dollars for a subsequent year, and urges this as an admission

by appellee of the proper amount for the year 1903. This contention cannot be viewed in any other light than as an admission by him that the proper amount of rent should be fifty dollars, and justifies us in sustaining the decree to that extent. So, if appellee will, within ten days, remit the decree for rent down to fifty dollars, the same will be affirmed; otherwise that part of the decree will be reversed and the cause remanded, with directions to the chancellor to hear further proof and ascertain the amount due for rent.

In all other respects the petition for rehearing is denied, and the decree stands affirmed. The cost of appeal will be adjudged against the other appellants.

An Abutting Owner on a Public Street, in addition to his right with the public to the use of the street from end to end for passage, has an individual property right in that part of the street necessary to free and convenient egress and ingress to his property, which cannot be interfered with without the wrongdoer being answerable: *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305. The general rule is, however, that to entitle an individual to maintain an action for damages resulting from the obstruction of a highway, or a suit in equity to prevent the obstruction, he must have sustained damages differing not merely in degree, but in kind from the damages sustained by the general public: *Tilly v. Mitchell*, 121 Wis. 1, 105 Am. St. Rep. 1007; *Little Rock etc. Ry. Co. v. Newman*, 73 Ark. 1, 108 Am. St. Rep. 17.

What Constitutes Color of Title within the meaning of the law of adverse possession is the subject of an extended note to *Power v. Kitching*, 88 Am. St. Rep. 701-729. At pages 708-711 of this note will be found a consideration of the certainty of description requisite to constitute a writing color of title.

The Estoppel of a Tenant to Deny his landlord's title is the subject of an extended note to *Davis v. Williams*, 89 Am. St. Rep. 62-115.

A Dedication of Property for a Public Street, to become effective, must ordinarily be accepted. Formal acceptance, however, is not necessary; acceptance may be inferred from acts of recognition, control, or user: See *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, and cases cited in the cross-reference note thereto; monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 752.

ANDERSON & COMPANY v. DIAZ.

[77 Ark. 606, 92 S. W. 861.]

SALOONS—Liability of Keeper for Assault.—A patron of a saloon who, while lying drunk therein, is assaulted by a stranger is not entitled to recover damages therefor from the saloon-keeper. (p. 181.)

MASTER AND SERVANT—Liability of Saloon-keeper for Assault by Bar-keeper.—A saloon-keeper is not liable for an assault on one of his patrons committed by his bar-keeper not in the scope of his employment. (p. 181.)

SALOONS—Liability of Keeper of.—A saloon-keeper does not hold himself out to the public as a protector of his patrons, and is not bound to the same degree of care to protect them as is required of an innkeeper or a common carrier. (p. 181.)

J. H. Harrod and W. A. Oldfield, for the appellant.

L. F. Reeder, E. Neill and Young & Casey, for the appellee.

⁶⁰⁶ WOOD, J. Appellant was a corporation, carrying on a retail liquor business in Batesville, Arkansas. Arthur Anderson was in its employ as bartender. The appellee for his cause of action alleges: "That on the twelfth day of January, 1903, the plaintiff was an occupant and patron of the defendant corporation's place of business in its saloon at Batesville, Arkansas, and that while in the said house he became somewhat intoxicated, and had lain down, and was asleep in said defendant's house. That while so asleep he was assaulted by the defendant, A. Ramsey Weaver, who was a patron of the said company, and Arthur Anderson, who was at the time in the service of the said saloon company as bartender, in a most brutal, wanton, malicious and cruel manner by pouring alcohol on the plaintiff's foot and setting fire to the same, by reason ⁶⁰⁷ of which the plaintiff's foot was severely burned before he could extinguish the fire. That the said Arthur Anderson furnished the alcohol to the said Ramsey Weaver from defendant company's saloon, and aided, assisted and abetted the said Ramsey Weaver in putting the same upon the foot of the plaintiff, and also himself poured some of the alcohol on plaintiff's foot. That by reason of said assault this plaintiff was severely burned, and suffered, and has suffered since said time, and continues to suffer, the most

excruciating and painful agony to which human beings are subjected."

The damages were laid at five thousand dollars. for which judgment was asked.

The answer denied the allegations of the complaint. There was proof to support the allegations of the complaint. There was no proof and no claim that appellant was negligent in employing or retaining its bartender, Arthur Anderson. The cause was submitted to the jury upon the proof and instructions, and they returned a verdict for one thousand dollars, and judgment was entered accordingly, which this appeal seeks to reverse.

608 Was appellant liable?

The decision in *Gage v. Harvey*, 66 Ark. 68, shows that there is no statutory liability. The sale of liquor at appellant's place of business was not the proximate cause of the injury. Nor was appellant liable according to any of the rules of the common law: *Black on Intoxicating Liquors*, sec. 281; *Cruse v. Aden*, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327; *Struble v. Nodwift*, 11 Ind. 64.

The cruel act of its agent, Arthur Anderson, was clearly beyond the line of his employment. The master is not liable for the acts of his servant that are beyond the scope of his employment: *Cooley on Torts*, p. 627. "Where a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests," the master will not be liable for his acts: *McManus v. Crickett*, 1 East, 106. The "test," says the supreme court of Nebraska, of the master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business: *Davis v. Houghtellen*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737.

Appellee mistakes the law in saying "that there is no distinction between the duty that the proprietors of a saloon owe their patrons" and that which a common carrier owes its passengers, or an innkeeper his guests. There is a difference as wide as the poles. The saloon-keeper does not hold himself out to the public as the protector of those who may be patrons of his saloon. His business the rather advertises him the other way. But the common carrier and the innkeeper hold themselves forth as providing for the comfort and safety of all who may seek their services—a "refuge through their

portals." It is strictly their duty and ⁶⁰⁰ their business to exercise the proper care to look after and to protect their passengers and guests from insult and injury: *Britton v. Atlanta etc. Ry. Co.*, 88 N. C. 536, 43 Am. Rep. 749. Not so with the saloon-keeper.

The doctrine announced above is supported by the cases cited in appellant's brief and by the following: *Story v. Ashton*, L. R. 4 Q. B. 476; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *Wood on Master and Servant*, 546; *Whittaker's Smith on Negligence*, 199; *Wharton's Law of Negligence*, sec. 168; and numerous cases cited in notes to these.

The judgment is reversed and the cause is dismissed.

The Liability of Liquor Sellers for the acts of persons becoming intoxicated is the subject of a monographic note to *Mastad v. Swedish Brethren*, 85 Am. St. Rep. 449-454. A saloon-keeper is bound to use reasonable care to protect his guests and patrons from injury at the hands of vicious or lawless persons whom he knowingly permits to be in or about his saloon; and he is therefore liable to a guest who, in his presence, is injured by the act of a third person in pouring alcohol on the guest while asleep, and then setting it on fire: *Curran v. Olson*, 88 Minn. 307, 97 Am. St. Rep. 517. To the same effect, see *Rommel v. Schambacher*, 120 Pa. 579, 6 Am. St. Rep. 732; *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 Am. St. Rep. 446.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

WOOLWINE v. STORRS.

[148 Cal. 7, 83 Pac. 434.]

LIMITATION OF ACTIONS.—The Liability of the Guarantor of a note secured by mortgage accrues at the time of the maturity of the note, without regard to the exhaustion of the security. (p. 184.)

LIMITATION OF ACTIONS—Suspension of Statute.—A written request for a year's extension of time for the payment of a note, accompanied by a written promise to pay the same at the end of that time, cannot save the debt from the operation of the statute of limitations, if the holder of the note does not accept the proposition thus made. (p. 187.)

LIMITATION OF ACTIONS—Suspension of Statute.—Where the guarantors of a note give their personal note for a part of the amount due, which note is paid before the commencement of an action on the original note, the right of the holder to maintain an action for the remainder of the indebtedness is not thereby suspended. (p. 187.)

Lawler & Allen and Lawler, Allen & Van Dyke, for the appellant.

Aylett R. Cotton, for the respondent.

S ANGELLOTTI, J. This is the same suit as that of Pierce v. Merrill, in which on a former appeal a judgment for the plaintiff was reversed: 128 Cal. 464, 473, 79 Am. St. Rep. 56, 63, 61 Pac. 64, 67. The present plaintiff is the assignee of the former plaintiffs, and has been substituted for them. The defendant Storrs has been substituted as executor of the will of the deceased defendant, Merrill. The case was tried on the answer of the defendant Storrs, and judgment was

entered in his favor. The appeal is from the judgment and from an order denying the plaintiff's motion for a new trial. The other defendants are not parties to this appeal or to the judgment appealed from.

" The original defendants were sued as guarantors of a note of the Semi-Tropic Land and Water Company, the amount of the note being fifty thousand dollars, the date June 1, 1889, and the date of maturity June 1, 1891. The suit was commenced January 31, 1896, more than four years after the maturity of the note, the theory of the plaintiff apparently being that the liability of the defendants on their guaranty did not accrue until other security given by the makers of the note, consisting of a mortgage, had been exhausted. It was held upon the former appeal that upon the facts stated in the complaint the liability of the defendants on their guaranty accrued at the maturity of the note, and that therefore the demurrer, based on the statute of limitations, should have been sustained. The court said: "If plaintiffs relied upon a written acknowledgment of indebtedness within four years prior to the commencement of the action, or upon any other fact, to take the case out of the statute of limitations, they should have pleaded the same in their complaint": *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67. Upon the going down of the remittitur, plaintiff, in order to take the case out of the operation of the statute of limitations, so amended his complaint as to allege a request by the maker of the note and defendants for an extension of one year from May 21, 1891, within which to pay the balance remaining unpaid on said note, and the granting of the same by the owners of the indebtedness. The request was made on May 21, 1891, when the principal debt had become due, under the provisions of the note, by default in the payment of interest and notification to the maker and guarantors that the holders declared the same due and demanded payment. The request was in writing, a copy of which was set forth in the complaint, and was as follows, viz.: "Office of Semi-Tropic Land & Water Co. Samuel Merrill, Pres. Geo. H. Bonebrake, Vice P. F. C. Howes, Treas. Jos. L. Merrill, Secy. Robt. D. Wade, Supt. Palace Hotel, San Bernardino Co., May 21, 1891. Henry Pierce, Esq., San Francisco: Our Semi-Tropic L. & W. Co. ask a year's extension. Messrs. Bonebrake, Howes, and Merrill pledge that the payment shall come at that time with-

out fail and without litigation or expense. Yours, S. Merrill, Prest.'" It was alleged that, pursuant to and in reliance upon this writing, the holders ¹⁰ of the note granted an extension of one year from May 21, 1891, within which to pay the balance due.

It is clear that the above letter could not, standing alone, have operated to save plaintiff's demand against defendant from the bar of the statute for a longer period than four years from its date. If, taken in connection with the existing circumstances and the previous demand for payment, the letter be considered as a sufficient acknowledgment of an existing indebtedness of Merrill, under section 360 of the Code of Civil Procedure, its utmost effect as such an acknowledgment was simply to waive so much of the period of limitations as had already run in Merrill's favor, and give a new period of four years, commencing at that date, May 21, 1891, within which action might be brought against him. It could only be in the event that the requested extension was agreed to by the holders of the note that any extension might be effected. If no such extension was effected, there was, of course, no moment of time after June 1, 1891, when the statute was not running, or when the holders of the note could not have maintained an action against Merrill upon his guaranty. The allegations of the amended complaint in regard to the granting of an extension were denied by the amended answer, and the trial court found that such requested extension was not granted. If this finding is sufficiently supported by the evidence, it necessarily disposes of plaintiff's contention in this behalf. We are unable to see how it can be held that this finding is not supported by the evidence. It is not claimed that there was any written assent to the proposition contained in the letter, and if it be assumed that an oral assent would have been sufficient, a perusal of the record shows that there was no oral agreement for the extension requested thereby. It affirmatively appears that the proposition contained in the letter, viz., that a year's extension on the fifty thousand dollar note should be granted was not accepted; for it is shown that Mr. Pierce, who was managing the matter for the holders, continued to press the matter to the extent of threatening a foreclosure "if they did not come to time," so that on May 23, 1891, two of the guarantors, Merrill and Bonebrake, gave their personal note for twenty-five thousand dollars.

payable four months after date, in order that the same might be negotiated, and the holders thereby enabled to at once obtain ¹¹ a portion of the amount due, which note was negotiated by the holders, and payment insisted on by them, in accordance with its terms. This note was partially paid at or about its maturity, and a new note given for the balance by the Semi-Tropic Land and Water Company, which was ultimately paid in full.

The utmost that the record shows in favor of plaintiff's claim in this behalf is that in consequence of other arrangements utterly inconsistent with the proposition for an extension of the note for a year, including the giving of the twenty-five thousand dollar note above referred to, and payments on the same and on the new note given in its place for the balance due thereon, until in 1893 the same was fully satisfied, the holders of the fifty thousand dollar note did in fact refrain from bringing suit upon their accrued cause of action thereon for nearly three years from May 21, 1891, when they instituted the proceeding for a foreclosure of their mortgage for the balance then due. There is nothing in this to compel even the conclusion that the holders of the fifty thousand dollar note ever orally agreed to forbear suit for any time, or to indicate anything more than that they were satisfied to refrain from pressing their accrued cause of action so long as satisfactory arrangements for the speedy payment of a large portion of the indebtedness were made. Much less does it tend to show the agreement for an extension of the note alleged by the amended complaint, which was the only agreement alleged by plaintiff for the purpose of taking the case from the operation of the statute, and consequently the only agreement within the issues. Upon the evidence the trial court was necessarily compelled to find that the alleged agreement for a year's extension was never made, and this was in effect the finding under discussion. The above-mentioned allegation as to the request for an extension of time and the granting of the same was the only allegation of matters affecting the running of the statute, except that there was an allegation to the effect that defendant Merrill was absent from the state of California between June 2, 1891, and June 2, 1895, for a period of more than eight months, and also one to the effect that prior to April 27, 1895, and within four years prior to the commencement of the action, said Merrill had

made, signed and delivered to plaintiff's predecessors a certain writing ¹² wherein he unconditionally admitted his liability. Upon both these matters the findings were against plaintiff. The unchallenged finding as to absence from the state was that Merrill was absent for not more than six months and twenty days, and this action was not commenced until the expiration of four years and eight months from the time the cause of action accrued. There is no evidence whatever in conflict with the finding that there was no written acknowledgment of the indebtedness by Merrill within four years prior to the commencement of the action.

It is urged that the letter of May 21, 1891, contains a promise on the part of Merrill to pay the debt at the expiration of one year from its date, and that such promise was enforceable at any time within four years after the expiration of the year, but manifestly the promise therein contained was conditioned upon the acceptance of the proposition for a year's extension, and was enforceable only in the event of such acceptance. It is further urged that by the taking of the four-month twenty-five thousand dollar note of Merrill and Bonebrake on May 23, 1891, an extension of at least four months was granted on the fifty thousand dollar note, which, added to the period of Merrill's absence from the state, would bring the action within time. The evidence does not show any express agreement for such extension. The mere taking of this note would not have the effect of suspending the right of the holders of the note to maintain an action against Merrill for the remainder of the indebtedness, and what is here sought to be recovered was included in such remainder, for the twenty-five thousand dollar note was fully satisfied before the commencement of the foreclosure action. A sufficient answer, however, to the contention in this behalf is that no such agreement for an extension of four months is embraced within the issues made by the pleadings. The findings already discussed being sufficiently sustained by the evidence, it follows, in view of what was decided upon the former appeal, that it must be held that plaintiff's claim against Merrill's estate is barred by the statute of limitations, and that therefore no recovery can be had thereon.

The trial court did not err in sustaining the objection to the question asked Pierce as to whether he remembered having had any conversation with Merrill on or about May 2,

1891, ¹³ or shortly subsequently thereto, concerning the original guaranty and the demand for payment made April 27, 1891. The question was not such as to indicate that it called for any competent evidence material to the issues being tried, or for any evidence material upon the issue as to the extension for a year. Counsel for appellant stated to the court, in effect, that the question was merely preliminary, and it is apparent that it was never suggested that there was anything said in any conversation prior to the letter of May 21st that could have affected the determination of the question as to whether an agreement for the extension alleged in the amended complaint was made. The ruling of the court admitting certain testimony on the question of the assignment of the indebtedness to plaintiff was not prejudicial, for the court found for plaintiff upon that issue.

It is unnecessary to consider any other point made on this appeal by either party.

The judgment and order are affirmed.

Beatty, C. J., Shaw, J., Lorigan, J., McFarland, J., and Henshaw, J., concurred.

Van Dyke, J., being disqualified, did not participate in the foregoing.

Contracts of Guaranty are discussed in the extended note to Pearsell Mfg. Co. v. Jeffreys, 105 Am. St. Rep. 502-526.

Acknowledgments and New Promises to suspend the running or remove the bar of the statute of limitations are discussed in the extended note to Warren v. Cleveland, 102 Am. St. Rep. 751-777.

SMITH v. BRADBURY.

[148 Cal. 41, 82 Pac. 367.]

MECHANIC'S LIEN—Unrecorded Contract.—A contract for plastering which does not expressly state the aggregate cost of the work, but which nevertheless clearly calls for an expenditure of over one thousand dollars, is, if not recorded, void under section 1183 of the Code of Civil Procedure, and the materials will be deemed furnished at the "personal instance of the owner," so that a lien therefor may be had against the building. (p. 190.)

E. C. Chapman, for the appellant.

J. N. Young, William H. Young and Marion S. Blanchard, for the respondents.

⁴¹ McFARLAND, J. This is an action to enforce a lien for materials under the mechanics' lien law against a building ⁴² and lot of land owned by defendant, W. B. Bradbury. The amount of the lien claimed is eighty-seven dollars and fifteen cents, and the court gave judgment for plaintiffs, enforcing the lien for that amount, together with interest, costs, etc. Defendant appeals from the judgment and an order denying his motion for a new trial. The case was tried without a jury, and, findings having been waived, no findings were made.

The defendant was engaged in repairing and altering some buildings and adding thereto, so as to convert the whole into a four-story hotel. He made a written contract with McKendrick and Mellon to do all the plastering throughout said buildings, and they purchased from plaintiffs certain materials which they used in carrying out the contract, and the lien of plaintiffs here in question is for such materials. It is averred in the complaint that the contract work done by McKendrick and Mellon exceeded one thousand dollars: that neither the whole of said contract nor any memorandum thereof was filed in the recorder's office, as required by the code; and therefore plaintiffs claim that the contract was void, and the materials furnished by them are to be deemed to have been furnished at "the personal instance of the owner," as provided in section 1183 of the Code of Civil Procedure. Defendant does not deny that the contract was not recorded, but contends that the contract price agreed upon in the contract with McKendrick and Mellon did not

exceed one thousand dollars, and that therefore the contract is not within the provisions declaring contracts void which are not recorded. We do not think that this point is tenable. By the contract in question McKendrick and Mellon agree to perform "all of the plastering work, including labor and materials, pertaining to that certain building, improvement, or structure now being altered and repaired by the said party of the first part [Bradbury], and situated," etc. It is further "mutually agreed that the contract price for lathing and plastering all the new work pertaining to said building shall be the sum of nineteen (19) cents per square yard," and that the contract price of the plastering of all the walls and ceilings of all the rooms and halls of the old building should be thirteen cents per square yard. The evidence clearly shows that the amount of the work done under the contract at the stipulated price per yard amounted to a ⁴³ great deal more than one thousand dollars. Defendant himself testifies, and it is asserted in the brief of his counsel, that he had paid two thousand four hundred and twenty-five dollars and sixty-eight cents "pursuant to the contract." And considering what was shown by the evidence, it must be assumed that the parties knew when the contract was made, unless they shut their eyes to what plainly appeared, that the work to be done at nineteen and thirteen cents per square yard would necessarily exceed one thousand dollars; and this being so, the defendant could not evade the provisions of the code by simply avoiding a statement of the aggregate amount of the full price. The statement of the rate per yard sufficiently showed, under the circumstances, an agreement for an amount exceeding one thousand dollars. Under this view there is no necessity to consider other points argued by counsel.

The judgment and order appealed from are affirmed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Mechanics' Lien Laws are construed liberally, so as to make the remedial purpose of the legislature effectual: *Hill v. Alliance Bldg. Co.*, 6 S. Dak. 160, 55 Am. St. Rep. 819; *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607, 51 Am. St. Rep. 925; *Nanz v. Park Co.*, 103 Tenn. 299, 76 Am. St. Rep. 650.

OLSON v. SAN FRANCISCO.

[148 Cal. 80, 82 Pac. 850.]

VESSEL—Situs for Purposes of Taxation.—If a vessel is owned by residents of different states, and is engaged in commerce on the high seas, her home port, for purposes of taxation, is that where her managing owner resides, notwithstanding she has never been in the waters thereof, nor received permanent registration thereat, but is temporarily registered in another state whose waters she enters as an incident of her employment in foreign commerce. (p. 195.)

Devoto & Richardson, for the appellant.

Franklin K. Lane, former city attorney, Percy V. Long, city attorney, and W. I. Brobeck, assistant city attorney, for the respondent.

⁸¹ ANGELLOTTI, J. This is an action to recover two hundred and sixty-four dollars and fifty-five cents, taxes paid under protest, which were levied by defendant upon the lumber schooner "Oliver J. Olson" for the fiscal year 1901-02. Defendant had judgment, and plaintiff appeals from an order denying his motion for a new trial.

The contention of plaintiff is that the vessel was not subject to taxation in this state for the fiscal year 1901-02. The material facts are as follows, viz.: The vessel was constructed in the state of Washington in the year 1900. At twelve o'clock M. of the first Monday of March, 1901, she had never been in the waters of California, but having received temporary registration at Port Townsend, Washington, on December 31, 1900, had thenceforth been engaged in commerce on the high seas between said Port Townsend and Sydney, Australia, and Callao, Peru, and consequently had not received permanent registration at San Francisco. At all times since her launching she was owned by some twenty persons, some residing ⁸² in the city and county of San Francisco, California, and some in the state of Washington. At all said times the plaintiff was the managing owner of the vessel, and resided in the city of San Francisco, California. The temporary certificate of registration of the vessel described her as "of San Francisco." There is nothing in the record to indicate that the conditions as to the vessel were such as to give her an actual or legal situs

in the state of Washington, unless that result was effected by her temporary registration at a port within that state, or by the fact that some of her owners, not including the managing owner, resided therein. She was not engaged exclusively within the waters of that state, and was only temporarily therein at certain times, as an incident to her employment as an instrument of commerce on the high seas.

Tangible personal property is ordinarily taxable only in the state wherein it is physically situated. The state wherein such property has its actual situs may always tax it (see *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. ed. 618); and while it has been held that it is within the power of a state to tax such property owned by its residents outside of the state (see same case, page 31 of 141 U. S., page 881 of 11 Sup. Ct. Rep.), such power is seldom exercised by a state, as it would lead to double taxation. In the case of such property the actual situs is, therefore, generally the essential factor in determining the question of taxability, and the residence of the owner is immaterial. When, however, we come to seagoing vessels engaged in foreign or interstate commerce, and not employed in such commerce wholly within the waters of any one state, a species of personal property capable of private ownership, and as such taxable, we find that from the nature of the property a different rule has necessarily been adopted. Such a vessel cannot be said to have an actual permanent situs. She goes where she may be called in the business in which she is engaged, and is in port in any jurisdiction only as an incident to that business, and therefore cannot properly be held to have an actual situs within any particular state. Under our shipping laws, however, every such vessel has what is called her "home port"—the port to which she belongs, and which constitutes her legal abiding-place or residence, regardless of her actual absence therefrom. ⁸³ It is only in the collection district embracing such port that she may be permanently registered. It is provided in section 4141 of the United States Revised Statutes (U. S. Comp. Stats. 1901, p. 2808) that "every vessel, except as hereinafter provided, shall be registered by the collector of the collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the

owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides." The exception referred to in this section relates to the temporary registration of vessels provided for by other sections, granted when for some reason a vessel cannot, owing to absence therefrom, be registered at her home port, for the purpose of enabling her to clear and engage in commerce until she reaches her home port, when such temporary registration must be surrendered: United States Rev. Stats., secs. 4159, 4160; U. S. Comp. Stats. 1901, pp. 2823, 2824. Such registration is purely temporary in character, and necessarily implies that the home port is at a different place from that at which the temporary registration is effected (see *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303), and that the vessel is not in any proper sense abiding within the limits of the district wherein such temporary registration is effected.

There can be no question upon the facts hereinbefore stated that the home port of the vessel here involved was at the time of her temporary registration the port of San Francisco, and that there was no change in this respect up to and including the first Monday of March, 1901. It appears to be thoroughly settled that the legal situs of such vessel for the purpose of taxation is in her home port, and that her physical absence therefrom cuts no figure. For such purpose she is deemed to be at such place, and is taxable only within the state in which such place is situated: See *People v. Commissioners*, 58 N. Y. 242; *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303; *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 15 L. ed. 254; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158; *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. ed. 618; *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 19 South. 640, 37 L. R. A. 518, note. It is held that such a vessel may, by being indefinitely and exclusively employed within ⁸⁴ the waters of another state, acquire an actual situs therein which will permit of her taxation there (see *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. Rep. 686, 49 L. ed. 1059; *National Dredging Co. v. State*, 99 Ala. 462, 12 South. 720); but this conclusion is founded on the proposition that by actual use the vessel has acquired a permanent actual situs in another state and is no longer actually engaged in foreign or inter-

state commerce, except within the limits of such state: See *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. Rep. 686, 49 L. ed. 1059. No such condition exists here, and it is universally recognized that, in the absence of the acquirement of any permanent actual abiding-place elsewhere, the rule as to situs for taxation is as first stated above.

In the application of that rule questions may sometimes arise as to the place within the state, including the home port, where the vessel may be taxed, where the owner resides without the limits of the city where the vessel is registered (see *Hooper v. Baltimore*, 12 Md. 464); but no such question exists here, in view of the residence of the managing owner within such city and county of San Francisco. The decisions enunciating the general rule generally show that the vessel has been, in fact, registered at her home port—viz., the port at or nearest to which at the time of registration the husband or acting and managing owner usually resides—and some of the opinions speak of the actual permanent registration at a place as determining the home port. But it is apparent that the vessel may have a home port prior to such registration. This home port, under the terms of the statute, conclusively determines the place of registration, and in many cases, as in the case at bar, the vessel with a home port precisely and definitely located cannot at once be there permanently registered, but must work under a temporary registration. This condition cannot affect the rule requiring taxation to be at the home port, the legal situs of the vessel, the only place at which she can properly be said to be permanently located. In *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 9 Am. St. Rep. 116, 15 Atl. 443, 1 L. R. A. 237, it was said: "The rule as to vessels engaged in foreign or interstate commerce is that their situs, for the purpose of taxation, is their home port of registry, or the residence of their owner, if unregistered. . . . These vessels, if they may ⁸⁵ be so called, were not registered. Hence their situs for taxation is the domicile of the owners. This rule must prevail, in the absence of anything to show that they are so permanently located in another state as to be liable to taxation under the laws of that state." This is but another way of stating that the taxation must be in the state of the home port, at which alone the vessel may be registered.

It is also clear, under the statute and decisions, that where the vessel has several owners it is only the residence of the managing owner that is material. It is therefore apparent that neither the temporary registration in Washington nor the residence in that state of one or more of the owners, exclusive of the managing owner, can affect the question before us. Under the well-settled law, this vessel had its legal situs in the city and county of San Francisco on the first Monday of March, 1901, and for the purpose of taxation was at that time within that city and county. It was "property in the state," within the meaning of those words as used in section 1 of article 13 of the constitution, relating to revenue and taxation, and was by such provision required to be taxed here. As was held in the Pennsylvania case last cited, this must be the rule, in the absence of anything to show such a permanent location elsewhere as to make the vessel liable to taxation there.

Counsel for plaintiff contend that sections 3644 to 3646 of the Political Code specify the only cases in which a vessel other than a ferry-boat may be taxed in this state, and that the facts of this case do not bring the vessel within the provisions of such sections. In view of the section of the constitution requiring all property in the state not specially exempted by constitutional provision to be taxed (article 13, section 1), the legislature could not, of course, exempt from taxation a vessel having its legal situs in this state: See *Mackay v. San Francisco*, 113 Cal. 392, 45 Pac. 696. We are, however, of the opinion that no attempt to do so is evidenced by the sections relied on. Section 3607 of the Political Code contains the same requirement as to the taxation of all property in the state as does the constitution. Sections 3644 and 3646 are manifestly nothing more than regulations fixing the particular place within the state, where certain vessels taxable in the state must be assessed and the taxes paid. Section 3646 is in no way applicable here, and ⁸⁶ the utmost effect that could reasonably be given to section 3644 in favor of plaintiff would be to hold that it forbids the assessment of any unregistered vessel in any other county or city and county of the state than that in which it is required to be permanently registered. It certainly cannot be construed as exempting altogether from taxation a vessel which has not been registered, or as making the temporary registration elsewhere a bar to

taxation here. By section 3645 it was attempted simply to provide for the taxation in this state of vessels permanently registered, licensed, or enrolled outside of the state, where such vessels ply in whole or in part in the waters of this state, and the owners reside in this state. That section is not relied on by defendant in this case, and under the facts of the case is in no way applicable. The case of *San Francisco v. Talbot*, 63 Cal. 485, is not in point. The vessel there involved was permanently registered in Washington Territory, where the managing owner resided, did not ply in whole or in part in the waters of this state, and was only transiently herein, where some of the owners other than the managing owner resided. Obviously, under the views herein expressed, this vessel was not taxable here, and nothing is said in the opinion in that case at all in conflict with what has here been said.

The finding that plaintiff was the managing owner, and that he resided in the city and county of San Francisco, which is not attacked, renders immaterial the finding complained of as to the residence of the other owners. The amount of interest of the managing owner was also an immaterial factor. The finding that the city and county of San Francisco was the home port of the vessel was not as claimed outside of the issues.

The order denying the motion for a new trial is affirmed.

Shaw, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

The Situs of Vessels for purposes of taxation is discussed in the note to *Buck v. Miller*, 62 Am. St. Rep. 471-473; and in the recent cases of *Old Dominion Steamship Co. v. Commonwealth*, 102 Va. 576, 102 Am. St. Rep. 855; *Northwestern Lumber Co. v. Chehalis*, 25 Wash. 95, 87 Am. St. Rep. 747.

ESTATE OF CLARK.

[148 Cal. 108, 82 Pac. 760.]

CONSTRUCTION OF STATUTE—Resort to Title of Act.—In construing the language of a code section, resort with propriety may be had to the title of the act. (p. 199.)

FOREIGN WILLS—Construction of Statute.—The words “all wills” in a code section may be construed to read all “foreign wills,” when the chapter or article in which the section appears is entitled “Probate of Foreign Wills.” (p. 200.)

FOREIGN WILLS—Jurisdiction to Probate.—Courts may grant original probate upon wills of deceased nonresidents leaving property in the state; but the exercise of this jurisdiction can affect only the property within the state. (p. 200.)

FOREIGN WILLS—Jurisdiction to Probate.—While in matters of probate states by comity permit ancillary jurisdiction of foreign wills, they are jealous in the extreme of any invasion of their original jurisdiction of such matters. (p. 201.)

FOREIGN WILLS.—It is the Duty of a Court to Refuse Probate to an instrument offered as a foreign will, when satisfied from the evidence that the testator was in fact a resident of the state at the time of his death. (p. 205.)

FOREIGN WILLS.—Authority to Take Proof of Wills is confined to courts whose territorial jurisdiction includes the domicile of the decedent. (p. 210.)

FOREIGN WILLS.—When the Will of a Nonresident is admitted to probate on original proceedings for the purpose of administering upon his property within the state, the decree therein binds that property here and everywhere that our courts are accorded full faith and credit, but it is not binding as to the will itself in other jurisdictions where the deceased may have left property, nor is it binding on the courts of his domicile. (p. 210.)

FOREIGN WILLS.—When a Will has been admitted to probate here on proof of its admission to probate in some other jurisdiction, not including the domicile of the decedent, the decree and proceedings regularly taken under it are secure against collateral attack. (pp. 210, 211.)

W. A. Anderson and George Clark, for the appellant.

Garret W. McEnerney, Arthur S. Hutton and S. D. Woods, for the respondent.

Charles S. Wheeler and Campbell, Metson & Campbell, amici curiae.

109 HENSHAW, J. Julius H. Clark died in the county of Yolo, in the state of California, on the fourteenth day of March, 1904, and was a resident of that county at the time of his death. He had resided in the county for more than

twenty years continuously prior to his death. On the thirteenth day of July, 1872, while visiting in Keene, New Hampshire, he executed his last will and testament. This will was executed in conformity with the laws of the state of New Hampshire, and also in conformity with the laws of the state of California. It was filed by the executrix named therein in the office of the county clerk of Yolo county, with a petition praying for the probate thereof. In addition to having been a resident of Yolo county at the time of his death, the deceased left estate in that county. Subsequent to the filing of the will and petition the superior court of Yolo county in probate made an order permitting the original will to be withdrawn and forwarded to Keene, New Hampshire. The will was then probated in New Hampshire, and thereafter appellant herein filed his petition in the superior court of the county of Yolo, asking for probate of the same will upon an exemplified copy from the probate court of the state of New Hampshire. The superior court of Yolo county took ¹¹⁰ evidence and determined that at the time of his death Clark was a resident of Yolo county. This finding is not in dispute. As a legal consequence following this finding, the court concluded that Clark's will should be admitted to probate originally in the superior court of the county of Yolo, and was not entitled to admission as a foreign will. It denied the petition, and this appeal is taken.

We are here for the first time upon a direct proceeding, by appeal from an order refusing probate to such a will, called upon to construe our code provisions governing the question. We say that we are for the first time called upon in direct proceedings, because, as will hereafter be shown, the cases in which the question may be considered to have arisen were either cases of collateral attack or cases where the precise question here presented was not made an issue, and therefore, under well-settled principles, cannot be said to have been decided. As all the provisions of the code bearing upon a single subject matter are to be construed together, and harmoniously if possible, it may be well to set forth the sections touching the probate of wills. Section 1294 of the Code of Civil Procedure declares: "Wills must be proved and letters testamentary or of administration granted: 1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died." Article 3 of chapter 2 of the same title (11)

containing section 1294, above quoted, is devoted to the probate of foreign wills. The article is itself entitled "Probate of Foreign Wills," and section 1322 provides: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate." Section 1323, following, provides that notice of a petition for proving a will shall be given with a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters. Section 1324 provides that if on the hearing it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled,¹¹¹ or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state. Section 1299 declares: "Any executor, devisee or legatee named in any will, or any other person interested in the estate, may at any time after the death of the testator petition the court having jurisdiction to have the will proved, whether the same be in writing in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state."

We take it that no jurist, feeling himself unembarrassed by earlier decisions and at liberty to treat the question as a new one, would hesitate to say: 1. That section 1294 fixes the place of jurisdiction for all grants of original probate, while section 1322 does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions; 2. That these laws mean that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence, and that, so far as the state of California is concerned, it cannot be primarily proved elsewhere and brought into this state for purposes of secondary and ancillary administration.

In construing the language of section 1322 attention would be called to the fact that resort with propriety may be had to the title of an act, and often must be had, to determine its true scope and intent; that the title of section 1322, relating exclusively and in terms to foreign wills, will be

read in, and of necessity must be read in, to the language of that section, so that "all wills" means, and should be read to mean, "all foreign wills"; and that "foreign wills," as the phrase is here employed, means all wills other than domestic wills, as plainly appears from the language of the section itself, which describes these wills as all those "duly proved and allowed in any other of the United States, or in any foreign country or state." In illustration, it might be pointed out that if the legislature had passed an act under the title of "An act for the government of boys in penal and reformatory institutions," and the body of the act had begun with the declaration, "All boys shall," etc., it would unhesitatingly be said that the phrase "all boys" had reference exclusively to all boys in penal and reformatory institutions in this state. We think this same unhampered jurist ¹¹² would point out that the matter of recognizing the judgment of a foreign state rested originally wholly in comity, and that, saving as exacted by section 1 of article 4 of the constitution of the United States, still rests wholly in comity. It would be pointed out that while the states themselves, as has this state, have by appropriate legislation provided that full faith and credit should be given to the adjudications of sister states, this never has meant that the state itself has parted with any of its sovereign rights, with any of its rights of primary jurisdiction, nor with any of the rights of its subjects, to have the will of a fellow-resident originally proved in the county of his residence, where, presumptively, he is the best known, and where they may the better litigate all questions touching the validity of the solemn instrument offered for probate.

Recognition would be given to the undisputable principle that every state has plenary power with respect to the administration and disposition of the estates of deceased persons as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate upon wills of deceased nonresidents who leave property within that state. In California this is expressly provided for by section 1294, *supra*, and the rule as to other states is the same: 1 Woerner on Administration, *439; *Shields v. Union etc. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790, 11

L. R. A. 41; *Walton v. Hall's Estate*, 66 Vt. 455, 29 Atl. 803; *Jacques v. Horton*, 76 Ala. 238. But the limitations of the operation of this principle would also be recognized—namely, that this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration: 1 *Woerner on Administration*, *491. And in this connection it would be further pointed out that if the position contended for by appellant is sound it involves upon the part of the state a formal surrender of ¹¹³ so much of its sovereignty and right of primary jurisdiction, conferring that upon foreign states, and at the same time to this extent is subversive and destructive of the rights of its citizens. It would be said with exact truth that the full faith and credit which is accorded to the adjudications of sister states is a full faith and credit consonant with complete jurisdiction and control of the sovereign state over all its inhabitants and over all the property within its boundaries. No less would the practical hardships of such an interpretation be pointed out, because if it were so that all wills therein, including domestic wills of residents of this state, could be primarily proved in a foreign jurisdiction, and by mere exemplification of that proof be entitled to ancillary probate under the laws of this state, it would result in numerous instances that wills of residents of this state would be probated in foreign jurisdictions without the knowledge of those in interest resident in this state, and without an opportunity to them afforded of raising any question of fraud, insanity, undue influence, or the like, affecting the validity of the instrument. Further, it would be pointed out with justice that if the construction contended for be the true one, it is arrived at by obliterating all distinction between the probate of domestic and foreign wills, by refusing recognition to the language of the code classifying these foreign wills and by a surrender of the state's original jurisdiction in these matters, with the result that it places the state of California in

an anomalous class by itself. For neither the laws of Great Britain nor of any sister state of the United States ever have permitted, and we venture to say ever will permit, any such doctrine, and it may be safely added that no civilized country in the world has ever entertained it. Numerous cases would be cited showing that, while in matters of probate states by comity permit ancillary jurisdiction of foreign wills, they are jealous in the extreme of any invasion of, or attempt to invade, their original jurisdiction in such matters: *Manuel v. Manuel*, 13 Ohio St. 459; *Sturdivant v. Neill*, 27 Miss. 157; *Stark v. Parker*, 56 N. H. 481; *Wallace v. Wallace*, 3 N. J. Eq. 616; *In re Law*, 80 N. Y. Supp. 410; *Moultrie v. Hunt*, 23 N. Y. 394; *Dial v. Gary*, 14 S. C. 573, 37 Am. Dec. 737; *Story on Conflict of Laws*, sec. 457; 23 Am. & Eng. Ency. of Law, p. 114; *Schouler on Executors*, secs. 15, 57; 114 2 *Redfield on Wills*, 290; 1 *Woerner on Administration*, 226.

In summing up, we think the unhampered jurist would reach the conclusion that our laws not only recognize, but sedulously preserve, the distinction between foreign and domestic wills and the probate thereof; that the law means what it says—namely, that all domestic wills must be proved in the county of which the decedent was a resident at the time of his death, for thus the state preserves its sovereignty and its jurisdiction over matters primarily belonging to it, and thus also it preserves the rights of its other residents and citizens; furthermore, that all foreign wills may be proved and allowed as provided in section 1322 et seq. of the Code of Civil Procedure; that in the case of a domestic will all questions touching the validity of the instrument are, and should be, primarily and exclusively cognizable by the courts of the state of the domicile; that in the case of a foreign will—that is to say, of one not a resident of this state—this state and its citizens have less concern with these questions of fraud, undue influence, and the like, and upon the offer of proof of such a will it shall be admitted upon the evidence prescribed by section 1324, without right of contest upon such matters: Code Civ. Proc., sec. 1913. But nevertheless and always, when a foreign will is so offered for probate in this state, two questions are open as new and original questions for the determination of our own probate court: 1. The sufficiency of the proofs of foreign probate; and 2. The question of the residence of the deceased. For if upon

the question of residence it shall be determined that the deceased was in truth a resident of this state, it follows of necessity that the proper state court has exclusive original primary jurisdiction to admit the will to probate, and will not admit it as a foreign will for ancillary proceedings. It does not, of course, follow that because the probate court under such circumstances will not admit it as a foreign will that it will refuse it probate altogether. It will grant it probate, the facts warranting, in proceedings under section 1294 for original probate. Nor can practical difficulty arise because such a will has been probated in a foreign jurisdiction, for the code (section 1299, *supra*) meets this precise situation by providing that petition may be made to the court having ¹¹⁵ jurisdiction to have the will proved, whether it be lost or destroyed, or beyond the jurisdiction of the state.

We have discussed this question under what we have said we were convinced would be the view of a jurist treating the case as one of first impression. We are met, however, with the argument that our own adjudications express a contrary view, and are determinative of the question. Not that alone, but that this view has been adopted by the courts in probate throughout the state, and that the result of the construction of the law here set forth would be to declare void all letters admitting such wills to probate, and cloud the title to untold millions of property in the hands of innocent holders. If such consequences were to result, or if in fact there were any such adjudications, a court would pause long and ponder gravely before announcing a construction which would lead to such direful consequences. But the answer is that this court has made no such adjudications, and that no such consequences can follow; for, as has been said, this is the first time that the question upon direct appeal has been presented for determination. The cases to which appellant refers and upon which he relies are those of *Rogers v. King*, 22 Cal. 71, *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801, and *Estate of Richardson*, 120 Cal. 344, 52 Pac. 832. In *Rogers v. King*, 22 Cal. 71, the attack was collateral, not direct. The opinion is addressed to this state of facts, and the essential part of it is as follows: "The agreed case states that the executor named in the will filed in the probate court a petition for the probate of the will, and filed therein an authenticated copy of said will, and that the petition stated

all the necessary facts. . . . If, as agreed, the petition stated all the necessary facts, then upon its presentation with a copy of the will and the publication of due and legal notice, the court acquired jurisdiction to probate the will, and the judgment of the probate thereafter entered is conclusive. If any irregularities occurred in the proceedings or error in the judgment after jurisdiction was acquired, they could only be corrected by a direct proceeding for that purpose, and cannot be inquired into in this collateral proceeding." This is all that the case of *Rogers v. King*, 22 Cal. 71, contains, and it amounts to no more than a declaration that, the court in probate having acquired jurisdiction and having admitted a will to probate, errors in the ¹¹⁶ exercise of its jurisdiction do not render its order admitting the will to probate void, and cannot be considered upon collateral attack. In *Estate of Richardson*, 120 Cal. 344, 52 Pac. 832, while it appears from the facts that the testator was a resident of California at the time of his death, and that his will had been originally probated in a sister state, and subsequently had been offered for probate in this state as a foreign will, the sole question at issue which this court was called upon to determine, and did determine, was the right of a nominee of a devisee to testamentary letters. The question now before the court, as to the right to probate the will under any circumstances as a foreign will, was never discussed nor decided. *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801, was a case originally decided in Department and reconsidered by the court in Bank. That, too, involved the question, not of a direct, but of a collateral, attack upon the validity of an order admitting to probate as a foreign will the last testament of a resident of this state. The attack was principally directed to the sufficiency of the proof of authentication, and the court said: "An error of the court in deciding that certain documentary evidence, not properly authenticated, proved a valid foreign probate of a will, is not different in character or principle from an error in deciding, as in the case of *Irwin v. Scriber*, 18 Cal. 499, that certain evidence proved that the deceased had her last place of residence in Sacramento county. The error in the former case may have proceeded from a misconception of what constituted a valid foreign probate of a will, or from an error as to what was competent or sufficient evidence to prove it. In the latter

case, the error may have arisen from a mistaken view of what constituted a residence, or from an error as to what was sufficient or competent evidence to prove it. Such errors may be corrected by appeal, but do not render the judgment void." This case, then, must be taken to decide, and to decide only, that upon collateral attack an order admitting a will offered as a foreign will to probate is not void for error either in the proof of authentication or in proof of residence, as in *Rogers v. King*, 22 Cal. 71, and *Irwin v. Scriber*, 18 Cal. 499. Question may be raised over the strict logic of that opinion, but no doubt can exist as to the strong necessity which called it forth. It must be taken, therefore, as settled in this state, upon the authority of the cases cited, that the probate of such wills is free from ¹¹⁷ attack upon these questions in collateral proceedings, but that, upon the other hand, it is the duty of the court in probate to do as the court here did, refuse probate to a will offered as a foreign will, if the court shall be satisfied from the evidence that the testator was in fact a resident of this state at the time of his death.

For the foregoing reasons the order and decree appealed from are affirmed.

Beatty, C. J., Lorigan, J., and Angelotti, J., concurred.

Van Dyke, J., Dissented, and said in part: "From the record it appears that the copy of the will was duly authenticated in conformity with the laws of New Hampshire, and that such will was valid under the laws of said state admitting it to probate; that all the proceedings thereon were regular, and that there was nothing upon the face of the record to dispute the jurisdiction of the court of such state admitting the will to probate; and that said will was made and executed in conformity, not only with the laws of said state, but also in conformity with the laws of this state. The question, therefore, presented is whether, in the case of a testator, who, at his death, resided in this state, a will filed for probate in this state upon a duly authenticated copy thereof from the court of a sister state, first having been duly probated therein according to the laws of said state, may be admitted to probate, or must the original will be produced here for that purpose? Section 1322 of the Code of Civil Procedure, copied in the prevailing opinion, is taken from the act of 1850 to regulate the settlement of estates of deceased persons, being section 27 of said act: Stats. 1850, p. 377, c. 129. The language of the code sections bearing on the subject under consideration is plain and unambiguous, and cannot be controlled by any headlines of the chapter put there by the code commissioners. 'The mere class-

ifications can scarcely be deemed part of the law': Endlich on Interpretation of Statutes, sec. 70.

"In the case of Goldtree v. McAlister, 86 Cal. 93, 24 Pac. 801, the plaintiff sued in the character of trustee of the estate of Jonathan Thompson, deceased, under his last will. The testator was a resident of the county of San Luis Obispo, and left estate therein. His last will had been duly proved and allowed in the queen's probate court of London on the twenty-eighth day of October, 1875. His heirs and devisees were residing in this state and in England. Upon petition filed for the probate of said will from an exemplified copy thereof from said English court, the probate court of San Luis Obispo county, this state, after notice and proceedings as required by the code, admitted said will to probate in the following order: 'It is ordered that the paper heretofore filed purporting to be a copy of the last will and testament of said deceased be admitted to probate as the last will and testament of said deceased; that the said John Thompson and John A. Patchett be and they are hereby appointed executors of said estate; and that letters testamentary issue to the said petitioners upon their taking the oath as required by law.' Letters testamentary were accordingly issued to John Thompson and J. A. Patchett, who duly qualified. The will also appointed Thompson, Patchett, and Grierson trustees of the estate, and devised the property to them for the uses and purposes stated in the will. Thereafter, by an order of said superior court, Patchett was removed and plaintiff Goldtree was appointed in his place. On the trial of the case the defendant objected to the introduction in evidence of the record of the California probate proceedings of San Luis Obispo county, on the ground that the probate court of San Luis Obispo county never acquired jurisdiction of the subject matter of the probate of the will. Defendant's objections were overruled and judgment went for the plaintiffs, which judgment on appeal was affirmed by this court in department. Appellant filed a petition for a rehearing, and made the point that as Thompson was a resident of California at his death, his will was domestic to the state of California, and that the California court had no jurisdiction to grant ancillary or secondary probate, as was done in that case. A rehearing was granted, and appellant filed additional points and authorities upon the rehearing in Bank, in which it is said: 'Admittedly Jonathan Thompson was a resident of California at his death. It follows that his will, if any he left, was not a "foreign" but a domestic will—domestic to the state of California. . . . The English court had no jurisdiction to grant original probate of a will domestic to this state. The California court alone had such jurisdiction. The California court had no jurisdiction to grant auxiliary or secondary probate of the will in question.' And appellant's counsel especially relied upon the point of want of jurisdiction in the probate court of this state in the premises, and this question seems to have been fully presented to this court on the rehearing. In the opinion upon the rehearing by the court in Bank it is

said: 'The judgment appealed from in this case was affirmed January 31, 1890. A rehearing was granted, and the case has been argued in printed briefs. We have carefully considered the arguments of the learned counsel for appellant on the rehearing, but find nothing in them having the effect to change the former opinion': *Goldtree v. McAlister*, 86 Cal. 96, 97, 24 Pac. 801. This case, which is the latest expression of this court on the question, seems to hold directly that a will of a resident of this state can be admitted to probate in this state on an exemplified copy of its probate in a court outside of the state.

"As already shown, the will in question, upon petition, was ordered by the lower court to be withdrawn and transmitted to New Hampshire, where the deceased left property, to be there first admitted to probate. It can hardly be supposed that the court in doing this at the same time entertained the view that said will could only be admitted to probate in the first instance in Yolo county. To suppose so would be to suppose that the court set a snare to entrap petitioners so as to deprive the legatees and devisees under the will of the principal benefit resulting from the same. Under the provisions of the code, as well as upon the authority of *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801, the court below clearly erred in refusing to admit the will in question to probate under the circumstances, as shown, and the order to that effect should be reversed."

McFarland, J., also Dissenting, said: "I dissent and think that the order appealed from should be reversed. In my opinion the language of section 1322 of the Code of Civil Procedure, 'all wills duly proven and allowed in any other of the United States, or in any foreign country or state may be allowed and recorded,' etc., is entirely too clear and explicit to leave any room for the play of construction. The fact that the section is preceded by the subheading 'Probate of Foreign Wills' is not sufficient to overcome the unmistakable meaning of the language of the section. Indeed, the word 'foreign' does not necessarily mean in law a country other than a sister state of the American Union. In the majority of instances it includes such sister states, and this view of its meaning is so well established as to have gone into the text-books and law dictionaries as settled law. In 'Words and Phrases Judicially Defined' (volume 3, page 2851) it is said: 'For all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign and independent of each other; their constitutions and forms of government being (though republican) altogether different, as are their laws and institutions.' In *Bouvier's Law Dictionary* (volume 1, page 811) it is said: 'The several states of the American Union are foreign to each other with respect to their municipal laws.' In *Abbott's Dictionary* (volume 1, page 514) it is said: 'In American usage the several states of the

Union are foreign to each other with respect to matters governed by their municipal laws; while the relations of the general government and either state are domestic. This consideration qualifies the usage of several of the phrases mentioned under the present head. It is abundantly well settled that a bill of exchange drawn in one state, payable in another, is a foreign bill. The corporations created by one state are constantly called foreign corporations in any other. In each state the judgments rendered in, and laws enacted by, another state are foreign judgments and laws. A port of another state is a foreign port.' Therefore the word 'foreign,' in the subheading, is not at all inconsistent with the language of the section in question. And, of course, the legislature has full power over the whole subject of wills, descents, distribution of estates, and probate proceedings. There is not a word in the state constitution limiting its legislative authority in such matters."

Shaw, J., also Dissenting, said: "So far as the policy of the provisions of section 1322 of the Code of Civil Procedure is concerned, that is a question for the legislature, and not for the courts. There are considerations both for and against the proposition that the will of a person who dies a resident of this state may be first probated in some other state. In cases of persons who have recently become residents of this state it is often very much more convenient and less expensive to pursue this course. A large part of the population of this state has always consisted of persons who have lived here but a short period of time. It may be that the legislature, having these circumstances in view, believed it the best policy to provide that this might be done, and enacted this statute for the express purpose of allowing it to be done. But, in any event, in view of the plain language of the section, the matter of policy is immaterial. 'A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against policy. The statute is itself conclusive upon these subjects': Davis v. Hart, 123 Cal. 384, 55 Pac. 1060. The section in question must have the same meaning now as it had when it was originally enacted. It first became a part of the statute law of this state in 1850 when it was enacted in section 27 of the probate act (Stats. 1850, p. 378, c. 129) in precisely the same language as that contained in section 1322 of the Code of Civil Procedure, except that the words 'superior court' have been substituted for 'probate court.' In the probate act there was no chapter, heading, or subheading which could have any effect. It is inconceivable that the legislature would have re-enacted the section in the same language if it had intended to change the meaning, by limiting its application to wills of persons who at the time of their death resided out of this state. The phrase 'all wills'

in the section plainly includes wills of every description, domestic and foreign. Where the language of the statute is clear and unambiguous, as in this case, the title of the act, chapter, article, or sub-heading of the section cannot be resorted to for the purposes of giving it a different meaning from that which the words import: In re Boston etc. Co., 51 Cal. 624; Cohen v. Barrett, 5 Cal. 195; People v. Abbott, 16 Cal. 358; Hagar v. Supervisors, 47 Cal. 222. Furthermore, it cannot be said that the decision will not tend to unsettle titles to real property. While it may be true that the determination of the court, upon the question of fact that the residence of the deceased at the time of his death was in some other state or country, is conclusive on collateral attack, and that this has been settled by the decisions of this court, yet it has never been decided that where, in case of the probate of a so-called foreign will, the petition on its face avers that the deceased died a resident of this state, but that the will had been first probated in some other state, the fact of lack of jurisdiction is not apparent on the face of the record, and may not be raised upon collateral attack. The records of this court show that there have been several cases where wills of this character have been proven as foreign wills, and it is a fair, if not necessary, inference that the actual cases of that character have been quite numerous. Whatever may be now said in the way of a discriminating review of the previous decisions of this court, it must be admitted that the general opinion has been that, under section 1322, the will of a resident of this state, having been first admitted to probate in some other state, may be probated in this state as a foreign will. I think the court below erred in refusing to entertain jurisdiction."

"A rehearing was denied, and the following opinion was filed on November 13, 1905:

"BEATTY, C. J. In their petition for a rehearing counsel for appellant reiterate the argument that our construction of the code provisions relating to the proof of foreign wills (Code Civ. Proc., secs. 1322-1324) can only be sustained by reading into the statute a qualification of the words 'all wills' which will limit its application to wills 'of a certain kind,' contrary to the intention of the legislature and the general understanding of the courts of the state and the legal profession. I take leave to doubt this general understanding of the courts and the profession, and again call the attention of counsel to the fact that it is wholly unnecessary to read anything into the statute in order to limit its application to wills of a certain kind. The qualifying words are plainly written in the statute, and the fault is with counsel in ignoring their existence and their force. The statute does not say 'all wills' and stop there. Its language is (section 1322) 'all wills duly proved and allowed' in any other state or foreign country. Wills that have been duly proved and allowed are wills 'of a certain kind,' and in order to determine whether a particular will is of that kind we have to give a construc-

tion to the words 'duly proved and allowed.' When, therefore, is a will duly proved and allowed? Proof of a will is a proceeding in rem. To the validity of any judgment in rem—a judgment which as to the res binds all the world—there must be adequate public notice of the proceeding, and such notice must emanate from a court which has jurisdiction of the res. When the will of a resident of this state is the res, is it possible that the courts of every civilized country on the globe have a concurrent jurisdiction upon published notice to determine its validity? If we look to our own statute for a test of jurisdiction in such cases, we find that we confine the jurisdiction to the county of which the decedent was a resident at the time of his death, and this, it is safe to say, is the ordinary rule. Authority to take proof of wills is confined to courts whose territorial jurisdiction includes the domicile of the decedent. The fact that in this state, as in other states and countries, wills of nonresidents are admitted to probate on original proceedings for the purpose of administering upon their property within the state is no impeachment of this proposition. In such cases it is the property within this state and subject to its jurisdiction which constitutes the res, and proof of the will is allowed as a mere incident or means of determining the disposition of that property. And the decree which has only that purpose is conclusive only to that extent. It binds that property here and everywhere that the decrees of our courts are accorded full faith and credit, whether by comity or by force of the federal constitution. But such a decree is not binding as to the will itself in other jurisdictions where the decedent may have left property, and still less is it binding upon the courts of his domicile. It is not conclusive in other jurisdictions simply because, as a will and for all purposes, it has not been duly proved and allowed. It has been proved and allowed so far as it affects the disposition of the property within the particular jurisdiction, but no further.

"The considerations thus briefly indicated, it seems to me, ought to have prevented the hasty construction which we are told has been generally placed upon our statute by the profession and the courts in this state. As to the courts, it is true that in three instances, as shown by our records, the construction contended for by counsel has been accepted by the trial court, but in this court decrees admitting wills of residents of California to probate, on proof of foreign probate, have never been sustained, except as against collateral attack. My own opinion is clear that no will has been duly proved and allowed within the meaning of sections 1322-1324 of the Code of Civil Procedure, unless the proof has been taken in a court whose territorial jurisdiction includes the domicile of the testator. When a will has been admitted to probate here on proof of its admission to probate in some other jurisdiction, not including the domicile of the decedent, the decree and proceedings regularly taken under it are, of course, secure against what in *Goldtree v. McAlister*, 86 Cal. 93, 24

Pac. 801, is held to be collateral attack, and this irrespective of the question whether that decision can be reconciled with a correct construction of the statute. Correct or not, the rule of that case has become a rule of property, and as such must be upheld upon the doctrine of *stare decisis* for the protection of vested rights."

PROBATE OF FOREIGN WILLS.

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II. Admission to Record of Foreign Probate.

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I. Original Probate of Foreign Will.

A court may grant original probate of the will of a nonresident who dies leaving either personal or real property within its territorial jurisdiction, without the will being first approved in the courts of the testator's domicile: *Varner v. Bevil*, 17 Ala. 286; *Jaques v. Horton*, 76 Ala. 238; *Estate of Edelman*, 148 Cal. 233, post, p. 231, 82 Pac. 962; *Estate of Washburn*, 45 Minn. 242, 47 N. W. 790; *In re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; *Booth v. Timoney*, 3 Dem. Sur. 416; *Estate of Barandon*, 41 Misc. Rep. 380, 84 N. Y. Supp. 937; *Shields v. Union Cent. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951; *Estate of Clayson*, 26 Wash. 253, 66 Pac. 410; *Rader v. Stubblefield* (Wash.), 86 Pac. 560.

The California court in the principal case, while recognizing the jurisdiction of courts to grant original probate upon the wills of deceased nonresidents who leave property within the state, observes: "But the limitations of the operation of this principle should also be recognized, namely, that this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with, nor abrogate, the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration."

II. Admission to Record of Foreign Probate.

a. In General.—The statutes of the different states generally provide for the admission to record in their probate courts of foreign wills affecting property within their jurisdiction, which wills have

already been probated in a foreign court having jurisdiction in the premises: See the principal case, ante, p. 197; *Ward v. Oates*, 43 Ala. 515; *Shephard v. Carriel*, 19 Ill. 313; *State v. Judges of Probate*, 17 La. 486; *Succession of Hall*, 28 La. Ann. 57; *Smith v. Henning*, 10 W. Va. 596; *Secrist v. Green*, 70 U. S. (3 Wall.) 744, 18 L. ed. 153. Statutes of this kind apply to wills probated in a foreign country as well as to those probated in a sister state: *Gaven v. Allen*, 100 Mo. 293, 13 S. W. 501. If the will should appear invalid as to the real property devised, but valid as to the personalty, a copy of it may be filed and recorded as a will of the personal property only: *Lapham v. Olney*, 5 R. I. 413; *Ex parte Todd*, 3 Leigh (Va.), 819. But it is generally a condition precedent to the recording of any foreign will that it has already been probated in the foreign jurisdiction: *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, 1 L. R. A. 79.

b. Persons Entitled to have Probate Recorded.—Under a statute providing for the production of a copy of a foreign will and the probate thereof by the executor or any other person interested in the will, an assignee of a part of the interest in a devise is regarded as a "person interested": *Estate of Engle*, 124 Cal. 292, 56 Pac. 1022; so, too, is a petitioner described as a "subsequent purchaser of the estate of the deceased": *Mower v. Verplanke*, 105 Mich. 398, 63 N. W. 302. The statute is complied with where the one producing the will states in his petition that he is authorized to make the same by the representatives of the estate: *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795. The agent or attorney of an interested person may appear for him: *Evansville Ice etc. Co. v. Windsor*, 148 Ind. 682, 48 N. E. 592.

c. Will of Resident Dying Abroad.—In the principal case it is held that where a resident of California dies in another state, and his will is probated in the latter state, a court of California, within the territorial jurisdiction of which the deceased resided and left property, will not admit the will as a foreign will for ancillary proceedings. In such a case, the California court has original primary jurisdiction to probate the will, which it will not yield to the courts of another state, and then admit it here as a foreign testament upon an authenticated copy of the will and its probate. The doctrine thus announced in the principal case has been recognized in several other jurisdictions: See the note to *Bowen v. Johnson*, 73 Am. Dec. 56; *Scripps v. Wayne Probate Court*, 131 Mich. 265, 100 Am. St. Rep. 614, 90 N. W. 1061; *Bate v. Incisa*, 59 Miss. 513; *Stark v. Parker*, 56 N. H. 481; *Wallace v. Wallace*, 3 N. J. Eq. 616; *Manuel v. Manuel*, 13 Ohio St. 458; *Tarbell v. Walton*, 71 Vt. 406, 45 Atl. 748. In this last case it is decided that a will made in Illinois, when the testator was there domiciled, must be proved de novo in Vermont, notwithstanding it has already been probated in Illinois, if the testator was domiciled in Vermont at the time of his death.

No practical difficulty need arise, as is pointed out by the California court in the principal case, where the will of a resident has been probated in a foreign jurisdiction, for the statutes provide for the proof of a will, in a court having jurisdiction, when it is lost, destroyed, or beyond the jurisdiction of the state. This is illustrated in *Appeal of McCauly*, 130 Pa. 480, 18 Atl. 617. In that case a resident of Pennsylvania died in Ireland, and his will was probated and filed in the probate court of Dublin. As the will could not be withdrawn from the records of the foreign court, the Pennsylvania court admitted to probate an authenticated copy of the will, the court remarking that the inability to produce the will, caused by its detention in a foreign court, made secondary evidence of its contents admissible, as much as if the papers were lost or destroyed. To the same effect is *Loring v. Oakey*, 98 Mass. 267.

A nuncupative will executed in Louisiana by writing it out at length on the records of the acts of a notary, which by the law of that state cannot be removed therefrom, may be probated in Mississippi, in the county of the first domicile of the testatrix, by means of an authenticated copy: *Pratt v. Hargraves*, 77 Miss. 892, 78 Am. St. Rep. 551, 28 South. 722.

d. Necessity of Recording Foreign Probate.—Generally, a will probated in the courts of one state or country is not effective as a muniment or conveyance of title to land situated in another state or country, unless the will is proved anew and recorded in the latter jurisdiction as required by its laws: *Jones v. Jones*, 107 Ill. App. 464; *Evansville Ice etc. Co. v. Windsor*, 148 Ind. 682, 48 N. E. 592; *Sneed v. Ewing*, 28 Ky. (5 J. J. Marsh.) 460, 22 Am. Dec. 41; *Crusoe v. Butler*, 36 Miss. 150; *Gaven v. Allen*, 100 Mo. 293, 13 S. W. 501; *Wilson's Exrs. v. Tappan*, 6 Ohio, 172; *Walton v. Hall's Estate*, 66 Vt. 455, 2 Atl. 803; *Kerr v. Moon*, 22 U. S. (9 Wheat.) 565, 6 L. ed. 161; *McCormick v. Sullivant*, 23 U. S. (10 Wheat.) 192, 6 L. ed. 300; *De Roux v. Girard*, 105 Fed. 798. This rule is applicable to a foreign will creating a trust; the trust is not enforceable in the jurisdiction where the property is situated, until the will is there proved and recorded in the manner prescribed by its statutes: *Campbell v. Wallace*, 76 Mass. (10 Gray) 162; *Wells, Fargo & Co. v. Walsh*, 87 Wis. 67, 57 N. W. 969.

In Tennessee, however, a foreign will, executed in conformity to the statutes of that state, passes title to lands therein situated, without probate or registration in that state, if it has been duly proved and recorded at the domicile of the testator in another state under statutes thereof identical with those of Tennessee: *Bleidorn v. Pilot Mountain C. & M. Co.*, 89 Tenn. 166, 204, 15 S. W. 737; *Currell v. Villars*, 72 Fed. 330.

A copy of a foreign will, although recorded in Illinois, is not constructive notice of the will, unless it is authenticated and certified in the manner prescribed by the statutes of that state: *Harrison v.*

Weatherby, 180 Ill. 418, 54 N. E. 237. And the probate of a will granted in another state is not admissible in evidence in West Virginia, without re-probate there, for the purpose of showing that the power of appointment authorized to be exercised by the will has been so exercised: *Thrasher v. Ballard*, 33 W. Va. 285, 25 Am. St. Rep. 894, 10 S. E. 411.

e. Proof of Foreign Probate.—Statutes providing for the proof and registration of foreign wills which already have been probated at the domicile of the testator generally require the production of an authenticated copy of the will and the probate thereof: Cal. Code Civ. Proc., sec. 1323; *Wickersham v. Johnston*, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89; *In re Capper's Will*, 85 Iowa, 82, 52 N. W. 6; *Shannon v. Shannon*, 111 Mass. 331; *Pope v. Cutler*, 34 Mich. 150; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, 1 L. R. A. 79. It has been affirmed, however, that the proof and allowance of a will in another state where the testator had his domicile at the time of his death, if duly authenticated, will be presumed to be in accordance with the laws of that state; and that it is not necessary to specially allege the foreign statute, or to expressly prove that the proof and allowance of the will was in accordance with such statute: *Martin v. Martin*, 70 Neb. 207, 97 N. W. 289 (citing *Wilt v. Cutler*, 38 Mich. 189); *Houze v. Houze*, 16 Tex. 598.

In some states, when a foreign will and the probate thereof are sought to be proved and recorded in a jurisdiction where the testator left property, the statutes do not require the execution of the will to be according to the law of that state, but only according to the law of the state where the original probate has been had: *Kennard v. Kennard*, 63 N. H. 303. See, too, *Gardner v. Ladue*, 47 Ill. 211, 95 Am. Dec. 487. In other states, however, where real estate is involved, the proof of the will and of its probate must show that the will was executed in accordance with the law of the state where its registration is sought: *In re Nash's Will*, 37 Misc. Rep. 706, 76 N. Y. Supp. 453; *In re Hagar's Will*, 48 Misc. Rep. 43, 96 N. Y. Supp. 96; *Raleigh etc. Ry. Co. v. Glendon etc. Mfg. Co.*, 113 N. C. 241, 18 S. E. 208; *Clayson v. Clayson*, 24 Or. 542, 34 Pac. 358; or it must be shown, not only that the will has been admitted to probate in the foreign court, but that the evidence heard there was sufficient to authorize its probate in the first instance in the probate courts of the state where it is offered for registration: *Williams v. Jones*, 77 Ky. (14 Bush) 418; *Dupoyster v. Gagoni*, 84 Ky. 403, 1 S. W. 652.

f. Conclusiveness and Effect of Probate.

1. In General.—A decree of a probate court of one state admitting a will to probate within its jurisdiction is generally regarded as conclusive evidence of the due execution of the will, the testamentary capacity of the testator, and other matters affecting the validity of the will, upon an application to prove and record the will in another

state: *Harris v. Harris*, 61 Ind. 117; *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156; *Crippen v. Dexter*, 79 Mass. (13 Gray) 330; *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020; *Crusoe v. Butler*, 36 Miss. 150; *Poole v. Jackson*, 66 Tex. 380, 1 S. W. 75. But see *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49. The only question open to consideration in such a case is, as a rule, the jurisdiction of the court granting the probate and rendering the decree: *Ives v. Salisbury's Heirs*, 56 Vt. 565. See, in this connection, the principal case. Certainly the validity of the will cannot, after thus having been probated in a foreign court having jurisdiction, be attacked collaterally: *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88.

Under the Kentucky statute providing that no will shall be received in evidence unless it has been recorded in the county court, and that its probate in that court shall be conclusive, an order of the county court reciting that a foreign will and certificate of probate have been presented and evidence heard, and adjudging that such copy be admitted to record as a last will, is conclusive as to the competency and validity as evidence of such foreign will: *Whalen v. Nisbet*, 95 Ky. 464, 26 S. W. 188.

Where a will, executed in Kentucky according to the law of Missouri, is recorded in the former state, and an authenticated copy of such record is recorded in the proper county in Missouri, a copy of this last record furnishes conclusive proof of the will: *Applegate v. Smith*, 31 Mo. 166.

The action of a court in another state annulling a will probated in Texas cannot affect the status of property of the testator situated in Texas: *Acklin v. Paschal*, 48 Tex. 147. And a will devising lands in Virginia may be proved in that state, although it has been declared void in some other state: *Rice v. Jones*, 4 Call (Va.), 89.

2. Where Real Estate is Involved.—The probate of a will in one state, although conclusive as to the title to personalty, if the probate is made at the domicile of the testator, is of no force in establishing the sufficiency of a devise of land in another state; it can obtain such force only by virtue of some law of the state in which the realty is situated. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, applies to the records and proceedings of courts only so far as they have jurisdiction, and the courts of one state are without jurisdiction over title to real estate in another state: *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 578; *Keith v. Johnson*, 97 Mo. 223, 10 S. W. 597; *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375; *Martin v. Stovall*, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130.

Where a will has been duly probated in one state, its admission to probate and record in another state where the testator left real property operates to convey to and vest title in the devisees the same as would a domestic will duly probated: *Parker v. Parker*, 65

Mass. (11 Cush.) 519; *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795; *Carpenter v. Denoon*, 29 Ohio St. 379; *Markwell v. Thore*, 28 Wis. 548; *Hayes v. Lienlokken*, 48 Wis. 509, 4 N. W. 584. And the title of the devisees takes effect by relation as from the date of the testator's death: *Wright v. Williamson*, 67 Me. 524; *Hall's Lessee v. Ashby*, 9 Ohio, 96, 34 Am. Dec. 424; *Bleidorn v. Pilot Mountain Coal etc. Co.*, 89 Tenn. 166, 204, 15 S. W. 737.

A conveyance by a devisee under a foreign will, made before the will is filed and recorded in the state where the land is located, is nevertheless good, for his title has relation to the decease of the testator: *Trustees of Putnam Free School v. Fisher*, 30 Me. 523. And if executors make a conveyance of land under a power contained in a will, after the will has been probated at the domicile of the testator, but before it has been proved and recorded in the state where the land lies, the subsequent proof and registration of the will in the latter state will relate back and validate the sale: *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503, 61 N. W. 1020.

GREENBERG v. WESTERN TURF ASSOCIATION.

[148 Cal. 126, 82 Pac. 884.]

PLACE OF AMUSEMENT—Rights of Ticket-holder—Constitutional Law.—A statute making it unlawful to refuse admission to a proper person holding a ticket to any place of public amusement, and entitling him, if refused admission, to recover his actual damages and one hundred dollars in addition thereto, is constitutional. (pp. 217, 218.)

This action was brought by a person ejected from a race-course, and was based on a statute declaring it unlawful to refuse admission to proper persons holding tickets to places of public amusement, and entitling them, if refused admission, to recover their actual damages and one hundred dollars in addition thereto.

W. S. Goodfellow, Goodfellow & Eels, Charles F. Gardner and D. E. Alexander, for the appellant.

Sullivan & Sullivan and E. C. Harrison, for the respondent.

127 HENSHAW, J. This case is between the same parties and similar to that of *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050. Plaintiff recovered judgment before a jury, and from that judgment and from an order refusing its motion for a new trial defendant appeals.

Defendant first complains of the court's refusal to instruct the jury to render a verdict in its favor; the contention herein being that upon the undisputed facts Green and Newman, who ejected the plaintiff, were not employes of the defendant, but of Mr. Morse, proprietor of the Morse Detective Agency, and that as Morse was an independent contractor, the doctrine of respondeat superior should have been applied to him, and not to the defendant. The evidence, however, upon the question was conflicting, and the court properly submitted the matter for determination to the jury.

It is next contended that the act under which plaintiff sought his recovery is unconstitutional, and in this regard it is insisted that the construction put upon the act in *Greenberg v. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050, is erroneous. Herein appellant contends that the statute is in contravention of the fourteenth amendment to the constitution of the United States and section 1 of the declaration of rights of the state constitution, and this court is asked to reconsider the construction which formerly was put upon the act. The argument of appellant in this respect seems to be that as at common law the purchaser of a ticket to a place of amusement held only a revocable license, and the proprietor of such a place of amusement could either refuse the holder of the ticket admission or eject him after admission, not being responsible in tort, but merely in contract for the price of the ticket and the necessary expenses incurred by the purchaser, no subsequent legislation by the state can modify this common-law rule, except in one particular, and that is, that the exclusion cannot be by way of race discrimination, and because of "race, color, or previous condition of servitude," and that, as the act in question is not designed ¹²⁸ to meet this condition or to effectuate this end, it is an unwarranted invasion of the rights which the defendant enjoyed before the passage of the act under the rule as it existed at common law. If the right of state legislatures to pass an act such as this rested upon the proposition enunciated, the acts themselves would be of no value, for, as pointed out in the note to *McCrea v. Marsh*, 12 Gray, 211, 71 Am. Dec. 745, "The states might pass such laws, but, if a ticket to a theater is but a revocable license, they would be of little effect, as, if the theater proprietor desired to exclude colored persons, he might do so merely by revoking the license, and it would be impossible to determine whether it was revoked by reason of 'race,

color, or previous condition of servitude.' ” The truth of the matter is that the right of the state rests upon no such flimsy foundation. It is based upon its fundamental right, when not acting in contravention to its constitution or to the constitution of the United States, to modify the common law. As is said in *Charge to Grand Jury*, 1 Hughes, 541, Fed. Cas. No. 18,258. “A state has the constitutional and legislative power to change or modify the common law, and by statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, etc.” As pointed out in *Dillon on Municipal Corporations* (fourth edition, volume 1, section 357), “Charters not infrequently confer upon the corporation the power to ‘license and regulate’ or to ‘license, regulate, and tax’ certain vocations and employments, and to ‘tax and restrain’ or ‘prohibit’ exhibitions, shows, places of amusement, and the like, and, unless there is some specified limitation on the authority of the legislature in this respect, such provisions are constitutional.” The state, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power, and not at all as having to do with civil rights, that the act in question was upheld in 140 Cal. (and 73 Pac.), and its constitutionality is here again affirmed.

McFarland, J., Lorigan, J., Shaw, J., Angelotti, J., and Van Dyke, J., concurred.

The judgment of the supreme court of California was affirmed, and the constitutionality of the statute involved sustained on writ of error: See *Western Turf Assn. v. Greenberg*, 27 U. S. S. C. Rep. 384.

The Law Applicable to Places of Public Amusement is considered in the recent note to *Horney v. Nixon*, 110 Am. St. Rep. 525-537, and in the subsequent case of *Collister v. Hayman*, 183 N. Y. 250, 111 Am. St. Rep. 740.

CALDWELL v. GRAND LODGE OF UNITED WORKMEN.

[148 Cal. 195, 82 Pac. 781.]

BENEFIT SOCIETY—Dependence of Beneficiary.—A married woman whose husband is capable of supporting her is not "dependent" on a member of a mutual benefit society, not her husband, so that he can designate her as his beneficiary, when she is not related to him and has no legal or moral claim upon him, except that he advised her to get married and promised to take care of her while he lived, which he did. (pp. 220, 221.)

BENEFIT SOCIETY—Dependence of Beneficiary.—The dependence which authorizes a member of a mutual benefit society to designate the person dependent upon him as his beneficiary, is a dependence resting upon some moral, legal or equitable ground, not a dependence which is only a matter of favor, which is founded upon the mere whim or caprice of the member, and which may be cast aside by him without violating any legal or moral obligation. (p. 221.)

BENEFIT SOCIETY—Change of By-laws.—A reasonable amendment to the by-laws of a mutual benefit society limiting the classes of persons who may be designated as beneficiaries is binding upon a member who agreed, when he joined the society, to abide by and conform to the by-laws then in force or subsequently adopted. (p. 222.)

William H. Jordan and Davis & Hirshberg, for the appellant.

Riordan & Lande, for the respondent.

196 HENSHAW, J. The defendant is a fraternal and beneficial association. Plaintiff brought her action to recover from the defendant the sum of two thousand dollars, which she claims under the terms of a beneficiary certificate issued by defendant to Oliver H. Baker, who in his lifetime was a member of the order. Baker joined the order in 1879 and in his application for a beneficiary certificate declared as follows: "I do hereby agree that compliance on my part with all laws, regulations and requirements which are or may be enacted by said order is the express condition upon which I am to be entitled to participate in the beneficiary fund and have and enjoy all the other benefits and privileges of said order." When Baker joined the order the by-laws provided that certificates might be made payable "to any person or persons selected by the member." In 1889 Baker's certificate was payable to the Humboldt Savings and Loan Society as

trustee of his estate. While this certificate was so outstanding the order in 1893 amended its laws so as to read: "Each member shall designate the person or persons to whom the beneficiary fund due on his death shall be paid, who shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." In 1898, while this by-law was in force, Baker revoked his nominee, the Humboldt Savings and Loan Society, and directed payment of the certificate to be made "to Mrs. Howard W. Caldwell, being no relation to myself, of 9 Langton street, San Francisco, being dependent upon me." After Baker's death Mrs. Caldwell made demand for the payment of the certificate, which was refused upon the ground that she was not one of the persons contemplated by the above-quoted by-law in whose favor a legal certificate could issue. Upon this controverted proposition the trial was had, resulting in a judgment in favor of the plaintiff, and the defendant appeals.

Respondent meets the appeal with the preliminary objection that the specifications of the particulars wherein the evidence is alleged to be insufficient are objectionable; but we think the specifications fairly comply with the requirements of ¹⁹⁷ section 659 of the Code of Civil Procedure. The court found that the plaintiff was a person dependent upon Baker within the meaning of the provision of the by-law above quoted. The facts as to such dependence are, in brief, as follows: Plaintiff was in no way related to the deceased, Baker. The deceased, Baker, had proposed marriage to her and she had refused him, saying that she did not love him and would not marry a man for his money; that she cared for Caldwell, but that he could not afford to marry her. Baker told her to get married, and she did. He furnished a house for her and lived there with her husband and herself, gave her money, paid doctors' bills, and showed himself in many ways most generous to her and her husband. Upon the other hand, Mrs. Caldwell had a husband who earned, when he worked, two dollars a day, and it is not pretended that she had the slightest legal claim whatsoever upon Baker. It is not pretended that she had the slightest moral claim upon him, unless it came from the fact that he told her to go ahead and get married and that he would take care of her while he lived; but as Baker's promise was only to take care of her while he lived, and as he appears to have handsomely fulfilled that promise,

this moral obligation certainly ended with his death. The question is whether this state of facts constitutes the plaintiff a dependent person within the meaning of the word as used in the by-laws of the order. Unquestionably it does not. The dependence which is there meant is a dependence resting upon some moral, legal, or equitable ground, not a dependence which is only a matter of favor, which is founded upon the mere whim or caprice of the member, and which may be cast aside by him without violating any legal or moral obligation. Accepting the somewhat strange story told by the plaintiff at its face value, she was married and had a husband capable of supporting her, yet she accepted presents of money, clothes, and the like from Baker, who lived in her household, and paid her board, without the slightest legal or moral obligation upon his part to continue so to do for one day longer than suited his whim. Moreover, as has been pointed out, the moral obligation to do anything for her ceased, by the very terms of her testimony, with his death. As is said in *McCarthy v. New England Order of Protection*, 153 Mass. 314, 25 Am. St. Rep. 637, 26 N. E. 866, 11 L. R. A. 144: "Trivial, casual, or perhaps wholly ¹⁹⁸ charitable assistance would not create the relationship of dependency within the meaning of the by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance, or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable ground, and not upon the purely voluntary or charitable impulse or disposition of the member." Such is the accepted rule, and it cannot be disputed that, in considering the charitable and benevolent nature of these associations, it is the just rule: *Supreme Lodge K. of H. v. Oeters*, 95 Va. 610, 29 S. E. 322; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561; *Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187; *American Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. 634; *Hellenberg v. B'nai B'rith*, 94 N. Y. 580; *Gillam v. Dale*, 69 Kan. 362, 76 Pac. 861; *Niblack on Benevolent Societies*, sec. 195; *Bacon on Benefit Societies*, 2d ed., sec. 261.

It is, however, contended that as Baker became a member of the order at a time when its by-laws permitted him to have the certificate issued in favor of any person, a subsequent change in the by-laws limiting the classes of persons to whom such certificate could be issued was an impairment of his con-

tract, and thereby void as to him and as to the certificate actually issued in favor of this plaintiff. It is unquestionably true that in a policy of life insurance a designation of a beneficiary valid in its inception remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated in the contract: *Courtois v. Grand Lodge*, 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. 970; *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610. But such is not the proposition here presented. This principle would have been applicable if refusal had been made by the order after the passage of its amended by-law to pay the certificate in favor of the Humboldt Savings and Loan Society, which was a valid certificate in favor of that institution at the time of its issuance. In this case Baker surrendered that certificate, and while the amended by-law was in force caused a new certificate to be issued to a person who under the by-law was not entitled to it. Baker had not been compelled to designate a new beneficiary; but having voluntarily ¹⁰⁰ undertaken so to do, could he or could he not designate a beneficiary not contemplated by the by-law then in force? We entertain no doubt that this he could not do. Baker joined the order, agreeing specifically to abide by and conform to the by-laws in force or subsequently to be adopted. His compliance with such laws as were then in force or might thereafter be enacted was by his express agreement made a condition by which he was entitled to participate in the beneficiary fund of the order; and where the contract between the member and the order is as here disclosed, it is never to be disputed that all subsequent rules, regulations, and by-laws, not in themselves unreasonable, against express law or public policy, enter into and govern all of his rights and relationship with the association: *Wist v. Grand Lodge*, 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; *Masonic Ben. Assn. v. Serverson*, 71 Conn. 719, 43 Atl. 192. The amended by-law in question was certainly a reasonable one, and after it went into force Baker had no right to name a beneficiary belonging to any other than one of the classes therein designated. Upon the other hand, he did declare that plaintiff came within the class of dependent persons, and the order was justified in issuing the certificate upon this declaration. It was a statement upon the truth of which the validity of the contract depended. It amounted to a warranty: *Hogins v. Supreme Council*, 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125.

But as it appears from what already has been said that plaintiff did not belong to the designated class, and that she was not, within the meaning of the word as employed in the by-law, a dependent person, the judgment appealed from must be reversed, and it is ordered accordingly.

McFarland, J., and Lorigan, J., concurred.

A Beneficiary in a Benefit Society must be dependent upon a member in a material degree for support, maintenance, or assistance, and the obligation to furnish it must rest upon some moral, legal or equitable ground, not upon purely voluntary or charitable impulses: *McCarthy v. Supreme Lodge*, 153 Mass. 314, 25 Am. St. Rep. 637; *Lavinge v. Ligue Des Patriotes*, 178 Mass. 25, 86 Am. St. Rep. 460.

Amendments to the By-laws of Benefit Societies, so long as they are reasonable, are valid as against pre-existing members, at least if they have expressly agreed in their contract of membership to be bound by subsequently enacted by-laws: See the note to *Strauss v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706-720; *Gilmore v. Knights of Columbus*, 107 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

WELCH v. BRITISH-AMERICAN ASSURANCE COMPANY.

[148 Cal. 223, 82 Pac. 964.]

FIRE INSURANCE—Construction in Favor of Insured.—Conditions in a policy of fire insurance which provide for a forfeiture of the interest of the assured or other persons claiming under the policy are strictly construed against the insurer; and if there is any ambiguity which reasonably may be solved by either of one of two constructions, that interpretation will be adopted which is the most favorable to the assured or the beneficiary in a deed of trust to whom the loss is made payable as his interest may appear. (p. 225.)

FIRE INSURANCE—Forfeiture by Mortgagor.—If a policy of fire insurance provides that, "If, with consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described therein, the conditions hereinbefore contained shall apply in the manner expressed in such conditions and provisions of insurance relating to such interest as shall be written upon, attached, or appended thereto," such provision has the effect of preventing the conditions previously mentioned from applying to such interest, unless they are again written upon, attached or appended to the policy, as applicable to that interest, and the interest of a mortgagee is free from all such conditions not thus attached, so that a conveyance by the owner, without the consent of the insurer, does not affect the rights of the mortgagee. (pp. 229, 230.)

Nye & Kinsell, for the appellant.

H. A. Powell and W. A. Dow, for the respondent.

224 SHAW, J. This is an action by a creditor whose debt was secured by a deed of trust of the property insured, to recover the sum of two thousand dollars upon a fire insurance policy issued by the defendant to one George H. Barrett, the maker of the deed of trust. The trust deed was executed after the issuance of the policy, and thereupon a slip was attached to the policy making the loss, if any, payable to the plaintiff, as his interest should appear. The sole proposition **225** presented for decision is the question whether or not, under the terms of the policy, and the facts stated in the complaint, a change of ownership of the property insured, subsequent to the issuance of the policy and before the loss, without the written consent of the defendant thereto indorsed on the policy, made the policy void as against the plaintiff.

The policy contained a paragraph declaring that it should be void upon the happening of either one of a large number of conditions, among which was that it should be void if, without an agreement by the company indorsed on or added to the policy, "any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or voluntary act of the insured, or otherwise." Following this paragraph, after several other intervening paragraphs relating to other matters, the following clause, called for convenience, the "mortgage clause," was inserted: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto." At the close of the policy appeared this clause: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto. . . . Nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." It appeared from the complaint that

after the policy was issued and the deed of trust executed, and before the loss occurred, the title to the property had been transferred from Barrett to one J. F. Sanborn, and that no agreement that it should be so transferred was indorsed on the policy or executed by the defendant. Upon this it is claimed that the policy was avoided by the transfer without consent of the company.

²²⁶ It is conceded that in the absence of any provision in the policy to the contrary, if the title to the property should be conveyed without the consent of the company, prior to the happening of a loss, the company would not be liable therefor. The insurance ran to the original owner, to whom the policy was issued, and the subsequent agreement that the loss should be payable to the plaintiff as his interest should appear, if taken alone, left the insurance still running to the owner of the property, and not to the plaintiff, so that under the rule prevailing in such cases (Civ. Code, sec. 2541), any act of the owner which, by the terms of the policy, would be sufficient to avoid it as against the owner, would prevent a recovery by the plaintiff, although he was not aware of the violation of its terms, and did not consent thereto. The question for decision is, therefore, whether or not the clause above quoted, referring to an interest in favor of third persons, operates to change this rule. We think it must be so considered. It is well established that conditions which provide for a forfeiture of the interest of the assured or other persons claiming under the policy are to be strictly construed against the insurance company, and if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, that interpretation shall be adopted which is the most favorable to the assured, or, in this particular case, to the beneficiary in the deed of trust. It is evident from the insertion of this clause in the policy that the parties thereto contemplated that the assured might thereafter mortgage or hypothecate the property, and thereby create an interest in the policy in favor of the creditor for his better security. The mortgage clause was manifestly inserted to facilitate such a transaction. It must be considered as having been directed toward such anticipated creditor of the assured, and as having been made for his benefit. The provision that, in the event of the existence of such an interest in favor of the third person, "the conditions hereinbefore contained shall

apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," was intended to have the effect of preventing the conditions previously mentioned in the policy from applying to such interest, unless ²²⁷ the conditions should be again written upon, attached or appended to the policy. No other reasonable meaning can be given to the language. It would not be necessary to write them out in full upon the policy, which would be practically impossible. A few words making the provisions, or certain of them, as was desired, applicable to the other interest could readily be inserted in the slip containing what is called the "loss payable" clause attached to the policy. Even, however, if it should be considered necessary to attach the conditions in full, it could be done without inconvenience by simply printing them in the attached slip.

The real contention of the appellant is that the last half of the mortgage clause should be interpreted as if it read as follows: "The conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance, so far as those conditions and provisions relate to such interest as shall be written upon, attached, or appended hereto." This, however, is contrary to the grammatical construction of the clause, as contained in the policy, and does violence to the natural and ordinary meaning of the language. It is also contrary to the rule that a contract must be construed so as to give some effect, if possible, to every part of it: *Mickle v. Sanchez*, 1 Cal. 200. Without this mortgage clause, under the rule as above conceded and as expressed in section 2541 of the Civil Code, the interest of a creditor to whom the loss is made payable is subject to all the conditions of the policy, and they would apply to such interest, whether the interest was described in any writing made upon or attached or appended to the policy or not. Therefore, if the above paraphrase correctly states the meaning intended by the mortgage clause, its insertion was idle and useless, for the legal effect of the policy would be the same without it as with it. Furthermore, if this could be considered a reasonable construction, the other is at least as reasonable, and under the rule of strict construction against the insurer who prepares the policy (Civ. Code, secs. 1442, 1654) the meaning we have attributed to it must be adopted. Section 2541 of the Civil Code gives the rule governing the effect of the cre-

ation of an interest in a mortgagee or creditor in cases where the policy runs to the mortgagor or ²²⁸ debtor, and contains no mortgage clause such as that here inserted. It was not intended to, and does not, apply to policies which are not silent on the subject, but themselves provide to what extent its conditions shall apply to such interest, when created.

No conditions with reference to the plaintiff's interest, or statement specifying the extent to which the conditions of the policy should apply thereto, were written upon, attached, or appended to the policy. We are therefore of the opinion that the interest of a third person in the policy is not subject to the conditions in question, and that such third person is not responsible for the acts of the insured in violation thereof, and consequently that the conveyance of the title to Sanborn without the consent of the company did not forfeit the interest of the plaintiff in the policy. The subsequent provisions above quoted do not change the effect of the clause in question. The declaration that the policy is made "subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added hereto," clearly does not change the effect of the mortgage clause, for that clause is one of the stipulations and conditions to which this last paragraph refers, and it affirms the mortgage clause as well as the other clauses of the policy, and the effect of the mortgage clause is to except the interest of the plaintiff from the other conditions referred to. The remaining provision, that no privilege or permission affecting the insurance should ever be claimed by the insured unless written on or attached to the policy, is equally ineffective to nullify the mortgage clause. The word "insured" as there used, under the rule requiring strict interpretation against the company, and in view of the language of the mortgage clause above quoted, must be considered as referring to Barrett, the original holder of the policy, or his successor, and not to the plaintiff. The policy considered in *Sharp v. Scottish etc. Co.*, 136 Cal. 542, 69 Pac. 253, 615, did not contain any provision equivalent to the mortgage clause in the policy here sued on, and that case has no application either for or against the plaintiff.

The mortgage clause in the policy under consideration is a part of the form of policy known as the "New York Standard ²²⁹ Form." This form was prescribed by statute in New York, and made obligatory after May 1, 1887, on all insurance

companies doing business in that state: 3 N. Y. Rev. Stats., p. 1663. It has since been prescribed by statute in Pennsylvania (Brightly's Digest, pt. 2, p. 2528), Minnesota (1 Laws Minn. 1891, sec. 2973), North Dakota (Laws 1890, p. 253, c. 74), Wisconsin (1 Rev. Stats. 1898, secs. 1941-1953), New Jersey (2 Gen. Stats., p. 1766), and Michigan (1 How. Ann. Stats., secs. 4345-4350). Singularly enough the clause in question does not appear to have been the subject of litigation or judicial interpretation in any of these states. It has been construed, however, by the highest courts of Nebraska, Washington, Mississippi, Illinois, Iowa, and Missouri in the following cases: *Oakland H. I. Co. v. Bank of Commerce*, 47 Neb. 717, 58 Am. St. Rep. 663, 66 N. W. 646, 36 L. R. A. 673; *Boyd v. Thuringia Ins. Co.*, 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165; *Queen's Ins. Co. v. Dearborn Sav. Assn.*, 175 Ill. 115, 51 N. E. 717; *Christenson v. Fidelity Ins. Co.*, 117 Iowa, 77, 94 Am. St. Rep. 286, 90 N. W. 495; *East v. New Orleans Ins. Co.*, 76 Miss. 697, 26 South. 691; *Senor v. Western etc. Ins. Co.*, 181 Mo. 104, 79 S. W. 687. These decisions all concede that, in the absence of such mortgage clause, the mortgagee takes subject to all the conditions expressed in the body of the policy, but hold, as we have held, that by virtue of the mortgage clause in the body of the policy the interest of the mortgagee is free from all such conditions, except such as are repeated at the time of the creation of that interest by being at that time again, in substance at least, written upon the policy or attached or appended thereto.

For the foregoing reasons we think the demurrer was rightly overruled.

The judgment is affirmed.

Beatty, C. J., Angellotti, J., and Van Dyke, J., concurred.

McFARLAND, J., Concurring. I concur in the judgment of affirmance. I have reached this conclusion after a great deal of consideration of the main question involved, and have done so mainly in deference to the opinions of judges and decisions of courts in other jurisdictions. The fire insurance policy involved here was issued by appellant to one Barrett. It was to be void if Barrett violated certain named conditions. ²³⁰ Barrett did violate one of those conditions, and as to him the policy became void. But after the issuance of the policy Barrett mortgaged the insured property to the plaintiff herein, George D. Welch, and afterward the appellant, at the re-

quest of Barrett, attached to the policy a writing, in these words: "Loss, if any, payable to George D. Welch as his interest may appear." These words, considered alone, did not change the policy. Barrett still remained the insured party, and in case of fire Welch was to recover only what was due Barrett, and could recover nothing if the latter had forfeited the policy. The above proposition is admitted upon all hands. But it is contended that Welch can recover, notwithstanding the policy is void as to Barrett, on account of a clause in the body of the policy, which, leaving out the parts immaterial here, is as follows: "If . . . an interest . . . shall exist in favor of a mortgagee, . . . the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto." This language seems to me to be as awkward and as difficult to put any meaning into as any that has come under my observation in judicial investigations. If an insurer intends that when he inserts a clause into the policy that the loss, if any, shall be payable to the mortgagee, the mortgagee is to be relieved from the effect of any act of the insured mortgagor which would invalidate the policy, it is a very simple matter for him to say so.

It is contended that he does say so by the mongrel clause above quoted. If I were entirely free to follow my own notion about the question, my inclination would be to agree with the dissenting opinion of Mr. Justice Anders in *Boyd v. Thuringia Ins. Co.*, 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165, and hold that such clause was not fairly susceptible of the construction claimed by respondent in the case at bar. But this identical clause, which seems to have originated in New York, has become quite common in insurance policies, and has been before a number of courts for interpretation, and its meaning has almost universally been held to be that none of the forfeiting conditions as against the insured affect the mortgagee, except those which are restated in the "loss payable clause," ²³¹ and that if there are no such conditions in said last-mentioned clause, the insured can do no act whatever which will in any way affect the right of the mortgagee. It was so expressly held in *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717, 58 Am. St. Rep. 663, 66 N. W. 646, 36 L. R. A. 673, *Queen's Ins. Co. v. Dearborn Sav. Assn.*, 175 Ill. 115, 51 N. E. 717, *Christenson v. Fidelity Ins.*

Co., 117 Iowa, 77, 94 Am. St. Rep. 286, 90 N. W. 495, East v. New Orleans Ins. Co., 76 Miss. 697, 26 South. 691, Senor v. Western Fire Ins. Co., 181 Mo. 104, 79 S. W. 687, and Boyd v. Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165. We have been referred to no cases squarely holding the other way, unless, perhaps, it be Franklin Ins. Co. v. Wolf, 23 Ind. App. 549, 54 N. E. 772. In Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 58 Am. St. Rep. 663, 66 N. W. 646, 36 L. R. A. 673, the supreme court of Nebraska construes the clause in question as follows: "That is, in order to render the general conditions of the policy applicable to the interests of the mortgagee, there must be written upon, attached or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the 'loss payable clause' nor otherwise by writing upon, attached to, or appended to the policy was there any provision or condition carrying the conditions of the policy into such clause or rendering them in any manner applicable." And the other cases give it the same construction. And I am disposed to follow those courts rather than rely upon my first impressions, particularly in view of the rule that an ambiguous clause in a policy must be construed against the insurer. And even if there be doubt as to the correctness of this construction, there is some consolation in the thought that an insurer who puts such a nondescript provision into his policy should hardly be heard to object to any kind of construction which anyone chooses to give it.

Henshaw, J., and Lorigan, J., concurred.

Rehearing denied.

For Authorities upon the question involved in the principal case, see Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 58 Am. St. Rep. 663, and note; Smith v. Union Ins. Co., 25 R. I. 260, 105 Am. St. Rep. 882, and cases cited in the cross-reference note thereto.

ESTATE OF EDELMAN.

[148 Cal. 233, 82 Pac. 962.]

APPEAL AND ERROR—Will Contest.—An Order Dismissing a Will Contest is Reviewable upon appeal from the final order or judgment in admitting the will to probate. (p. 233.)

WILL CONTEST—Order of Proof—Interest of Contestant.—In controlling the order of proof in a will contest, the court may require the contestant to first establish his interest, and may dismiss the proceedings if he fails to do so. (p. 233.)

RELEASE OF HEIRSHIP—Proof of Fairness.—Where a release of a right of inheritance is made to the ancestor, the rule requiring the person relying on it to prove its fairness is no longer in force. (p. 234.)

HUSBAND AND WIFE, Release of Heirship as Between.—If a husband and wife execute an agreement of separation whereby each releases all claim to the property of the other and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he will not be heard to say, after her death, that the contract is unfair. (p. 234.)

RELEASE OF HEIRSHIP—Equitable Estoppel.—While the law may not give effect to transfers or releases of heirship, they are cognizable in equity, and in property cases afford a complete defense by way of estoppel. This equitable defense by way of estoppel is cognizable by the court in probate. (pp. 234, 235.)

FOREIGN WILLS—Original Probate.—A court has jurisdiction to grant original probate of the will of a nonresident who died leaving property in this state. (p. 235.)

James G. McGuire and J. J. Burt, for the appellant.

Garret W. McEnerney, for the respondent.

234 HENSHAW, J. The last will and testament of Hannah E. Edelman, deceased, having been offered for probate, Charles Edelman appeared, presenting grounds of contest against its admission, and alleging that he was the husband of deceased, that the deceased at the time of making the will was not of sound or disposing mind, and the will was executed under undue influence. Proponents of the will answered these grounds of contest by denial, and for an affirmative defense pleaded an agreement entered into between Edelman and his wife, wherein it was recited that it ²³⁵ being desirable to avoid litigation and controversy and to settle and define all property rights and controversies as to property which might arise between the parties, it was mutually agreed and understood that they would henceforth continue

to live separate and apart and would not live again together as husband and wife; that neither would thereafter make or assert any right, claim or demand upon or against the other for any maintenance or support, and each party in turn "waived and released any and all claim of every kind and nature of, in and to the whole and every part of the real and personal property now or heretofore or hereafter owned, claimed or possessed by or standing in the name of either party, and waives all right and claim of inheritance to succeed to any part of the property as an heir or successor at law, upon or in the event of death." Trial was had upon the issues thus framed, and the court in its discretion directing the order of proof, heard and decided the question of the validity and legal effect of the agreement above mentioned. It held in favor of the validity of the agreement, and decided that its effect was to deprive appellant of his right of contest of the will of deceased, as being neither an heir nor a party in interest. This decision was embodied in an order dismissing appellant's contest, subsequent to which the court, taking proof of the execution of the will, admitted it to probate, and from the order so admitting it to probate this appeal is taken.

Respondent makes a preliminary objection to the hearing of this appeal, which is in its essence a motion to dismiss the appeal, upon the ground that the appeal should have been taken from the order of court dismissing the contest; that if that order is not appealable it cannot be reviewed under this appeal from the order admitting the will to probate, because at the time of the admission of the will to probate, appellant's contest having been dismissed, he was not a party aggrieved nor a party in interest. Reliance is here placed upon *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595. That was a contest after probate, and an appeal from the order dismissing the contest was entertained by this court. Support for respondent's position is also sought in the language of this court in *Estate of Gregory*, 133 Cal. 131, 65 Pac. 315, and *Estate of Latour*, 140 ²³⁶ Cal. 414, 73 Pac. 1070, 74 Pac. 441; but what was said in those cases was for the purposes of illustration and by way of analogy, and neither of them undertook to say that an order such as here made is not properly reviewable upon appeal from the order admitting the will to probate. The only appealable orders in probate matters are those designated in subdivision

3 of section 963 of the Code of Civil Procedure. Sections 1307 and 1312-1314 of the Civil Code have reference to proceedings upon contest of the probate of a will. The adjudication to be made is as to the validity or invalidity of the will, and the order here made dismissing a contest is reviewable upon appeal from the final order or judgment admitting the will to probate as is any other intermediate order or ruling which the court may make: Code Civ. Proc., secs. 956, 1714. Thus in *Re Hickman*, 101 Cal. 609, 36 Pac. 118, the contest of the public administrator of the probate of a will was met by demurrer, upon the ground that he was not a person interested in the estate. The demurrer was sustained, and the appeal taken by the public administrator was from the order admitting the will to probate as here. There is no difference in principle between the order of the court denying a right of contest for lack of interest upon demurrer, and denying it, as in this case, by a formal dismissal of the contest for lack of interest.

The court, in controlling the order of proof correctly held that the contestant must first establish his interest: *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 444. And it further held that contestant had waived his right of heirship and all claim upon the estate of the deceased by the articles of separation and mutual disinherison above referred to. This agreement was carefully drawn, and by its terms was clearly designed to effect the disinherison of the appellant: *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595; *Estate of Davis*, 106 Cal. 453, 39 Pac. 756. But it is contended that it was incumbent upon the respondent to have proved the fairness of the agreement, and that the court therefore erred in giving equitable effect to it without such proof. It is true that where the heir sought to transfer or convey his interest in the estate of an ancestor to a third person, equity, before it would give effect to such transfer required evidence from that third person ²³⁷ of the good faith and fairness of the transaction, the very apparent reason being that designing persons should not take advantage of the improvidence or penury or inexperience of one to strip him of his prospective inheritance. An additional reason was that such a transfer, made without the knowledge of an ancestor, was in a certain sense a fraud upon him. But these reasons are eliminated, however, and with their elimination the rule ceases when the release is made to the ancestor him-

self; for, in the first place, since he has the right absolute to disinherit, he cannot be accused of taking advantage of the heir, and, in the second place, as the release is made to him, he is not in ignorance of the fact, and thus could not be deceived into leaving his property to one to whom he never intended it should go. Therefore, where such a release is made to the ancestor, the rule requiring the party relying on it to prove its fairness is no longer in force, but, as said in Appeal of Summerville, 129 Pa. 631, 18 Atl. 554, such a release is "properly admissible, and when once admitted the burden of overthrowing it is cast upon the parties who signed it or whose names are subscribed to it." In this same connection reference may be made to *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651, and the whole subject matter was elaborately argued in *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595. Still less reason, however, exists for the application of the rule requiring proof of the fairness in a contract such as this where there is a mutual relinquishment upon the part of the spouses of their property rights and of their rights of succession and inheritance, and where, moreover, the contract having been fully executed during the lifetime of the parties, the fairness is sought to be drawn in question after the death of one by the other, and particularly when questioned upon the death of the wife by the husband; for while the freedom of contract between husband and wife is fully recognized in this state and upheld, it is equally well recognized and exemplified in a hundred instances in our law that the wife is regarded as the weaker and more dependent spouse; the one whose interests, therefore, are to be the more carefully safeguarded, even from the exactions of a husband. In *Re Noah*, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287, this court, disposing of a similar argument under a contract of ²³⁸ separation between husband and wife, declared that the agreement, "as far as it was an agreement to separate and for her support during separation, was fully executed during the lifetime of the deceased." In this case, as in the *Noah* case, the contract had been lived up to by both parties, so far as appears to the contrary, during the lifetime of the wife, and it is a somewhat too tardy discovery upon the part of the husband to find after her death that the contract was unfair. The question is completely disposed of by *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595, *Estate of Davis*, 106 Cal. 453, 39 Pac. 756,

Daniels v. Benedict, 38 C. C. A. 592. 97 Fed. 367, and Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956.

While it is true that the law was unable to, and therefore did not, give effect to such transfers, releases, or extinguishments of heirship, it is equally true that they were always cognizable in equity, and that in proper cases they afforded a complete defense by way of estoppel. And this equitable defense by way of estoppel is cognizable by the court in probate: Estate of Garcelon, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595; Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623. It has been shown that it was not incumbent under the circumstances for the party relying upon the agreement to make proof of its fairness. It does not appear, upon the other hand, that appellant was denied the opportunity to prove its unfairness. The record discloses that, upon proof of the agreement (its execution having been admitted), a motion to dismiss was made, upon the ground that, by force of the agreement, the contestant was not a party in interest. The motion was opposed by contestant's attorney, who stated his grounds of opposition as follows: "The first ground of our resistance to the motion is that the contract is absolutely void, and cannot be taken into consideration in this proceeding. The next ground is upon the uncertainty of it. If the contract had any consideration at all, it is incumbent upon the proponents to allege and prove it." Upon this the motion was granted by the court, and the order dismissing the contest was entered. At a following session of the court, and when formal proofs of the due execution of the will were being offered looking to its admission to probate, appellant's attorney appeared, renewing his objection ²³⁹ in a somewhat more elaborate form, and raising new grounds of objection, amongst the new suggestions being the proposition here disposed of, that the proponents should show affirmatively that the contract was fair and just, and if that were not so, then contestant asserted the right to show that the contract was not fair and just, but was obtained through fraud and coercion. The court, however, ruled, and ruled very properly, that as those were matters not presented for consideration at the time of the motion to dismiss, when ample opportunity to present them had been afforded, he would not entertain the objection after his order dismissing the contest.

It being shown, as was determined by the lower court, that the appellant was not a party interested so as to entitle him

to appear and contest, the consideration of the propositions advanced upon his appeal may well come to an end. It may, however, be added that the court had jurisdiction to grant original probate of the will of the deceased, although a non-resident, since she had left property within this state: *Estate of Clark*, 148 Cal. 108, ante, p. 197, 82 Pac. 760.

For the foregoing reasons the order and judgment appealed from are affirmed.

Lorigan, J., and McFarland, J., concurred.

Hearing in Bank denied.

The Assignment or Release of Expectant Estates is discussed in the monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 339-361.

Contracts Between Husband and Wife, whereby they agree to live separate and apart from each other and to adjust their property rights, are discussed in the monographic note to *Baum v. Baum*, 83 Am. St. Rep. 859-885.

Courts have Jurisdiction to Grant Original Probate of the will of a nonresident who dies leaving property in this state: *Estate of Clark*, 148 Cal. 108, ante, p. 197.

EX PARTE SOHNCKE.

[148 Cal. 262, 82 Pac. 956.]

STATUTES—Repeal by Implication.—As between two conflicting statutes, the one first enacted to take effect after sixty days is impliedly repealed by the one enacted a day later to take effect immediately. (p. 237.)

STATUTES—Repeal by Implication.—An unconstitutional statute does not repeal by implication portions of a former statute inconsistent therewith. (p. 237.)

CONSTITUTIONAL LAW—Usury Statute—Uniform Operation.—A statute which makes the loaning of money in specified amounts in excess of a prescribed rate of interest a misdemeanor, and which makes the same acts punishable by different degrees of punishment according as they are committed by employes or officers of the corporations authorized by such statute, or by other persons or corporations, transgresses the constitutional provision that all laws shall be uniform in operation. (p. 238.)

CONSTITUTIONAL LAW—Usury Statute—Discrimination.—A statute forbidding the loaning of small amounts at more than a specified rate of interest on certain kinds of chattels, while it permits any rate to be charged on such loans on other chattels, is unconstitutional, if there is no reasonable distinction between the different classes of persons and things affected by the law. (p. 242.)

Charles W. Slack, for the petitioner.

John J. Allen, district attorney, W. H. L. Hynes, deputy district attorney, and Aylett R. Cotton, for the respondent.

262 VAN DYKE, J. The petitioner was charged and convicted of the crime of loaning one hundred dollars in money upon **263** the security of a chattel mortgage upon certain furniture and household goods at a rate of interest exceeding one and one-half per cent a month, and charging more than five dollars for the examination and valuation of the mortgaged chattels and the preparation of the mortgage. These acts are the subject of legislation in two laws passed by the legislature of 1905 upon different days—namely, the act of March 20, 1905, entitled “An act fixing the rates of interest and charges upon loans on chattel mortgages on certain personal property, and prescribing the penalties for the violation of the act” (Stats. 1905, p. 422, c. 354), and the act approved March 21, 1905, entitled “An act to provide for the incorporation of associations for lending money on personal property, and regulating the same, and to forbid certain loans of money, property, or credit” (Stats. 1905, p. 711, c. 550). Each one of these laws made the particular acts charged in the complaint upon which the petitioner was convicted a misdemeanor. The petitioner was convicted and sentenced to pay a fine of one hundred dollars, with imprisonment if the fine was not paid. He asks to be released from custody on the ground that the above-mentioned statutes are unconstitutional. The act of March 20, 1905, prescribes no time when it takes effect; hence did not take effect until May 19, 1905: Pol. Code, sec. 323. The act of March 21st by its terms was to take effect immediately upon its passage. Under these circumstances, if the two acts are inconsistent, and both are otherwise valid, that of March 21st, so far as the inconsistency extends, will prevail, and the former act will stand to that extent repealed: *Goodwin v. Buckley*, 54 Cal. 295; *County of San Luis Obispo v. Felts*, 104 Cal. 60, 37 Pac. 780; *County of Mariposa v. Madera*, 142 Cal. 50, 75 Pac. 572. If, however, the conflicting part of the latter act is itself unconstitutional, and consequently void, it will not have the effect of repealing by implication the former act: *McAllister v. Hamlin*, 83 Cal. 361, 23 Pac. 357; *Orange County v. Harris*, 97 Cal. 600, 32 Pac. 594; *City of Los Angeles v. Hance*, 122 Cal. 77, 54 Pac. 387.

Upon an examination of the provisions of the act of March 21, 1905, we are of the opinion that the portions thereof which purport to make a criminal offense of the same acts which are the subject of legislation in the previous statute ²⁶⁴ of March 20, 1905, are unconstitutional, and hence that they do not have the effect of repealing the prior act. This act of March 21st authorizes the formation of certain classes of corporations which are to be licensed and empowered to loan money in sums not exceeding three hundred dollars to any one person, upon the security of pledges or mortgages of personal property, and to charge interest thereon at a rate not over one and one-half per cent a month, and certain sums for expenses in connection with such loans. By section 12 of this statute the acts charged against the petitioner in the complaint under consideration, when committed by any person except the corporations therein authorized, are made a misdemeanor, and punishable by a fine of one hundred dollars for the first offense, and by a like fine and imprisonment for thirty days in the county jail for the second and each subsequent offense, and also by a forfeiture of the interest thereon to the borrower. By section 6 the corporations thereby authorized are allowed to charge interest upon loans made by them "at a rate not exceeding one and one-half per cent a month," and by section 13 any director, officer, or employé of such corporation who shall charge, take, collect, or receive any compensation on a loan beyond the charge therein allowed, "shall be guilty of a misdemeanor and be fined not to exceed one hundred dollars or be imprisoned in the county jail for not more than six months, or both." The same section provides that if a corporation organized under the act shall willfully violate any of the provisions of the act, by which any person shall suffer loss or damage, it shall forfeit its right to do business, and the attorney general shall thereupon take the necessary legal measures to wind up and discontinue the business thereof. The offenses defined in section 12, as above mentioned, are made a misdemeanor by the terms of the section only when the acts constituting the offense are committed by some "person, firm or corporation, other than corporations organized pursuant to this act." It is manifest that these provisions of the law transgress that provision of the constitution requiring that all laws shall be uniform in operation. The same acts are made punishable by different degrees of punishment according as they may be committed by

officers, servants, or employés of the corporations authorized by this particular statute, or by other persons or corporations. ²⁶⁵ The punishment, if the acts are committed by officers of such special corporations, may be any sum less than one hundred dollars, and the imprisonment for the second or any subsequent offense may be for any period less than six months. It will be seen that the punishment may be very much less in such cases than the fixed sum of one hundred dollars for the first offense and the same sum and imprisonment for thirty days for the second and each subsequent offense, which is imposed in case the crime is committed by some person other than the officers of such corporations. There can be no valid ground for such discrimination in favor of the officers of such special corporations. If the magistrates in the locality in which such corporations may be doing business should see fit, they could by imposing light fines practically allow such corporations to charge the forbidden rates, while all other persons would be prohibited from so doing. The uniformity of operation of the law would depend entirely upon whether or not the fines imposed upon such officers were in all cases made precisely the same as those imposed upon other persons regardless of the character of the circumstances attending the offense. Such legislation is clearly a violation of the constitutional restriction. The penal clauses of section 12 of the act are therefore unconstitutional and void, and being so, they cannot operate to repeal by implication the previous act of March 20th, nor can they otherwise affect the present case.

The remaining point in the case is the contention of the petitioner that the act of March 20, 1905, is unconstitutional. It is claimed that the law is not uniform in its operation upon those engaged in the business to which it relates, and therefore is contrary to the provision that all laws of a general nature shall have a uniform operation (article 1, section 11): that it secures special privileges and immunities to a part of those engaged in such business which are denied to others, and therefore is in violation of section 21 of article 1 of the constitution, forbidding the granting to a class of citizens privileges or immunities which, upon the same terms, are not given to all citizens; and that it denies to some citizens the equal protection of the laws, and therefore is in violation of the fourteenth amendment to the constitution of the United States. Section 1 of the act (Stats. 1905, p. 422, c. 354) is as follows: "It shall not be lawful for any individual,

266 partnership, association or corporation lending money upon chattel mortgages, where there is taken for such loan any security upon any upholstery, furniture or household goods, oil paintings, pictures or works of art, pianos, organs or sewing-machines, iron or steel safes, professional libraries or office furniture or fixtures, instruments of surveyors, physicians or dentists, printing-presses or printing material, to have or charge for the use of money so loaned more than the rate of one and one-half per cent per month interest thereon, and that no additional sum, either in the way of loans or otherwise, shall be required or exacted of the borrower or borrowers; and further, that no charge for examination or valuation of property offered, insurance of same, and preparation, execution and recording of necessary papers shall be imposed except as follows: For examination or valuation of property offered for mortgage and preparation of papers (both included), no greater sum than five dollars, where the amount loaned does not exceed three hundred dollars. For necessary affidavits, recording of papers, and fire insurance premiums, the amounts actually to be paid for same, provided that the foregoing charges may be deducted from the principal of the loan when the same is made; and provided further, that in no case shall it be lawful to deduct interest in advance, nor make any charge for extension of loans, nor to divide or split up loans under any pretense whatsoever for the purpose of requiring or exacting any other or greater charges than prescribed herein." Section 2 of the act makes any violation of the provisions of the act a misdemeanor, punishable by a fine of one hundred dollars for the first offense, and a like fine and imprisonment in the county jail for thirty days for the second and each subsequent offense; and further, that any agreement to pay interest above that allowed in the act shall be void.

A law which applies alike to all the subjects upon which it acts, or, in other words, a law which applies equally to all persons or things within a legitimate class to which alone it is addressed, does not violate the provision requiring laws of a general nature to have a uniform operation, and is neither local nor special: *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Ex parte Halstead*, 89 Cal. 471, 26 Pac. 961; *Cody v. Murphey*, 89 Cal. 522, 26 Pac. 1081; *Abeel v.* **267** *Clark*, 84 Cal. 226, 24 Pac. 383; *Summerland v. Bicknell*, 111 Cal. 567, 44 Pac. 232; *Hellman v. Shoulters*, 114 Cal.

136, 44 Pac. 915, 45 Pac. 1057. In *Hellman v. Shoulters* the court says: "It has been uniformly held that a law is general which applies to all of a class—the classification being a proper one—and that the requirement of uniformity is satisfied, if it applies to all of the class alike. The word 'uniform' in the constitution does not mean 'universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same." The classification, however, is not a proper one for distinct legislation, if it is not founded upon some natural, intrinsic or constitutional distinction, a distinction which bears some relation to, or furnishes cause for, the particular legislation embraced in the act: *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Darcy v. Mayor*, 104 Cal. 645, 38 Pac. 500; *Bruch v. Colombet*, 104 Cal. 347, 38 Pac. 45; *Rauer v. Williams*, 118 Cal. 401, 50 Pac. 691; *Budd v. Hancock*, 66 N. J. L. 133, 48 Atl. 1023; 26 Am. & Eng. Ency. of Law, 2d ed., 683. Upon this subject the supreme court of the United States has said that the state, "in prescribing regulations for the conduct of trade, cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity," and that it cannot discriminate "by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates": *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679. This was said with respect to a law prohibiting combinations between persons engaged in trade, but exempting from its provisions farmers and stock-raisers. A similar ruling was made in Illinois in regard to a statute restricting the number of persons a lodging-house keeper could allow to sleep in a single room, but making no ²⁶⁸ restriction upon the number that might be permitted by the keeper of a hotel or boarding-house: *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E.

98, 54 L. R. A. 838. The business of loaning money is as much a part of domestic trade and commerce as any other legitimate business. There is no substantial reason why those who lend money in sums not exceeding three hundred dollars on chattel mortgages of upholstery, pictures, or works of art, pianos, organs, sewing-machines, safes, professional libraries, or office furniture or fixtures, instruments of surveyors, physicians, or dentists, printing-presses, or printing material, should be limited in their charges and the business they do in that respect made less profitable than it otherwise would be, while they or others who lend on chattel mortgages upon instruments of a photographer, livestock agricultural implements, equipments of livery-stables, or other property allowed to be mortgaged by section 2955 of the Civil Code (Stats. 1905, p. 36, c. 40), and not enumerated in the act under consideration, or who lend upon pledges of any kind of personal property, or who lend in sums exceeding three hundred dollars upon any kind of security, should be allowed to exact any rate of interest or other charge which they can obtain from the borrower. It is a part of the same kind of business, and there is no distinction between the particular classes of persons or things affected by the act and those exempted from its provisions that will justify special legislation. It may be that such exorbitant charges should be absolutely prohibited, but, if so, the prohibition should be made general, and should extend to all who engage in the business as lenders on the one hand, and should protect all who are made the victims thereof on the other hand, without discrimination in favor of any. There is a clear distinction between this case and the case of *Ex parte Lichtenstein*, 67 Cal. 359, 56 Am. Rep. 713, 7 Pac. 728, in which the court held valid a law regulating the business of licensed pawnbrokers. The business of pawnbroking is one well known to the law, and constitutes of itself a distinct class of persons and things which may be properly regulated by a law applying to them alone, as was clearly held in the decision in that case.

We are of the opinion that the law violates the constitutional provisions above set forth, that the petitioner has been convicted of a crime which has no legal existence, and that the ²⁶⁹ judgment of conviction is consequently void, and that the petition should be granted.

It is ordered and adjudged that the petitioner be forthwith discharged from custody.

Shaw, J., Angellotti, J., Lorigan, J., and Henshaw, J., concurred.

McFARLAND, J. I concur in the judgment discharging the petitioner.

The Repeal of Statutes by Implication is the subject of an extended note to *Howard v. Hulbert*, 88 Am. St. Rep. 271-297. The general rule is, that repeals by implication are not favored and are indulged only so far as unavoidable, in the absence of a clear intention: *Morris v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955; *Lavagnino v. Uhlig*, 26 Utah, 1, 99 Am. St. Rep. 808; *Florida etc. Ry. Co. v. Hazel*, 43 Fla. 263, 99 Am. St. Rep. 114.

The Legislature is Competent to Enact Statutes applicable to one class of persons only, if the classification is based upon intrinsic differences requiring different legislation: *Deyoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73; *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497, 98 Am. St. Rep. 254; *Commonwealth v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590; *Continental Fire Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916; *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291. But the classification, to be a basis for valid legislation, must be reasonable and founded upon real differences. There can be no arbitrary discrimination against any one class engaged in a lawful business: *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116; *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481.

LEISHMAN v. UNION IRON WORKS.

[148 Cal. 274, 83 Pac. 30.]

MASTER AND SERVANT—Appliances to be Constructed by Employés.—The rule that an employer must furnish his employés safe appliances with which to do the work for which they are engaged does not require him to furnish them in their completed form; his obligation is discharged when he furnishes suitable materials with which to construct the appliances where, under the terms of the contract of employment, the employés are to do the constructing, and in that event he is not liable for an injury through a defect in the construction or adjustment of the appliances. (p. 248.)

EMPLOYER'S LIABILITY—Fellow-servants.—The department rule does not obtain in the law of fellow-servants in California. (p. 251.)

EMPLOYER'S LIABILITY—Fellow-servants—Safe Appliances.—Where a foundryman maintains a carpenter-shop in which to make flasks for use in the molding department of his foundry, one employé having the supervision of both departments, the carpenters and the molders are fellow-servants, so that the employer is not liable to a molder injured by a defective flask, if he has employed competent carpenters and furnished them suitable materials. (p. 252.)

Charles F. Hanlon, for the appellant.

Van Ness & Redman, for the respondent.

²⁷⁵ LORIGAN, J. Plaintiff was a journeyman molder in the service of defendant. While assisting in casting an iron piston-ring, he was seriously injured by the explosion of the mold in which the ring was being cast, and brought this action to recover damages for the injuries sustained. The case was tried before a jury, and at the close of the evidence the trial court granted a motion made by the defendant for a nonsuit. Judgment was entered accordingly in favor of defendant, and this appeal is taken from the judgment and from an order denying plaintiff's motion for a new trial. The only question involved on the appeal is the validity of the judgment of nonsuit.

The material facts, as disclosed by the pleadings and evidence, stated as briefly as possible, are as follows: That plaintiff was injured at the time and place mentioned in the complaint, and there was evidence tending to prove that his said injuries were of a serious character. That at the time he was injured he was an employé of the defendant, working in the ironmolders' department of defendant. That he was injured while assisting in casting a piston-ring. That for the purpose of casting such piston-rings the employés of defendant were furnished with lumber, iron and other material, out of which to construct the molds in which such piston-rings were cast, and out of such material so furnished said employés did from time to time, as needed, construct such molds. That the molds aforesaid in which such piston-rings were cast, consisted of three parts, commonly called the "drag," "cheek," and "cope," fitting the one upon the other. To the bottom of the cheek was attached and bolted an iron ring, or disk, known as the "plate." In the preparation of the flask it was customary to attach to the bottom of the cheek either this iron ring, or disk, or a wooden substitute, called a "chuck." Each of these parts was filled with sand, rammed and tamped. In this sand, so rammed and tamped in the cheek, a pattern of the casting to be made is sunk and withdrawn, and the molten iron poured into the space made by the removal of the pattern, which iron when cooled makes the casting. For the purpose of making a casting a pattern is furnished the ironmolders' department, which pattern is made in, and furnished by, the pattern department of defendant, a department separate from and ²⁷⁶ independent of the molders' department. For the purpose of casting a piston-ring such as was being cast at the time

of plaintiff's injury, the flat iron ring, or disk, commonly known as the "plate," is attached to the cheek, and these iron plates are molded and cast in the ironmolders' department from time to time as needed, and are kept on hand for use from time to time as required. The wooden framework of the drag, cheek, and cope were made out of lumber furnished by the defendant for that purpose by carpenters, who are under the orders and subject to the control of the foreman of the ironmolders' department; the carpenter-shop, in which said carpenters work, being separate from and independent of the general carpenter-shop of the defendant and a part of the ironmolders' department of defendant. There was evidence tending to prove that the explosion of the mold, by which explosion plaintiff was injured, might have been caused by the use of a plate of improper size attached to the cheek, by reason of an unusual amount of rust upon said plate used, or by reason of improper tamping of the sand, which may have permitted the molten metal in the mold to find its way through the sand to the wooden bars of the cope. That in the making of castings in the foundry of defendant the patternmaker would prepare a pattern for each of said castings, and the foreman of the molding department would distribute daily these patterns to the molders in said department, and it would be, and was, the duty of each molder receiving a pattern to obtain from the foreman of the molding department the necessary drag, cheek and cope with which to make the casting, and thereupon to proceed with said drag, cheek and cope to his place of work in the molding department, and with sand on hand in the molding department to prepare the mold in which to make the casting, and upon the completion of the mold, together with other employés of the defendant in the molding department, to proceed with and finish said casting. That it was the business of the molder receiving the pattern to secure from the foreman of the molding department the necessary drag, cheek and cope, and if any part thereof, or the plate upon the cheek, were not in proper order for the purpose for which intended and for the work to be done, to call the attention of the foreman to any existing defect therein, whereupon it ²⁷⁷ was the duty of said foreman to have such defect remedied. That the drag, cheek and cope in use at the time of the accident were constructed in the carpenter-shop of defendant, a part of the molding department, upon the order of the

foreman of the molding department, out of materials furnished by defendant to and for the molding department, and the plate attached to the cheek was attached by the carpenter. At the time of the accident there were on hand in the molding department, and for use in said department, for work such as was being done at the time of the accident to plaintiff, and by reason of which plaintiff was injured, drags, cheeks with plates, and copes other than the drag, cheek with plate, and cope in use at the time plaintiff was injured, which could have been used in place of the drag, cheek with plate, and cope actually used, and it was the duty of the foreman to have selected from such drags, cheeks and copes for the job upon which plaintiff was injured such as were in order, with the proper plate, and proper for that job. The defendant did not, other than as hereinabove stated, furnish to plaintiff or its other employés in the molding department, a finished drag, cheek, plate or cope with which to make the castings, but furnished to and for said department the necessary material from which to construct said appliances, and they were constructed as aforesaid. From time to time the drags, cheeks, plates and copes in use in said department would become worn and inefficient for one kind of work, while remaining efficient for some other or different kind of work, and it was the duty of the foreman and workmen to see to it that for each particular job a proper and efficient drag, cheek and cope was selected out of the supply on hand and used. That each molder was understood to be capable of determining the sufficiency and safety for use on the job given him of the drag, cheek and cope furnished him, and if in his judgment there was any defect in the drag, cheek, or cope furnished, it was his privilege and duty to call the attention of the foreman to such defect, and to procure another drag, cheek, or cope which was not defective. That the nature of the work in the molding department of defendant, in the use of drags, cheeks and copes, was such that rust would always accumulate upon the plates attached to such cheeks, and whether or not the amount of rust upon any ²⁷⁸ particular plate was such as to render the use of the cheek unsafe was a fact to be determined immediately prior to its use, and the molder using the cheek was as competent as any other employé of defendant to determine such fact; and if in fact the amount of rust upon any particular plate was such as to render the cheek to which it was attached

dangerous, then and in that case it was the duty of the molder, through the foreman, to procure another cheek which was in all respects proper to use, or to remove the rust from the plate attached with oil, of which there was always plenty at hand in the department for that purpose.

Upon the day when plaintiff was injured one Drury, a fellow-molder of plaintiff, was given a piston-ring to cast, and having secured the three parts of his flask, proceeded to his place of work and prepared the mold as above described. While plaintiff was assisting him in pouring molten metal into the mold it exploded, plaintiff receiving the injuries of which he complains. As stated, it is not clearly apparent from the testimony in the case to what cause the explosion of the mold was attributable. It might have been caused by the use of an iron plate of improper size attached to the cheek, or by the use of one which was in an improper and dangerous condition to be used on account of the accumulation of rust upon it, or by reason of improper tamping of the sand, which may have permitted the molten metal in the mold to find its way to the bars of the cope, and so cause the explosion without the metal having ever reached the plate at all.

With the particular cause of the accident, however, we have no present concern. The only point to be determined on this appeal is whether, upon a consideration of the entire evidence, the lower court was warranted in taking the case from the jury and deciding as a matter of law that upon no theory of the case did the evidence, considered most favorably in behalf of the plaintiff, show any liability upon the part of defendant, and would not have warranted a verdict in his favor. The theory of plaintiff on the evidence was that the accident was occasioned through the use of a defective plate attached to the cheek, and that the plate was too small for the particular casting in question, was composed of four pieces, when it should have properly consisted of but one, ²⁷⁹ and, besides this, was coated with rust to such an extent that when the molten metal reached it the explosion occurred. His legal contention, based on this theory of the evidence, is that it was the imperative duty of the defendant to furnish the molders with appliances reasonably safe to do the work of casting, and that in failing to have a plate of proper size and in good condition attached to the cheek of the mold at which plaintiff was working when his injuries were received

the defendant failed to discharge its legal obligation, and is liable. The lower court in granting the nonsuit evidently held, notwithstanding the general rule as contended for by plaintiff, that when the defendant furnished to the molding department proper materials from which to construct all parts of the appliances—the flasks—with which the casting was to be done therein, and provided competent employés to construct and attach them, the defendant had discharged all the duty it owed to the employés in such department, and was not liable for any defects in the construction or adjustment of such appliances occasioned by the employés themselves, and that, proper materials having been furnished to the employés in the molding department by the defendant for the proper construction of such appliances to be used in such department, any defects, either in construction or adjustment thereof, must be deemed to have proceeded from the negligence of fellow-servants of the plaintiff, for which, under the familiar rule of law, the defendant could not be held liable. We are satisfied that under the evidence the trial court applied to it the proper rule of law, and correctly granted the motion for nonsuit.

There can be no doubt but that the settled rule is that an employer must provide his employés with safe appliances with which to do the work for which they are engaged, that he must keep such appliances in reasonably safe condition, and that this is a personal obligation which cannot be delegated so as to relieve the employer from liability in not having done so. But there is no positive duty incumbent upon an employer to furnish such appliances to do the work as completed instruments. He may supply sufficient and suitable materials to the employés themselves out of which the appliances with which they are to work are to be constructed and adjusted by them, in which case the general ²⁸⁰ rule that safe appliances shall be furnished by the employer—that is, that efficient and complete appliances shall be furnished by him—has no application. His obligation to his employés, as far as furnishing such appliances is concerned, is satisfied when he furnishes suitable materials with which to construct them, and under the terms of the contract of employment, either express or implied, the employés themselves are to do the constructing. In that event the employer is not liable for an injury through a defect in the construction or adjustment of such appliances. Upon this sub-

ject it is said, in *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017: "The rule which requires the master to provide a safe place and safe appliances for the servant is applied when the place in which the work is to be done is furnished or prepared by the master, as in the case of a ship or a mill or a factory, or when the machinery or other appliances with which the servant is employed to work are furnished by the master; but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself. If the appliance is furnished by the master for the purpose of enabling the servants to perform the work in which they are to be engaged, he is required to see that it shall be reasonably safe for that purpose; but if the preparation of that appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation. 'The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employés are to adjust the appliances by which the work is to be done': *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916." In *Kerrigan v. Market Street Ry. Co.*, 138 Cal. 506, 71 Pac. 621, it is said: "Where certain persons are employed to do certain work, and by the contract of employment, either express or implied, such employés are to construct and adjust the appliances by which the work is to be done, the employer to furnish proper material and the employés to construct and adjust such appliances as in their judgment are necessary, the employer is not liable to such employés for any defect in the construction or adjustment of such appliances."

Now, it appears clearly from the evidence that the flasks ²⁸¹ necessary for making castings were not furnished as complete appliances by defendant. It did not assume to do so, and it is obvious that under its contract of employment with the employés in the molding department of its business it was not required that they should be so furnished, but, on the contrary, that they should be constructed by the employés of that department themselves. To that end it furnished good and sufficient material—lumber and iron. It is not questioned but that the employés whose duty it was to construct the flasks were competent workmen. No complaint is made that the carpenters in the molding department did not properly put together the woodwork of which the

flask consisted, but only that the plate adjusted by them, and which was cast by the ironmolders themselves, whose duty it was to cast it, was not a proper one to be used in making a particular casting. As, however, the defendant furnished not only the lumber and competent carpenters, but the pig-iron for the making of these plates, and competent ironmolders, as the plaintiff himself was, to cast them for use on the flasks, it is evident that, under the rule stated above, the defendant failed in no duty it owed the plaintiff, and that assuming the injury to plaintiff was occasioned as claimed by him, still it proceeded from the neglect of fellow-employés to properly construct and adjust the flasks from materials furnished the molders' department for that purpose.

It is claimed, however, by plaintiff that the carpenter-shop was a separate and distinct shop or department from that portion of the molding department in which plaintiff was engaged, and that the foreman of the carpenter-shop was not a fellow-servant with plaintiff in the construction and adjustment of the flask in question. But it appears from the evidence in the case that this is not true in point of fact. The foreman of the carpenter-shop, or, as under the evidence he might more properly be designated, the "boss carpenter," was not in the control of an independent department. The carpenter-shop was strictly a part of the molding department, and its foreman was under the control and direction of O'Neill, the foreman of that department. O'Neill had control and supervision of the entire molding department, including therein, as a part thereof, the carpenter-shop. It was as essential, in efficiently performing the work of casting, ²⁸² in which the molding department was exclusively engaged, that the flasks should be put together by the carpenters in that department for use by the ironmolders therein, as it was that the latter should prepare the molds in them and do the casting. The only work that was done in the carpenter-shop was for the benefit and in aid of the molding department, particularly in the construction and adjusting of these flasks. And the making of these flasks was as much a part of the work of the molding department as was the making of the castings. But were this not so, the department rule, relative to which counsel for appellant cites numerous decisions from other jurisdictions, does not obtain in this state. Our Civil Code, (section 1970) lays down this general rule: "An employer

is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé." In construing this section it was early said by this court that "The law of this state respecting this subject, as set forth in the code referred to, recognizes no distinction growing out of the grades of employment of the respective employés, nor does it give any effect to the circumstance that the fellow-servant through whose negligence the injury came was the superior of the plaintiff in the general service in which they were in common engaged, and the alleged distinction in this respect insisted upon by the appellant's counsel, founded, as he claims, on the general principles of law and the adjudged cases, requires no examination at our hands": *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255. To the same effect are *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 360, 26 Pac. 175; *Davis v. Southern Pac. R. R. Co.*, 98 Cal. 13, 32 Pac. 646; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Livingston v. Kodiak Packing Co.*, 103 Cal. 258, 37 Pac. 149; *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519. Within this rule, as declared by the code and construed by the authorities, the foreman of the carpenter-shop was a ²⁸³ fellow-servant of the plaintiff. They were both in the employment of defendant in the molding department, both under the control of the general foreman of that department, O'Neill, and both engaged not only in the general business of defendant, but in the particular business in which the molding department was exclusively engaged—casting. And the same rule applies to the foreman, O'Neill, in as far as it is claimed that the defendant should be held responsible for his asserted negligence in failing to inspect the flask, the explosion of which occasioned the injury. If the positive duty rested upon defendant to supply completed and finished flasks to the molding department, and inspect them as necessity for doing so arose, and the foreman, O'Neill, represented the defendant, as its vice-principal, to discharge these duties of supply and inspection, his neglect would

be no doubt that of the defendant. But, as we have seen, no such positive duty of furnishing the flasks in the completed state devolved upon the defendant. It furnished, as it had a right to do under the rule above stated, only the materials for such purpose, the task of constructing the flasks to be performed by its employés. Having furnished such materials, and competent workmen to construct the flasks, defendant fully discharged its duty to its employés. As it was not bound to furnish finished appliances, but discharged its duty by furnishing adequate materials for that purpose, it logically follows that it was not required to inspect the appliances after construction. The construction and inspection of such flasks were simply details in the proper execution of such work after ample provision made for its being safely done, and as to such details the foreman and the workmen in the department were fellow-servants: *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766. The other cases cited immediately preceding bear also directly upon this point and illustrate the application of the rule.

We do not think any further discussion of this matter is necessary, nor to particularly consider additional points urged by respondent in support of the judgment of nonsuit—namely, that the evidence shows that there were on hand in the molding department at the time the flask in question was selected other flasks which, taken in their entirety, were in good condition, and that if any improper selection was made by the foreman or other employés, the defendant was not ²⁸⁴ liable for such error in judgment; further, that the molder Drury was capable of determining, and should have inspected to ascertain, whether the flask in question was sufficient and safe, and that his failure to do so and to call the attention of the foreman of the department to the defective plate, or substitute a chuck therefor, or remove the rust from it with the oil at hand for that purpose, was negligence of a fellow-employé of plaintiff, for which defendant was not responsible.

Whatever merit there may be in these points we do not discuss, because under the settled rule of law which we have mainly considered, and which was the principal question discussed by counsel, defendant having furnished the materials out of which the appliances for use in the molding department were to be constructed, and the employés in that department being required to construct them from the ma-

terials so furnished, the safety appliance rule urged by appellant has no application, and the defendant was not liable for any injury resulting to plaintiff in such department from a defect in the construction and adjustment of such appliances by his fellow-employés.

Under this rule of law, applied to the evidence in the case, the lower court properly granted the motion for a nonsuit, and the judgment and order appealed from are therefore affirmed.

McFarland, J., and Henshaw, J., concurred.

The Liability of Employers for defective tools and appliances is discussed in the monographic notes to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 289-325; *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884-900. If an employé is injured by the failure of his employer to furnish a safe place to work, the latter cannot escape liability on the ground that the injury was the result of the negligence of a fellow-servant in constructing an unsafe appliance, for the employer owes a positive obligation to his employé in this respect which cannot be avoided by deputing its performance to another servant: See *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 45, and cases cited in the cross-reference note thereto. Compare, however, *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710; *Dougherty v. Milliken*, 163 N. Y. 527, 79 Am. St. Rep. 608. For tests by which to determine who are fellow-servants, see *Merrill v. Oregon Short Line R. R. Co.*, 29 Utah, 264, 110 Am. St. Rep. 695; *Enright v. Oliver*, 69 N. J. L. 357, 101 Am. St. Rep. 710, and cases cited in the cross-reference note thereto.

CLYNE v. EASTON, ELDRIDGE & CO.

[148 Cal. 287, 83 Pac. 36.]

ATTACHMENT—Strict Compliance With Statute.—The provisions of an attachment statute must be followed strictly to acquire any rights thereunder. (p. 258.)

ATTACHMENT.—A Notice of Attachment of Credits and effects is not a sufficient garnishment of a debt. (p. 258.)

ATTACHMENT.—The Admission by a Garnishee that the debt has been attached is not conclusive evidence that it has been. (p. 259.)

ATTACHMENT—Estoppel of Garnishee by Refusing Payment. If a garnishee should, by refusing to pay a debt on the ground that it has been attached, create an estoppel in favor of his creditors, this would not necessarily preclude him, as against the plaintiff, from denying the efficacy of the notice of garnishment. (p. 259.)

ATTACHMENT—Appearance of Garnishee.—Under the attachment laws of California, a garnishee is not required, and has no right to appear in the action. (p. 260.)

ATTACHMENT—Limitation of Actions in Favor of Garnishee.

The running of the statute of limitations in favor of a debtor is not interrupted by making him a garnishee, if he denies the indebtedness or disputes the defendant's title to any property in his possession. (p. 264.)

ATTACHMENT—Effect of Garnishment.—A Contract liability is not changed or converted by garnishment into another sort of liability; the sole effect of the garnishment is to work a contingent transfer of the alleged indebtedness from the creditor to the garnisher, without any change in the nature of the liability. (p. 264.)

ATTACHMENT.—A Garnisher may Commence an Action against the garnishee, it seems, for the protection of his contingent interest in the debt or property attached, before he obtains a judgment in the attachment suit. (p. 265.)

R. E. Houghton and Houghton & Houghton, for the plaintiff.

Jesse W. Lilienthal and Frohman & Jacobs, for the defendant.

289 BEATTY, C. J. The trial of this cause in the superior court resulted in a judgment for the plaintiff. Defendant moved for a new trial, and its motion was granted as to some of the issues, but denied as to the others. Both parties appeal—plaintiff from that part of the order which directs a new trial of the issues as to which the findings are vacated, and defendant from the part which denies a new trial of the remaining issues. The record is of course the same on both appeals, and they have been submitted together.

The salient facts of the case are that the defendant, a California corporation, prior to the seventh day of June, 1893, had written authority from Linnie W. Goodyear and her husband, H. C. Goodyear, to sell on commission twelve hundred and forty-four and thirty-one hundredths acres of land belonging to Mrs. Goodyear. The land was heavily encumbered by a first mortgage to the German Bank and by a second mortgage to one Kahn. The authority to sell provided for a sale of the land in separate tracts at a fixed minimum of price, and defendant was to receive a commission of two and one-half per cent of the price so fixed, and also one-half of any excess received from sales of the property over and above the fixed price plus the expenses of surveying, platting, and advertising, which expenses it is clear **290** from the whole tenor of the writing were to be borne by the defendant as a part of its undertaking to make the sales. The effort to dispose of the land upon the

terms of this authorization having failed, it was superseded on the 7th of June, 1893, by a new one in the following terms:

"Whereas, on the 25th day of January, 1893, the undersigned entered into a contract with Easton, Eldridge & Company for the sale of certain real estate in the county of Solano, state of California; and whereas, owing to the condition of the mortgages, it is absolutely necessary to sell the land as a whole: Now, therefore, it is agreed, and Easton, Eldridge & Company are hereby authorized to sell the land, viz.: 1,244 and 31-100 acres, more or less, for such sum as shall liquidate the present mortgage indebtedness, and in addition to pay us the sum of twelve thousand dollars, and all excess received over and above that, as also all crop returns now in hand or due on account of crops growing on the land for the year 1893, shall belong to the said Easton, Eldridge & Company, and shall be held by them as a part of their compensation under this agreement of sale.

"Witness our hands this 7th day of June, A. D. 1893.

[Signed] "MRS. H. C. GOODYEAR.

"H. C. GOODYEAR.

"Witness: [Signed] GEO. EASTON."

Acting under this authority and some alleged oral modifications thereof, the defendant during the year 1893 sold the entire tract in two parcels, and out of the proceeds satisfied and discharged all the encumbrances thereon, including the mortgages above mentioned and some other liens. The twelve thousand dollars claimed by the Goodyears, however, had not been paid in full, and there was a dispute between them and the defendant as to the balance remaining due upon the account, when, on the tenth day of August, 1894, the plaintiff in this action commenced an attachment suit in Solano county against Mr. and Mrs. Goodyear to recover, with interest, the sum of six thousand eight hundred and five dollars due upon their promissory notes. Summons and attachment were duly issued in said suit, and on August 11th the attachment was placed in the hands of the sheriff of San Francisco for service. No return was made thereon until March 29, 1897—at which date the following paper was filed in the office of the county clerk of Solano county:

“Office of the Sheriff of the City and County of San Francisco.

“By virtue of the annexed writ, I duly attach all moneys, ²⁹¹ credits, and effects belonging to the defendants named in said writ, or to either of them, by serving upon each of the hereinafter named parties, personally, in the city and county of San Francisco, at the times set opposite their respective names, a copy of said writ, with a notice in writing notifying each of said parties, respectively, that such moneys, credits, and effects of said defendants, or either of them, was attached, and not to pay over or transfer the same to any one but myself. Statement demanded. The answers were as set opposite their respective names. Names of the parties served as aforesaid: Easton & Eldridge & Co., through G. Easton (Sec.); time of service, Aug. 11th, 1894, at 11:00 o'clock a. m.; answers, ‘No funds.’ Henry B. Shaw, Aug. 11th, 1894, at 11:15 a. m.; no answer.

[Signed] “John J. McDADE,
“Sheriff.”

“By J. J. McTIEMAN,
“Deputy Sheriff.”

After said writ of attachment was so served upon the defendant herein, on the eleventh day of August, 1894, an entry was made in the margin of the ledger account, kept by said Easton, Eldridge & Co., in connection with the transactions under the contracts above mentioned, as follow: “Attached August 11, 1894.” And thereafter said Easton, Eldridge & Co. refused to make further payments on account of such transactions to H. C. Goodyear, or Linnie W. Goodyear, giving as the reason for such refusal that it had been enjoined by the courts from paying over any more money. In the meantime Clyne had recovered a judgment in his attachment suit against the Goodyears for seven thousand five hundred and thirty-two dollars, with accruing interest. The date of said judgment was December 13, 1895, but execution thereon was not issued until June 28, 1897. This writ was served on the defendant herein on July 15, 1897. In response to the accompanying notice and demand, defendant denied any indebtedness to the Goodyears, and subsequently, upon supplementary proceedings duly taken, appeared by its president before a referee appointed by the superior court of Solano county, where it

again denied all indebtedness to the Goodyears exceeding fifty dollars, denied possession of any of their property, and also pleaded the statute of limitations (Code Civ. Proc., sec. 339, subd. 1) as a separate defense to any claim in their behalf. Upon the coming in of the referee's report to that effect the court made an order in the case of Clyne v. Goodyear authorizing ²⁹² the institution of this action for the recovery of the alleged indebtedness of defendant to the Goodyears at the date of the attachment in said suit. In pursuance of this order the original complaint was filed on the following day, July 30, 1897, but the case was not tried until the year 1899, and the pleadings as finally amended were filed after the trial. In his second amended complaint the plaintiff alleges, among other things, that on the eleventh day of August, 1894, when his writ of attachment in the action of Clyne v. Goodyear was served on the defendant corporation, it was indebted to the Goodyears in the sum of six thousand nine hundred and ten dollars and twenty-eight cents, and that said debt was attached by the service of said writ. The defendant by its answer to said second amended complaint denied that the sheriff attached any debt due to the Goodyears. It also denied the existence of any debt at the date of the attachment, and along with other separate defenses (account stated and laches) pleaded the statute of limitations (Code Civ. Proc., secs. 312, 325, 339, subd. 1) in bar of the action. Upon these and other material issues the findings were adverse to the defendant.

In disposing of the plaintiff's appeal we have to consider only the particular issues to which the order granting a new trial was limited, and which relate exclusively to the question whether the debt of the defendant to Mrs. Goodyear was really attached in August, 1894, as alleged by plaintiff and denied by defendant. These issues vitally affect the plea of the statute of limitations. For whatever may have been the amount of defendant's indebtedness to Mrs. Goodyear resulting from the sale of her lands, it is certain that it accrued prior to the alleged garnishment on August 11, 1894, and it is conceded that an action for its recovery by her would have been barred by subdivision 1 of section 339 of the Code of Civil Procedure within two years from that date. It is also conceded that there could have been

no liability of the defendant to any creditor of the Good-years by virtue of an attachment or execution levied after the debt had become barred as to them. The appeal of the plaintiff therefore must fail unless the evidence in the case shows without substantial conflict that the debt was attached as alleged. The appellant to sustain his contention upon this point relies upon two items of evidence: 1. The return of the sheriff above quoted; ²⁹³ and 2. An admission of the fact by the defendant under circumstances estopping them now to deny it. As to the first item, it will be observed that the notice served with copy of the writ made no mention of debt or indebtedness specifically, and had no application to the indebtedness of the defendant unless it was included in the more general term "effects." The contention of the plaintiff is that the statute, being remedial, should be liberally construed for the advancement of the remedy, and that a notice of attachment of credits and effects should be held a sufficient garnishment of a debt. The defendant cites in opposition to this view the cases in which it has been held by this court that proceedings by attachment being special and statutory, the provisions of the statute must be strictly followed in order to acquire any rights thereunder: *Gow v. Marshall*, 90 Cal. 565, 27 Pac. 422, and cases there cited; *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619; *Beltaire v. Rosenberg*, 129 Cal. 164, 61 Pac. 916. In view of these authorities, it cannot be doubted that the established rule in this state is to exact a strict compliance with the law, and that rule was applied in *Gow v. Marshall*, 90 Cal. 565, 27 Pac. 422, to a case almost exactly the counterpart of this. There the notice of attachment mentioned only credits, and it was held, upon a critical examination of the various sections of the code relating to this matter, and upon very satisfactory reasoning, that the attachment created no liability on the part of the garnishee for a debt due to the defendant in the attachment suit. The only difference between that case and this is that while that notice of attachment mentioned credits only, the notice in this case, also contained the word "effects." But this difference would seem to be immaterial, for both *Rood* (on Garnishment) and *Shinn* (on Attachment) agree that the attachment and garnishment laws make a fundamental difference between custodians of the debtor's property, which includes his effects, and his debtors:

Rood on Garnishment, sec. 50; Shinn on Attachment, sec. 600. In the section last cited it is said: "The liability of a person to be charged as garnishee on the ground that he has property, money, or chattels, credits, and effects in his hands or under his control, is distinct from his liability on the ground of indebtedness to the principal defendant, and when process is issued on affidavit specifying one of these grounds only, the garnishee ²⁹⁴ cannot be charged with liability on the other ground." Of course, these writers were referring more particularly to the proceedings under the laws of other states, regulating what is there variously denominated garnishment process or trustee process, but those proceedings, though differing in detail from our proceeding by attachment, are so far analogous as to make the distinction there recognized between the liability of a debtor and of a custodian of goods or effects, a safe precedent here. We think that upon this view of the matter, it must be held that the sheriff's return, so far from proving an attachment of the debt of defendant to Mrs. Goodyear, must, upon the presumption that it stated the truth, be regarded as evidence, and very persuasive evidence, that the debt was not attached.

As to the admission of defendant, consisting of a pencil entry by one of its bookkeepers on the margin of the Goodyear account in defendant's ledger, and of the statement of its president that the debt was attached as an excuse for refusing further payments, that certainly was evidence that the debt had been attached; but it was not conclusive evidence. It may have been nothing more than the expression of an erroneous opinion as to the effect of the service of the notice which the sheriff says he served. As to the argument that the defendant, by refusing further payments to the Goodyears, upon the ground that the debt had been attached, and thereby securing an advantage to itself at their expense, is now estopped to deny the efficacy of the notice, it may be said that in a conceivable case these facts might work an estoppel in favor of the Goodyears; but it is not apparent how such estoppel can avail this plaintiff in view of the facts appearing in this record. A great deal of the argument of appellant on this branch of the case is devoted to the proposition that the defendant has no concern in disputing the validity of an attachment, the regularity of which has at all times been conceded by the

Goodyears. This argument ignores the fact that the defendant denies any indebtedness to the Goodyears, and that an action by them is barred by the statute of limitations. The right to interpose this plea is a valuable right of which the defendant cannot be deprived by the admission of a third party, and especially of a party whose interest is adverse. If the debt was not attached, the ²⁰⁵ plea of the statute is a perfect defense to the action, and for the purpose of that defense the defendant is interested and deeply concerned in contesting the issue. The Goodyears, on the other hand, are interested in having it established that the debt was attached; for if so, and if, as contended, the service of the writ stopped the running of the statute in favor of the plaintiff, he may now recover the debt, and what he recovers will satisfy pro tanto his judgment as against the Goodyears to their manifest advantage.

The plaintiff urges still another objection to the right of defendant to question the attachment of the debt. It is said that no objection to the sheriff's return was ever made prior to the motion for a new trial, and cases are cited in which it has been held that a garnishee waives all objections to the sheriff's return which he does not make when he appears, and other cases which deny his right to interpose technical objections to the mode of service of the writ. These cases are not in point, because they arose under the laws regulating trustee process and garnishee process in other jurisdictions where the garnishee is required by the process to appear in the action and answer to the court. Under our attachment law a garnishee is not required and has no right to appear in the action. The only answer he makes is to the sheriff at the time of the service of the writ, and that relates only to the property actually attached which he has in his possession or under his control. He has nothing to do with the return of the writ, unless it should be false in some particular which would subject him to a liability beyond that warranted by the facts. In this case, the defendant does not object to the return. On the contrary, it relies on the return as containing a true statement of what the sheriff did—i. e., that he attached credits and effects, but did not attach the debts. Defendant's real objection was made in the only manner and at the earliest time it could be made. Its answer to the original complaint is not in the transcript, but by the amended plead-

ings the issue as to the attachment of the debt is distinctly raised by allegation on one side and denial on the other. And at the trial, when the sheriff's return of the writ was offered in evidence, defendant objected that it was irrelevant. It is said that this was not the proper objection; that the real objection to the return, if any, was that it was ²⁹⁶ incompetent. But this is not so. Conceding that the evidence may have been incompetent, that was an objection which the defendant could waive, as it did by failing to make it, but this waiver made the objection of irrelevancy all the more pointed—made it mean, in other words, that, waiving all other objections, this return has no tendency to prove an attachment of the debt. The present position of the defendant as to this matter is, therefore, the same position it has maintained from the beginning, and it follows from what has been said, that the part of the order of the superior court from which the plaintiff has appealed must be affirmed.

This conclusion, however, does not dispose of all the questions arising upon the plaintiff's appeal, for the defendant contends (and in view of the further proceedings involved in the order for a new trial, the question cannot be left open) that whether the debt of defendant to the Goodyears was or was not attached in August, 1894—that even conceding the efficacy of the attachment in that respect—the order granting a new trial should still be affirmed, upon the more radical ground that this plaintiff's cause of action was barred by the same lapse of time that barred an action by the Goodyears themselves; or, in other words, that the running of the statute of limitations in favor of a debtor is not interrupted by making him a garnishee. This is really the most important, as it is the most difficult, question in the case; for its determination in favor of respondent would seem to put an end to the present controversy, and however it may be determined our conclusion will remain a precedent of vital importance for future cases. The plaintiff claims that this question (if since the adoption of the civil practice act it has ever been a question) was set at rest by the decision of Department Two of this court in *Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 48 Pac. 332. The code provision relied on is contained in section 544 of the Code of Civil Procedure, which reads as follows: "All persons having in their possession or under

their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such ²⁹⁷ debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." The construction which the plaintiff contends this section requires, and which he says this court has adopted, is that the liability of a garnishee to the defendant in an attachment suit—such as it is when the writ is served—is never barred as to the plaintiff in the attachment. If this be so, it must be conceded that it puts a garnishee at a great disadvantage as compared with other alleged debtors, and this without any fault or complicity on his part. Though the alleged claim of the defendant in the attachment may be barred the day after the garnishment, he nevertheless remains liable to an action by the garnisher on the same claim as long as he holds an unsatisfied judgment against the defendant in the attachment. This is the conclusion to which a literal reading of the statute inevitably leads, and it admits of no qualification or compromise. A conclusion so fraught with injustice to innocent parties may well induce a doubt whether the language of the statute is to be taken literally; and in considering whether it will bear a more liberal and equitable construction, we find nothing in Judge Temple's opinion in *Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 48 Pac. 332, to sustain the opposite view. All that he says touching this matter is contained in a single paragraph at the close of the opinion: "As to the statute of limitations, if the garnishee is entitled to the plea as against the defendant in the attachment suit, he can plead it. The liability created by the garnishment is never barred. Of course, the garnishee can plead any defense he would have against his creditor, and also that the attaching creditor's debt has been satisfied, or that he failed to recover judgment, or that it had been reversed or has been barred. These last defenses might also have been made by the intervener. But the liability which arises from the attachment, as something entirely distinct from these, is not barred." This language was used in deciding a case in which the claim of the attach-

ment debtor against the garnishee was not barred at the commencement of the action, and was an answer to the contention of an intervening claimant of the fund in the hands of the garnishee that the liability created by the garnishment ²⁹⁸ was barred. This being the case, it was quite natural for the court to say that the liability created by the garnishment, as something distinct from the original liability of the garnishee, is never barred.

But in making this entirely correct statement, in response to the claim there asserted by the intervener (and not by the garnishee, against whom an action by his creditor was not barred), it will be seen that the court took pains to add the qualification that of course the garnishee could plead any defense against the garnisher that could be pleaded against his creditor. So far from sustaining the position of plaintiff, this decision is distinctly adverse. The cases cited by plaintiff from other jurisdictions afford us no aid in construing our statute. Generally, they sustain the statement in *Drake on Attachment* (section 672) to the effect that in his action against the garnishee the garnisher can claim nothing which the original creditor could not claim if suing in his own behalf; and upon this principle it would seem to follow that the plea of the statute might be interposed against the garnisher whenever it could be interposed against the original creditor. In none of the cases to which we have been cited do we find anything in conflict with this view. Of course, in those jurisdictions where service of trustee or garnishee process has the effect of making the trustee or garnishee a party to the action, the statute ceases to run in his favor after service, because the claim against him is then in suit. In this dearth of authority upon the particular point in controversy we have left for consideration only the language of the statute (Code Civ. Proc., sec. 544), as affected by cognate provisions of the codes. We think, in view of the general provisions of the statute of limitations (Code Civ. Proc., sec. 312 et seq.), and of its conceded policy, the legislature could not have intended to exclude from its equal benefit every person who happens to be made a garnishee in an action between other parties, and that the section in question was intended to apply to those cases only in which the garnishee admits his indebtedness to the defendant in the attachment or admits his possession or control of specific property of

the defendant. In such case he can discharge his admitted obligation by paying the debt to the sheriff or delivering possession of the defendant's property. This it is not only his ²⁰⁰ privilege, but his duty to do, but if he chooses to retain possession of the defendant's property, or to withhold payment of a sum admitted to be due, he thereby makes himself by his own act the trustee of a fund or of specific property in custodia legis, and in that character liable to account to the party entitled whenever called upon. The language of the section, no less than the reason for making the distinction, lends support to this view; for, according to its terms, the continued liability of the garnishee is made a consequence of his failure to pay his debt or deliver the defendant's property. But the alternative of accepting such liability or delivering property or making payment is not open to a garnishee who denies any indebtedness or disputes the defendant's title to any property in his possession or control, and when he takes that position in response to the writ and notice—as the defendant in this action did—his right to invoke the protection of the limitations act would seem to stand on the same plane with that of any other alleged debtor, and such is our opinion. As an alternative position to the claim that the liability of the garnishee is never barred, the plaintiff argues that by the garnishment a new statutory liability is created, upon which an action may be commenced at any time within three years after it accrues: Code Civ. Proc., sec. 338. But this position cannot be sustained. A contract liability is not changed or converted by garnishment into another sort of liability. The sole effect of the garnishment is to work a contingent transfer of the alleged indebtedness from the creditor to the garnisher without any change in the nature of the liability.

Our conclusion upon the whole matter is that whether or not the writ and notice served on defendant in the suit of *Clyne v. Goodyear* effected a garnishment of its indebtedness to them, or either of them, the statute which had begun to run in their favor continued to run, and that the right to maintain this action was barred before the original complaint was filed. The only inconvenience that could result from this construction of the statute is this: It might happen, and in many cases no doubt would happen, that a judgment in favor of an attaching creditor could not be obtained until after the statute had barred an action against the garnishee;

and if the right of the attaching creditor to sue the garnishee ³⁰⁰ does not accrue until he gets a judgment against the defendant in the attachment suit he would be deprived of all benefit of the statutory remedy, unless the latter chose to commence an action for his benefit. The point does not call for decision in this case, but, in answer to this argument against our construction of section 544, it may be said that there appears to be no very weighty reason for holding that the garnisher might not commence an action against the garnishee for the protection of his contingent interest in the debt or property attached before he obtains a judgment. It is certain that after garnishment, the claim of the original creditor against the garnishee itself becomes contingent, and yet we have held that his right of action is not suspended: *Glugermovich v. Zicovich*, 113 Cal. 64, 45 Pac. 174. If his creditor may sue upon a contingent liability, we see no reason for holding that the garnishee could object to a suit by the garnisher upon the same sort of liability upon the same obligation. The right being the same, the remedy should be the same; and the right being admitted, the general provisions of the code should be sufficient to supply a remedy. In any action by the garnisher against the garnishee before judgment, in the attachment suit, the creditor would of course be a necessary party, and the judgment would afford the garnishee complete protection: *Glugermovich v. Zicovich*, 113 Cal. 64, 45 Pac. 174. Upon this view of the law, the statutory remedy is fully preserved without any impairment of the right of garnishees, and a view which gives full effect to the remedy at the same time that it preserves the rights of all parties, should commend itself to the favorable consideration of the courts. But notwithstanding our conclusion, that upon any view of the facts as disclosed by the record before us the action was barred, we cannot on this appeal, or on the defendant's appeal, remand the cause with directions to the superior court to enter a judgment for the defendant. All we can deal with is the order granting in part and denying in part the motion for a new trial.

It seems unnecessary, however, in view of the points decided, to enter upon any detailed discussion of the questions presented by the defendant's appeal. This involves a construction of the original and substituted authorizations to defendant to sell the land, and the amount and character of

³⁰¹ its indebtedness or liability to the Goodyears upon the completion of the sale, and the credits to which it was entitled for payments to and on account of Mrs. Goodyear. The second agreement, dated June 7, 1893, by its express terms, supersedes the former agreement under which the defendant had incurred all the items of expense charged in its accounts up to that date, and we construe the words "all crop returns now in hand" to mean the balance of rents theretofore collected by defendant over and above its expenditures to that date. This balance and any further collections for the year 1893 were to belong to defendant as part of any surplus of proceeds of sale of the land over and above the sum necessary to pay off the existing encumbrances on the land (including the interest necessarily accruing during the reasonable time required for effecting the sale, which the parties must have taken into consideration in making their agreement) and the twelve thousand dollars to be paid to Mrs. Goodyear. Upon this construction no expense incurred by defendant, nor any payment to or on account of Mrs. Goodyear, prior to the second agreement, can be charged as a credit against its indebtedness arising upon the subsequent sale of the land. We hold further that when, in pursuance of the authorization of June 7th, defendant procured a conveyance of the land from Mrs. Goodyear to its own clerk, it became bound by an implied agreement to pay off the encumbrances with accrued interest, and to pay Mrs. Goodyear twelve thousand dollars, unless by valid subsequent agreement she had consented to make her claim for that sum dependent upon the amount actually collected by defendant upon the securities accepted by it in part payment of the purchase price. There is no finding, and we think no sufficient allegation in the answer, that she consented to any such modification of the written authorization. What has been said covers every substantial point made by defendant in support of its appeal, except the claim that, according to the evidence, it should have received credit for one or two payments on account of Mrs. Goodyear which the court disallowed. We think that on the uncontradicted evidence, the court should have allowed an item of two hundred and twenty dollars paid Montgomery and one hundred and seventy-one dollars and fourteen cents taxes. There are perhaps some other small items which should have been allowed, and for this error, affect-

ing as it does the amount of ³⁰² the judgment, we think that part of the order denying a new trial should be reversed.

It is ordered that so much of the order appealed from as grants a new trial be affirmed, and so much thereof as denies a new trial of other issues be reversed.

McFarland, J., Henshaw, J., and Lorigan, J., concurred.

SHAW, J. I concur in the judgment and in all of the opinion of the chief justice, except the part thereof to the effect that where a garnishee, in his answer to the sheriff, admits that he is indebted to the defendant, the service of the garnishee process in such cases interrupts the running of the statute of limitations on the debt, and in fact prevents its again running until the attachment is discharged or the plaintiffs' debt paid. The provision of section 544 of the Code of Civil Procedure, which is said to have this effect, applies alike to cases where the garnishee owes a debt to the defendant and to those where he has in his possession personal property belonging to the defendant. Where the garnishee has property which he admits he holds as custodian of the defendant, the statute of limitations does not run, and cannot begin to run, so long as he admits that he holds as such custodian, nor until in some manner he asserts a claim thereto adverse to the defendant. The admission in the answer to the sheriff in such cases, therefore, would of itself be evidence that the statute had not begun to run. But where a matured debt exists at the time of the service of the garnishee process, the statute of limitations has already begun to run against it, and an admission that the debt still exists does not ordinarily stop or interrupt the running of the statute. There are strong grounds for holding that section 544 was not intended to give any greater effect in this respect to an admission contained in an answer to the sheriff on garnishee process than in ordinary cases, and that the full meaning of that section, so far as this point is concerned, is that after the service of garnishee process upon a third person the garnishee, if he keeps the property or does not pay the debt to the sheriff, shall thereafter be liable to the attachment plaintiff in the same manner and to the same extent that he was therefore liable to the defendant, but no further, and that ³⁰³ this transfer of liability continues, subject to its original

limitations and qualifications, until the attachment is discharged or any judgment in the main action in favor of the plaintiff satisfied, in which case the liability to the attachment plaintiff ceases, and the liability to the defendant continues, if not then barred.

As this question is not involved in the case, I do not think any opinion should be expressed concerning it.

Van Dyke, J., and Angellotti, J., concurred in the foregoing.

Rehearing denied.

Proceedings by Attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder: Ireland v. Adair, 12 N. Dak. 29, 102 Am. St. Rep. 561; Williams v. Olden, 7 Idaho, 146, 97 Am. St. Rep. 250, and cases cited in the cross-reference note thereto; note to Miller v. White, 76 Am. St. Rep. 800.

To *Render an Attachment of a Debt* due to the defendant valid, a copy of the warrant of attachment, and a notice showing the property attached, must be delivered to, and left with, the person against whom the debt exists: Ireland v. Adair, 12 N. Dak. 29, 102 Am. St. Rep. 561.

PEOPLE v. SALMON.

[148 Cal. 303, 8 3Pac. 42.]

ADULTERY—When not Open and Notorious.—An adulterous relation which, though continuous, is kept secret, the community supposing the parties to be married, will not sustain a conviction of living “in a state of open and notorious cohabitation and adultery.” (p. 270.)

W. R. Leeds and Davis, Rush & Willis, for the appellant.

U. S. Webb, attorney general, and L. B. Wilson, for the respondent.

³⁰³ HENSHAW, J. The information jointly charged A. B. C. Salmon and Daisy I. Salmon with the crime of living together “in a state of open and notorious cohabitation and adultery,” each at the time being married to a designated person other than the codefendant. The defendant was convicted, and ³⁰⁴ appeals from the judgment and from the order denying his motion for a new trial. The evidence may be taken as established that the defendant Salmon was,

as charged, a married man, and that Daisy I. Salmon was not his wife, but the wife of another man; that the defendants came from New Jersey to the city of Los Angeles, where they were not known, and rented a room in a lodging-house on South Olive Street in that city, where they lived together as husband and wife under the name of Salmon. The conduct of the Salmons while there is told in the evidence of Mrs. Hall, who conducted the lodging-house. She says: "I never knew that there was anything wrong between the defendant, A. B. C. Salmon, and Mrs. Daisy I. Salmon while they were at my place. They never lived at my place in open and notorious adultery, not that I knew anything about. They never lived at my place in a notorious state of any kind. They were very quiet. They were quiet, peaceable, gentlemanly and ladylike. Nobody was shocked by their being at my place that I know of. Nobody took any exception to their being there. If I or my sister had known there was any such thing as an adultery charge against them, or that they were guilty of living in an adulterous relation, we would not have permitted them to have stayed there."

The question thus presented is whether the charge in the information, which embodied the offense of the law, is established by this testimony. The statute upon the subject is entitled "An act to punish adultery," and provides, in section 2, that "If two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony": Stats. 1871-72, p. 381, c. 276. It will be noted that this statute does not punish secret adultery, which from the moral aspect alone, is as grave an offense as known adultery. The object of the law, as pointed out by the decisions of all of the states where like statutes are found, is to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy which outrages public decency, and has a demoralizing and debasing influence upon society. It is designed, as the supreme court of Iowa phrases it, "To prevent evil and indecent examples, tending to corrupt the public morals": *State v. Marvin*, 12 Iowa, 499; *Searls v. People*, 13 Ill. 597; *State v. Crouner*, 56 Mo. 147. In this state the distinction is drawn in *People v. Gates*, 46 Cal. 52, where the conviction was for the same offense, and this court reversed the case, saying that while the evidence tended to show that

the defendant committed adultery with the woman named in the indictment, there was not the slightest proof of a living with her in a state of notorious adultery. "The offense consists in living in a state of open and notorious cohabitation and adultery. The notoriety is as material in making out the offense as is the fact of adultery committed." So it is the publicity of the offense, the demoralizing and debasing influence of the example, that the law designs to prevent: *State v. Marvin*, 12 Iowa, 499; *State v. Johnson*, 69 Ind. 85. Adultery is, as is well understood, sexual intercourse of one spouse with anyone other than the other spouse. In this case the evidence may be taken as establishing that the defendant committed adultery, since it was shown that in all respects he sustained to Daisy Salmon the relationship of husband. But during all the time that they so lived in the house of Mrs. Hall no one in the community ever even suspected that defendant's intercourse was adulterous. Notoriety is the state or character of being well known, usually (and always when applied to crime) in an unfavorable sense. It is often with words of similar import, such as "open" and "flagrant." Can it be said that a person whose adulterous relationship is not only not known, but not even suspected, is guilty of the open and notorious adultery made punishable by our law? It certainly cannot. Having regard to the very design of the law, which is to prevent an affront to society by such notorious practice, having regard to the uniform decisions of the law, that where the adulterous relationship is kept secret, even if it be continuous, the crime is not made out, it must be answered that the evidence fails to establish the essential of notoriety, without which this particular offense is not proved. The two kinds of cases most commonly found in charges of this nature are when John Doe and Jane Roe, known in the community not to be husband and wife, maintain an open, flagrant and notorious sexual relationship, without pretense of marriage, or do the same thing under pretense of marriage, where the community knows the facts, and knows, therefore, that the pretense is ³⁰⁶ false. In both of these cases there is the same affront to social decency and to the marital relation which is the basis of it. In this case, however, no such affront was put upon society. The couple were by all supposed to be married, and comported themselves with all the respect due to the marriage relation and to society. The

moral delinquency may have been the same, but their conduct did not constitute a violation of the penal laws of the state.

The judgment and order appealed from are reversed.

Beatty, C. J., Angellotti, J., Van Dyke, J., McFarland, J., and Lorigan, J., concurred.

WHAT CONSTITUTES THE CRIME OF LIVING IN OPEN AND NOTORIOUS ADULTERY.

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- V. Effect Where the Parties Honestly, Though Mistakenly, Believe Themselves to be Married, 273.
- VI. What Constitutes a Living Together or Cohabitation Within the Meaning of Statutes of This Class, 273.

I. Scope of Note.

In this note we shall not discuss cases which involve the crime of unlawful cohabitation, which is very often confounded with the crime of living in open and notorious adultery. It may be said, however, that there are strong points of similarity between the two crimes and that both are often provided for in statutory enactments against crimes of this general class.

II. Object of Statutory Provisions Prohibiting the Living Together of Persons in Open and Notorious Adultery.

The statute of California respecting the crime which is the subject of this note is perhaps quite similar to statutes on the same general subject in other states. The statute in California is entitled "An act to punish adultery," and provides in section 2 that "If two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony": Stats. 1871-72, p. 381, c. 276.

The court in the principal case (*People v. Salmon*, 148 Cal. 303, ante, p. 268, 83 Pac. 42) observed: "The object of the law, as pointed out by the decisions of all the statutes where like statutes are found, is to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy which outrages public decency, and has a demoralizing and debasing influence upon society. It is designed, as the supreme court of Iowa phrases it, 'To prevent evil and indecent examples, tending to corrupt the public

morals': *State v. Marvin*, 12 Iowa, 499; *Searls v. People*, 13 Ill. 597; *State v. Crowner*, 56 Mo. 147."

In fact, it is the object of all statutes of this class, whether they relate to what is termed in some states the crime of lewd and lasciviously associating and cohabiting together, or what is called in other states unlawful cohabitation: *Luster v. State*, 23 Fla. 339, 2 South. 690; *Penton v. State*, 42 Fla. 560, 28 South. 774; *Commonwealth v. Calef*, 10 Mass. 153.

III. Necessity for the Meretricious Relation to be Open and Notorious.

Statutes of this general class usually provide for violations by persons who are married, violations by persons one of whom is married, and violations by persons neither of whom is married. Hence in order to facilitate the proof in such cases, the prosecutions are frequently based on those sections of the statute which do not require proof of an adulterous relation. Where the offense charged is that of living in a state of open and notorious adultery, the offense consists in an open and notorious living or cohabiting together and consequently occasional and illicit intercourse will not constitute the offense. The statute was intended to provide against persons who in defiance of morality and of the good or well-being of society should openly live together. "They must reside together publicly in the face of society as if the conjugal relation existed between them; their illicit intercourse must be habitual": *State v. Crowner*, 56 Mo. 147. It is the publicity of the offense, together with the demoralizing and debasing influence of the example, that the law is designed to prevent. Consequently it is essential that the adulterous relation be notorious. If kept secret, even if it be continuing, the crime is not established: *People v. Salmon*, 118 Cal. 303, ante, p. 268, 83 Pac. 42. The same object was designed by the legislature in enacting statutes prohibiting the living together in an open state of fornication: *Searls v. People*, 13 Ill. 597; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21. And the courts also hold that under indictments for "lewdly and lasciviously associating and cohabiting together," that the burden of the offense is the open, lewd and lascivious conduct of the parties living together as husband and wife: *State v. Marvin*, 12 Iowa, 499; *State v. Chandler*, 132 Mo. 155, 53 Am. St. Rep. 483, 33 S. W. 797. And where a defendant is charged in one count with living in a state of open and notorious adultery and in another count with lewdly and lasciviously abiding and cohabiting with each other, the prosecution fails in the first count where it fails to show open and notorious acts of illicit intercourse between the parties, but it need not show open and notorious acts on the part of the defendants in order to convict on the second count: *State v. West*, 84 Mo. 440.

IV. Materiality of the Question Whether the Parties Profess to be Married.

In the principal case, though the parties held themselves out as husband and wife, they were living in a strange city, and the falsity of their claim of the relation of husband and wife was not known nor even suspected by the community or even by the inmates of the house in which they resided as boarders. This condition of affairs was held by the court not sufficient to constitute their relation as "open and notorious." And the court observed that the two most common violations of the statute were where the parties, who are known in the community as not being husband and wife, live in an open, flagrant and notorious sexual relationship, without pretense of marriage, and where they do the same things under a pretense of marriage and the community know that the pretense is false: *People v. Salmon*, 148 Cal. 303, ante, p. 268, 83 Pac. 42. It has, however, been held in a prosecution for living and cohabiting with a married woman "in a state of adultery," that it is sufficient to constitute the crime if such a state exists either secretly or openly and whether they profess to live in the marital state or not, the court saying: "If they cohabit—if they live after the fashion of husband and wife—they are within the letter of the statute and likewise, it seems to us, within its spirit": *Sweenie v. State*, 59 Neb. 269, 80 N. W. 815.

V. Effect Where the Parties Honestly, Though Mistakenly, Believe Themselves to be Married.

Though we have not observed any cases which hold directly that an honest, though mistaken, belief by the parties that they are married would relieve them from prosecution for living in "open and notorious adultery," still we believe that the same principles would be applicable in such a case as are announced in prosecutions for lewd and lascivious cohabitation or unlawful cohabitation as husband and wife, namely, that such an honest, though mistaken, belief is sufficient to show a want of that public scandal and defiance of common morality which is the element of such crimes: *Commonwealth v. Munson*, 127 Mass. 459, 34 Am. Rep. 411; *Schondel v. State*, 57 N. J. L. 209, 30 Atl. 598.

VI. What Constitutes a Living Together or Cohabitation Within the Meaning of Statutes of This Class.

Within the meaning of statutes of this class many of the statutes designed to prevent the bad example arising from flagrant violations of the sexual laws use the words "living or cohabiting in adultery." Hence it sometimes becomes material to inquire what constitutes a living or cohabitation within the meaning of such statutes. In *Bird v. State*, 27 Tex. App. 635, 11 Am. St. Rep. 214, 11 S. W. 641, the court held that "living together" in statutes of that character "means that the parties must dwell or reside together—abide together in the same habitation as a common or joint residing place."

The decision in *Marsey v. State* (Tex. Cr.), 65 S. W. 911, was to the same effect. But there must be something more than the fact that the parties live at the same place or even in the same house. There should be proof of not only sexual intercourse, but contribution toward the support of the woman: *Bradshaw v. State* (Tex. Cr.), 61 S. W. 713. It has, however, been held in Alabama that to constitute "living in adultery," though a single or occasional act would not be sufficient, still if there be an agreement for continuation or circumstances from which such a continuation could be inferred, it will be sufficient to constitute the crime: *Bodiford v. State*, 86 Ala. 67, 11 Am. St. Rep. 20, 5 South. 559. A doubt was thrown on the force of the decision in a later case, though the matter was not necessary to the decision: *Hall v. State*, 88 Ala. 236, 16 Am. St. Rep. 51, 7 South. 340. But under statutes prohibiting unlawful cohabitation as husband and wife, conduct on the part of the man and woman which usually marks the bearing and intercourse between husband and wife is regarded as sufficient. It is, however, a question for the jury whether the occupation of the same house or room, eating at the same table, the house consisting of only two rooms, constitutes such cohabitation: *Bush v. State*, 37 Ark. 215. In *Turney v. State*, 60 Ark. 259, 29 S. W. 893, the court, in discussing the meaning of the term "cohabit," said: "The law lexicographers define it 'to dwell together in the same house; to live together as husband and wife; to live together in the same house, claiming to be married': *Rapalje's*, *Burrows'*, *Bouvier's* and *Kinney's Law Dictionaries*, verbo 'Cohabit.' In *Calif v. Calif*, 54 Me. 365, 92 Am. Dec. 549, it is said: 'The primary meaning of the word "cohabit" is to dwell with someone, not merely to visit or see them. It includes more than that.' In *Commonwealth v. Calif*, 10 Mass. 153, it is said: 'By cohabiting must be understood a dwelling or living together, not a transient and single unlawful interview.' Mr. Bishop, in his work on *Marriage, Divorce and Separation*, says: 'To cohabit is to dwell together; so that matrimonial cohabitation is the living together of a man and a woman ostensibly as husband and wife': Sec. 1669. And in a note to this section he approves of the definition given in *Ohio v. Connaway*, Tapp. 90, where 'cohabiting' is defined 'as a living together in the same house; a boarding or tabling together, carrying with it the idea of a fixed residence'; in contradistinction to a mere traveling in company. In an Indiana case, where the statute prohibits cohabiting in a state of adultery or fornication, the supreme court said: 'To cohabit, in the sense of the statute, is for a man and woman to live together in the manner of husband and wife. It implies a dwelling together for some period of time, and is to be understood as something different from occasional, transient interviews for unlawful and illicit intercourse: *Jackson v. State*, 116 Ind. 464, 19 N. E. 330. These authorities are in consonance with our own decisions

upon the subject: *Sullivan v. State*, 32 Ark. 187; *Taylor v. State*, 36 Ark. 84.

"The mere stopping over night at a house upon a transitory journey, and assuming the marital relationship, for purposes of illicit sexual commerce, however scandalous and disgraceful from a moral standpoint, is not within the inhibition of our statute. Criminal statutes must be strictly construed. The term 'cohabitation' has a definite legal signification, and when used in criminal statutes conveys the idea of living or dwelling together as husband and wife. Such conduct would be very convincing evidence if connected with other facts and circumstances going to show a degree of permanency or continuity in the ostensible relationship, but would not of itself 'authorize' the jury to convict of illegal cohabitation."

The fact that a man of wealth boards with a woman who is without means and pays the household expenses under the guise of board is, however, in connection with other circumstances indicating the existence of sexual relations, sufficient to prove living in an open state of adultery: *Crane v. People*, 65 Ill. App. 492. But the mere fact that a general servant, who also attends to the cooking, occupies a room in the house occupied by the man and his wife, who is sick, does not constitute the man and the general servant as living together in the sense that several acts of illicit intercourse will constitute the crime of habitual carnal intercourse: *Boswell v. State* (Tex. Cr.), 85 S. W. 1076. The same ruling has been made in other cases in which the woman was a domestic servant: *Taylor v. State*, 36 Ark. 84; *State v. Marvin*, 12 Iowa, 499; *Carotti v. State*, 42 Miss. 334, 97 Am. Dec. 465; *Sweenie v. State*, 59 Neb. 269, 80 N. W. 815.

Mere occasional acts of illicit sexual intercourse are not sufficient to constitute the crime of living together in open and notorious adultery: *Wright v. State*, 5 Blackf. 358, 35 Am. Dec. 126; *State v. Gartrell*, 14 Ind. 280. A single act or improper conduct for a single day is not sufficient to constitute open and notorious adultery. It should continue for a period of time of more or less duration. But where the woman has lived in the defendant's family as a member of it, slept in the same room, if not the same bed, with him; gave birth to four children in his house, which children he admitted to be his, and declared to one of his neighbors that "it was worth all that it was costing him," the showing is sufficient to constitute the offense of living in open and notorious adultery: *State v. Coffee*, 75 Mo. App. 88.

The courts universally hold that in order to constitute such offenses as living together in adultery, or in a state of adultery, unlawful cohabitation, habitual carnal intercourse, or in lewd and lascivious cohabitation, something more than a single or merely occasional act of sexual intercourse must be shown: *Collins v. State*, 14 Ala. 608; *Smith v. State*, 86 Ala. 57, 11 Am. St. Rep. 17, 6 South. 71; *Wright v. State*, 108 Ala. 60, 18 South. 941; *Luster v. State*, 23 Fla. 339, 2

South. 690; *Penton v. State*, 42 Fla. 560, 28 South. 774; *Lawson v. State*, 116 Ga. 571, 42 S. E. 752; *State v. Marvin*, 12 Iowa, 499; *Carrotti v. State*, 42 Miss. 334, 97 Am. Dec. 465; *State v. Crouner*, 56 Mo. 147; *Richardson v. State*, 37 Tex. 346; *Swancourt v. State*, 4 Tex. App. 105; *Hilton v. State*, 41 Tex. Cr. 190, 53 S. W. 113; *Collins v. State*, 46 Tex. Cr. Rep. 550, 80 S. W. 372; *Jones v. Commonwealth*, 80 Va. 18; *Pruner v. Commonwealth*, 82 Va. 115; *State v. Miller*, 42 W. Va. 215, 24 S. E. 882.

TATUM v. ACKERMAN.

[148 Cal. 357, 83 Pac. 151.]

SALE ON CREDIT—Premature Action for Price.—If goods are sold on an unconditional credit which is not obtained by fraud nor based upon a consideration that has failed or has been waived, an action will not lie for the purchase price until the expiration of the term of credit, although the buyer refuse to accept the goods and repudiates the contract. (p. 278.)

Naphtaly, Freidenrich & Ackerman, for the appellant.

J. P. Langhorne, for the respondents.

357 ANGELLOTTI, J. This action was brought to recover fifteen hundred and eighty-one dollars and ninety-eight cents and interest, in which sum, it was alleged in the complaint, the defendant "became and was indebted to plaintiffs . . . for and on account of goods, wares, and merchandise sold and delivered by plaintiffs to defendant." The allegations of the complaint were specifically denied by the answer, and, in addition, a breach of warranty was alleged—viz., that an engine, which was one of the articles sold, failed to satisfy the plaintiff's warranty—and thereupon the **358** defendant had rescinded the purchase and had attempted to return the engine to the plaintiffs. It appeared upon the trial that defendant, upon the alleged ground as to the breach of warranty as to the engine, refused to accept or keep any of the merchandise sold and delivered to him, but shipped all the articles from Usal, California, to San Francisco, addressed to the plaintiffs. Plaintiffs refused to receive the goods back from the defendant, but attached them on the institution of this action. On the trial defendant did not introduce any proof as to the alleged breach of warranty, and the court

found that the engine was as represented by the plaintiffs. The merchandise had been sold by the plaintiffs to the defendant upon a credit of sixty days from September 24, 1900. This action was commenced within said sixty days—viz., on the fifth day of November following—but the court found that the defendant had refused to keep the merchandise and had shipped it back to the plaintiffs, with the intention of abandoning and repudiating his purchase thereof, and that he did repudiate such purchase, and that prior to and at the time this action was commenced he did not intend to pay plaintiffs at any time or at all for the said merchandise, and gave judgment for plaintiffs as prayed for in their complaint. This appeal is taken from the judgment and from an order denying defendant's motion for a new trial.

The contention on this appeal is that the action was prematurely brought—that an action upon the contract of sale for the purchase price of the articles sold could not be maintained until the expiration of the time of credit allowed thereby—and this contention presents the only question to be determined. It is, of course, not disputed that where goods are sold on credit an action cannot ordinarily be maintained for the purchase price until the term of credit has expired. Until such time the obligation to pay has not matured, and there has been no breach of contract as to payment. But it is alleged that the credit here was conditioned upon the acceptance of the goods by the vendee, and his payment for them at the expiration of the term of credit, and that by his refusal to accept he necessarily waived the condition as to credit, and in effect declared that he did not intend to pay for the goods at all. The stipulation here as to credit was absolutely unconditional, unless such a condition ³⁵⁹ as is here claimed is necessarily implied in every contract of sale upon credit where no condition is expressed in the contract, for it is not claimed that there was any such express condition in the contract under consideration. We know of no rule of law that will warrant us in holding that such a condition may be so implied from the mere sale of goods on credit, and no case is cited supporting any such theory. In the American note in Bennett's *Benjamin on Sales* (seventh edition, page 795) the rule is stated as follows, viz: "If credit was unconditionally given by the contract, an action for the full price cannot be maintained under any circumstances before the time of credit has expired.

Such action affirms and counts upon the very contract of sale, time of credit included. The fraud or insolvency of the buyer, or abandonment of the contract does not alter the term of credit." Mechem states the rule in substantially similar terms, declaring that, by his action for the price, the vendor affirms the contract and must affirm it as an entirety: Mechem on Sales, secs. 1410, 1411. Some authorities hold that where the credit was obtained by fraud the stipulation as to credit may be alone rescinded, and an action brought at once for the price. These cases regard the credit stipulation as an independent one, capable of rescission by itself where it was induced by fraud, without disaffirmance of the sale. Such is the well-settled rule in New York (see *Heilbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759, and in some other states [43 Cent. Dig., sec. 990]). But this doctrine can, of course, have no application to a case where there was no fraud at the time the contract was made.

It appears to be universally recognized that where the credit is unconditional, if it was not obtained by fraud, or based upon a consideration which has failed, or has not been waived, an action will not lie on the contract for the purchase price until the expiration of the term of credit: See 24 Am. & Eng. Ency. of Law, 2d ed., p. 1122. Here, as we have seen, the credit was unconditional, and there was no fraud. Nor was there any express consideration for the credit. The credit was undoubtedly given in consideration of the purchase of the goods by the defendant, but plaintiffs, maintaining an action on the contract for the price, and insisting upon the contract, are not in a position to insist that this ³⁶⁰ consideration has failed. Nor was there any waiver of the credit. An attempted repudiation of the contract in toto by the vendee is no waiver of the single stipulation as to credit. The plaintiffs refused to acquiesce in such repudiation and insist that the contract shall be enforced according to its terms, which they have the right to do, but they have no right to make a new contract for the defendant. If, against the will of the vendee, the contract is to stand, the vendee may still insist that it shall stand according to its terms. Construing the refusal to keep the goods and their return as notice on the part of the defendant that he would not pay upon the expiration of the term of credit, plaintiffs are not relieved from the effect of the stipulation as to credit. Section 1440 of the Civil Code, relied on by them, has no application to cases

where performance is not yet due upon the part of the party who has previously given notice that he will not perform when such performance is due. In such cases, when performance on his part is due, and not before, if such notice has not been retracted, the other party may enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party. Such is the whole effect of this section: See in this connection, *Keller v. Strasburger*, 90 N. Y. 379.

As contended by plaintiffs, there can be no doubt of the right of a vendor, where the vendee refuses to take the goods sold and delivered, and repudiates the contract, to elect to treat the contract of sale as still in full force, and the goods as belonging to the vendee, and to sue on the contract for the entire contract price. But this does not mean that he may sue for the contract price before it is due according to the terms of the contract, and we have not been able to find any case so holding. The case of *Brady v. Isler*, 9 Lea (Tenn.), 356, is precisely in point. There the vendee abandoned possession of the goods, and the vendor repossessed himself thereof, and elected to resell the goods and sue for the difference between the price received upon the resale and the contract price. The action was brought before the expiration of the term of credit, and it was held that the action was premature and must fail. The court said: "It will be observed that no part of the purchase money was due at the time of the resale ³⁶¹ of the goods. And in such case the vendee has not been guilty of any breach of the contract as to payment, although he may be in default in respect to his refusal to receive the goods, or, rather, in the abandonment of their possession." The court further, in effect, said that in the aspect of the case contended for by plaintiff, that the contract was valid and subsisting, the money was not due upon it when suit was brought, and that it is essential that it should be due before suit is brought to enforce the collection. We see in this case no possible answer to the objection that the action was brought to recover money alleged to be due upon a contract, before it became due under the terms of the contract. Upon the repudiation of the contract by the vendee, the vendors might have elected to keep the property as their own and at once sue for damages on account of the breach, but this action cannot, under the most liberal rules as to construction of pleadings, be held to be such an action. It was simply

and solely an action on the contract for the purchase price, based upon the promise of defendant to pay, and the evidence shows without conflict that, according to the terms of the contract, the liability had not accrued at the time the action was commenced.

The judgment and order denying the new trial must be reversed, and it is so ordered.

Shaw, J., McFarland, J., Lorigan, J., and Henshaw, J., concurred.

Chief Justice Beatty and Justice Van Dyke Dissented, the former delivering an opinion, a part of which is as follows: "This is not strictly an action upon the express contract for the sale of the machinery, but is in form and substance an action in assumpsit on an implied contract to pay for the value of goods sold and delivered, and is based upon the claim that the plaintiff had a right under the circumstances to rescind the stipulation for a credit of sixty days. There is abundant authority for the proposition that one who has sold goods or loaned money on a credit fraudulently obtained may, upon discovery of the fraud, sue in assumpsit before the credit has expired. There is no doubt authority to the contrary, one of the most noted cases being *Galloway v. Holmes*, 1 Doug. (Mich.) 330. But, on the other hand, the doctrine is sustained by the highest courts of New York, Massachusetts, Alabama, and perhaps other states, and it commends itself to me as a just and reasonable doctrine. The foundation of the doctrine being the right of rescission, it should be applied to any case where the right exists. In New York it has been extended to a case in which after the sale of the goods the purchaser made a transfer of his property in fraud of his creditors: *Arnold v. Shapiro*, 29 Hun, 478. In that case the court said: When a 'fraudulent disposition of the property has taken place at the time of the making of the contract, the fact itself would also avoid credit obtained by means of its concealment in incurring the liability. *In principle the same effect should also follow such a disposition of the debtor's property, after he has contracted the debt and secured the credit, for it is always implied in such transactions that the debtor will make no disposition of his property which will operate as a fraud upon his creditor.*' I have italicized that part of the opinion which states the principle governing cases of this character, which principle, in my opinion, clearly embraces the present case, for here, according to the facts found by the court, the debtor, after obtaining the credit, did make a disposition of his property which would 'operate a fraud' upon the creditor. He represented in purchasing the engine that it was to be employed in logging. Instead of putting it to work where it would earn money and enable him to meet his obligation to pay for it at the expiration of the term of credit, he shipped it back to San

Francisco, in violation of his contract and at the cost of the plaintiffs, obliging them to pay the freight to prevent its being sold to pay charges, and when it was attached by them they were compelled, of course, to discharge the lien of the carrier. The case is the same in all respects as that of a mechanic who buys a kit of tools on credit, representing that he is going to work at his trade, and who, instead of going to work, pawns the tools and pays another creditor with the money so obtained.

“In asking and obtaining a credit, a purchaser of goods always represents himself as having, or being able to provide, the means of discharging his obligation at maturity, and whatever representation he makes affecting his prospective ability to pay constitutes the basis upon which the credit is accorded. If, then, he materially impairs his ability to meet his obligation, and by an inexcusable breach of the contract renders the security of his creditor worthless or precarious, there is at least a partial failure of consideration for the credit, and it will be noticed that one authority cited in the main opinion (24 Am. & Eng. Ency. of Law, 2d ed., p. 1122) includes among the exceptions to the rule stated the case in which there has been a failure of consideration for the credit. It may be said that the reasoning upon which I hold this action to have been well brought is technical. I concede it, but I call attention to the fact that the main opinion rests its conclusion upon purely technical grounds. The right of plaintiffs to sue at the time they did is conceded, but their action is defeated because, as it is held, they have sued on the contract, instead of in tort. If we are to be technical, I think we should give the preference to a technicality that results in upholding a just claim against one who has, as appears by the findings of the superior court, wantonly violated his contract, to the serious injury of innocent parties. There may not be any precise precedent to sustain this action; but if I have succeeded in showing that the right of rescission is the basis of the rule which allows a creditor to sue in *assumpsit* regardless of an unexpired credit expressly stipulated, I have shown that this case is within a principle sustained by abundant precedent, and, the principle applying, a court constituted like this should not be afraid to make a precedent which in all like cases would tend only to the promotion of justice.”

In Case of a Sale on Credit the seller cannot ordinarily sue for the price until the expiration of the term of credit (Bradford v. Marbury, 12 Ala. 520, 46 Am. Dec. 264; Girard v. Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327; Tucker v. Billing, 3 Utah, 82, 5 Pac. 554; Hunt v. Markle, 12 Ind. App. 335, 40 N. E. 151), unless, perhaps, there is fraud or some other controlling circumstance: Willson v. Force, 6 Johns. 110, 5 Am. Dec. 195; Jones v. Brown, 167 Pa. 395, 31 Atl. 647.

HAWLEY v. KAFITZ.

[148 Cal. 393, 83 Pac. 248.]

DEEDS.—Conditions Subsequent are not Favored, and no provision in a deed will be interpreted to create such a condition, if the language will bear any other reasonable interpretation. (p. 283.)

DEEDS—Condition Subsequent—Covenant to Build.—A provision in a deed that it is given and accepted upon the express agreement of the grantee to build a house of a specified value on the premises within a designated time, and that the agreement is a part of the consideration for the conveyance, creates a personal covenant, and not a condition subsequent. (pp. 283, 284.)

DEEDS—Condition Subsequent—Evidence.—If a clause in a deed is no wise ambiguous or equivocal, evidence of the understanding of the parties that the clause was intended to create a condition subsequent is not admissible in determining whether or not it does. (p. 284.)

J. M. Brooks and Edward H. Bentley, for the appellants.

P. W. Doone, for the respondents.

394 LORIGAN, J. The plaintiffs on November 26, 1901, executed to defendant William Kafitz a grant, bargain, and sale deed of a lot in the Electric Railway Homestead Association Tract in the city of Los Angeles for a money consideration of three hundred and seventy-five dollars. The deed contained the following provision: "This deed is given by the parties of the first part, and accepted by the second party, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six (6) months from the date hereof a dwelling-house to cost not less than fifteen hundred (\$1,500.00) dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." No dwelling of any kind was built upon the lot within the six months specified, and subsequent to the expiration of that period plaintiffs brought this action to have the right of defendant in said lot declared forfeited and for a decree requiring a reconveyance to them by defendant of the property. Defendant had judgment, from which plaintiffs appeal, their appeal being accompanied by a bill of exceptions.

The only question arising on this appeal from the judgment is as to the nature of the provision inserted in the deed relative to the building of a house on the lot granted within

six months and the correctness of the construction the trial court gave it. As to this provision, it is insisted by plaintiffs that by virtue of its incorporation in the deed an estate on condition subsequent was created, and defendant having failed to perform the condition, his interest in the property was subject to forfeiture at the instance of plaintiffs for nonperformance of the condition. The trial court held that this provision did not create a condition subsequent; that it amounted simply to a personal covenant. We think there can be no question of the accuracy of the construction placed upon it by the court. Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. ³⁹⁵ Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created—language which *ex proprio vigore* imports such a condition: *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222; *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 16, 62 Pac. 295.

In the case at bar the provision in question which, it is claimed, created a condition subsequent contains no language which in terms declares such a condition, or which by necessary implication imports one. There is an entire absence of any of those apt or appropriate words or expressions which are usually employed for the purpose of creating a condition subsequent—technical terms which, if a condition subsequent is intended to be created, generally follow the granting clause of the deed, and declare that the estate conveyed is upon “express condition” that certain things shall be done, or “provided, however,” or “in the event that” certain terms imposed are or are not complied with, the deed shall be void, and the estate granted shall be terminated and forfeited. Neither is there in the deed any declaration that in the event

of the failure of the grantee to build within the stipulated time the deed shall be void, nor any provision declaring a forfeiture or right of re-entry for breach of condition. Nor does it appear from the deed that any specified purpose was to be attained by the grantor in having the building erected on the lot within the given time, or that its erection was the sole consideration for the conveyance. In fact, there is not only an entire omission on the part of the grantor to use any technical language, such as is ordinarily employed to create an estate on condition subsequent, but there is also an entire absence of any language indicating that for noncompliance with the stipulation to build it was the intention of the grantor that the estate granted should be defeated and forfeited. Not only is there no language which would create a condition subsequent, but the language actually employed, "This deed is . . . upon the express agreement," implies a personal covenant, and not a condition. As supporting this conclusion, we refer to *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222; *Behlow* ³⁹⁶ v. *Southern Pacific R. R. Co.*, 130 Cal. 16, 62 Pac. 295; *City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90; *Palmer's Exr. v. Ryan*, 63 Vt. 227, 22 Atl. 574; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655; *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719. In this last case cited a provision almost identical with the instant provision under review here was declared not to create a condition, and one of the same general nature was, in *Behlow v. Southern Pacific R. R. Co.*, 130 Cal. 16, 62 Pac. 295, construed as simply a personal covenant.

Under the bill of exceptions accompanying the appeal from the judgment the only point presented is as to the ruling of the lower court upon the admissibility of certain evidence offered on the part of the plaintiffs. The offer was to prove that the clause in the deed was understood by the parties as "intended to be a condition subsequent and clause of forfeiture." The court refused the offer, and properly so. The clause in the deed was in no wise ambiguous or equivocal. Its language was plain and clear, and whether the clause created a condition subsequent, as contended by plaintiffs, or a mere personal covenant, as insisted by defendant, was a matter of pure legal interpretation for the court. That neither evidence of the understanding of the plaintiffs nor the interpretation they desired to place upon the unambiguous language

of the clause in their deed was admissible is so elementary that it is disposed of merely by stating it.

The judgment appealed from is affirmed.

Henshaw, J., and McFarland, J., concurred.

Words Which Create a Condition Subsequent are discussed in the note to *Ecroyd v. Coggeshall*, 79 Am. St. Rep. 747-769. Conditions precedent are discussed in the note to *Brennan v. Brennan*, 103 Am. St. Rep. 366-370. Whether a condition is precedent or subsequent depends upon the intent of the parties as collected from the whole contract, although certain words are customary where a condition rather than a covenant is intended: *Frank v. Stratford-Hancock*, 13 Wyo. 37, 110 Am. St. Rep. 963. The mode of taking advantage of breaches of conditions subsequent is the subject of a monographic note to *Trustees of Union College v. New York*, 93 Am. St. Rep. 572-578.

COUNTY BANK v. JACK.

[148 Cal. 473, 83 Pac. 705.]

APPEAL AND ERROR—Time of Taking.—The Supreme Court has no jurisdiction of an appeal from a judgment taken more than six months after its entry, and cannot consider questions arising upon the judgment-roll. (p. 286.)

APPEAL AND ERROR.—The Sufficiency of the Complaint to support the judgment cannot be considered upon an appeal by the defendant from an order denying his motion for a new trial; and this principle is equally applicable upon an appeal by the plaintiff from an order denying his motion for a new trial, where the judgment was for the defendant after a trial upon the merits, and the latter claims that the judgment should be affirmed because the complaint states no cause of action, at least where the defect in the complaint is merely technical and can be remedied by amendment. (p. 287.)

JUDGMENT—Presumption of Jurisdiction.—In the event of a collateral attack upon a judgment foreclosing a mortgage which recites that the defendants have been duly and regularly summoned" and "that the default of each for not appearing and answering has been duly and regularly entered," the case comes within the rule that in all particulars wherein the record is silent or noncommittal the presumption is in favor of the validity and regularity of the action of the court. (p. 287.)

PROCESS—Presumption to Support Service.—An affidavit of service of summons which is silent as to the venue of the notary will, in case of a collateral attack upon the judgment, be presumed to have been made in the county of his appointment. (p. 288.)

PROCESS—Presumption to Support Service.—If an affidavit of service of summons is ambiguous as to whether or not a copy of the complaint and summons was delivered to each defendant, it will be presumed, in case of a collateral attack upon the judgment, that it satisfactorily appeared to the court that each of the defendants at the time of the service received a copy of the complaint and summons. (p. 288.)

TAX SALE—Deed from State—Recitals as Evidence.—When the state conveys land acquired by it for taxes, the requirement of section 3898 of the Political Code that the deed to the purchaser shall recite "the facts necessary to authorize such sale and conveyance, which deed shall convey all the interest of the state in and to such property, and shall be prima facie evidence of all facts recited therein," does not operate as proof of the execution of a prior deed whereby the title of the taxpayer has been transferred from him to the state. (p. 289.)

Smith & Allen, for the appellant.

Stearns & Sweet, for the respondent.

438 SHAW, J. The record purports to present appeals from the judgment and from the order denying the plaintiff's motion for a new trial. The judgment was entered in the court below on June 20, 1903, and the notice of appeal from the judgment was served and filed on December 23, 1903, which was more than six months after the entry of the judgment, and consequently after the time within which such appeal could be taken had expired. This court, therefore, has no jurisdiction of that appeal, and the questions arising upon the judgment-roll cannot be considered. The objection of the respondent, that the complaint does not state facts sufficient to constitute a cause of action, is no answer to an appeal by plaintiff from an order denying a motion for a new trial, and cannot be considered: *Hall v. Susskin*, 120 Cal. 559, 53 Pac. 46; *Tompkins v. Montgomery*, 123 Cal. 219, 55 Pac. 997; *Swift v. Occidental U. & P. Co.*, 141 Cal. 161, 74 Pac. 700; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661. These cases all go to the point that the sufficiency of the complaint or findings to support the judgment cannot be considered upon an appeal by the defendant from an order denying his motion for a new trial. The principle, however, is equally applicable upon an appeal of the plaintiff from an order denying plaintiff's motion for a new trial, where the judgment below was for the defendant after a trial upon the merits, and the defendant claims that the judgment should be affirmed because the complaint states no cause of action. At all events, this is true in cases like the present, where the alleged defect in the complaint is merely **439** technical, and can be remedied by an amendment if necessary: *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352.

The complaint states a cause of action to quiet title. Both parties claim title to the land in controversy under one Henry

J. Symonds—the plaintiff by virtue of a foreclosure sale, the defendant by a sale for taxes to the state and a subsequent sale from the state to the defendant. The defendant claims that the evidence of plaintiff was insufficient to show a valid transfer under the foreclosure sale, the objection thereto being that the judgment of foreclosure under which the plaintiff claims is void for lack of jurisdiction over the persons of the defendants. The mortgage was executed by Henry J. Symonds and his wife, Eliza Symonds. The foreclosure judgment was rendered on default. The first objection is that the proof of service of summons in the judgment-roll in the action was made by affidavit, and that the affidavit is defective because no venue is stated therein. The other objection is that the proof does not show a legal service.

We are of the opinion that neither of the objections can be sustained, upon the record, upon a collateral attack, such as that here made upon the validity of the judgment. The affidavit is not the only evidence in the record in regard to the service of summons. The judgment recites that the court having heard all the evidence and proofs, it appeared therefrom to the satisfaction of the court “that Henry Symons and Eliza Symons, his wife, the above-named defendants, have been duly and regularly summoned to answer unto the plaintiff’s complaint herein, and that the default of each defendant for not appearing and answering unto plaintiff’s complaint has been duly and regularly entered herein.” The case comes within the rule that in all particulars wherein the record is silent or noncommittal the presumption is in favor of the validity and regularity of the action of the court; that unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done, or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak was properly done. Thus in *Drake v. Duvénick*, 45 Cal. 455, 440 it is said: “The record fails to show by direct assertion that the copy of the summons was delivered to Dorland, but as it fails to show the contrary, and as the court must have found from the return or other evidence before it that it was so delivered—for upon that its jurisdiction depended, and it necessarily decided that it had jurisdiction, as the first point in the case—we think it one of the cases where presumption will now come to the aid of the judgment.”

With regard to the venue, the affidavit does not affirmatively show that the oath of the person making the affidavit of service was administered by the notary public in the county for which he was appointed as such notary, but neither does it show that it was not administered within that county. It is silent as to the place where the oath was taken. The court affirmatively finds from the evidence that the defendants were duly and regularly summoned. This it may have found either from evidence that the oath was administered in the proper county, or from other evidence of service which is not in the record. The alleged defect in the proof, as set forth in the affidavit, is that the affiant therein states that he personally served the summons on the defendants "by delivering to and leaving with said Henry Symons and Eliza Symons, said defendants, personally, a copy of said summons attached to a copy of the complaint in said action," and that this statement does not show that he delivered to each of the defendants a copy of the complaint and summons, but that, for aught that appears therefrom, he may have delivered but one copy to the two of them for their joint behoof, and that this latter form of service would not be a legal service. It must be admitted that the affidavit of service is ambiguous on this point. But here again there is no affirmative statement that but one copy was delivered to the two defendants, and proof that each received a separate copy would not be contradictory of the affidavit, but would be in harmony therewith. The recital in the judgment and the presumption of law come to the aid of the specific proof appearing in the record, and it is to be presumed from the recital that from other evidence satisfactory to the court it appeared that each of the defendants at the time of the service received a copy of the summons and complaint: *Sacramento Bank v. Montgomery*, 146 Cal. 745, 81 Pac. 441 138; *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Freeman on Judgments*, sec. 130. It may be added that in *Reavis v. Cowell*, 56 Cal. 588, it was held that a statement of the venue therein is not necessary to the validity of an affidavit. The citation of authority holding that the sufficiency of such proof of service may be inquired into upon a direct appeal from the judgment does not detract from the force of the principles above stated. They have no application to cases where the attack is collateral.

The next question is whether or not the deed to the defendant from the state of California is valid and sufficient to show the vesting of Symonds' title in the defendant. There was no other evidence tending to show that the title of Symonds had been transferred to the defendant, no deed to the state having been introduced, and the sufficiency of this deed as evidence of such transfer must depend on the sufficiency of the recitals in the deed to prove a previous transfer of the title from Symonds to the state. The deed introduced did not purport to transfer title from Symonds to the state. Its purport and its only efficacy as a conveyance was to transfer the title of the state, such as it had, to the defendant. It contained a great many recitals of matters of fact, and among other things stated that in the year 1894 the land was the property of Symonds, and was regularly assessed to him for the taxes of that year, which he failed to pay when due; that the land was then advertised and sold for the payment of such taxes, then delinquent, on July 3, 1895, and was on that day, in pursuance of said proceedings, sold to the state of California for the nonpayment of said taxes; and that afterward, on August 1, 1901, in pursuance of said sale, there having been no redemption therefrom, the tax collector of the county duly executed a deed conveying to the state all the said property, which deed was duly recorded and thereupon filed in the office of the state controller. Further recitals were made to the effect that the controller thereafter authorized the tax collector of Kern county to sell said land at public auction, in the manner provided by law; that the tax collector had accordingly advertised it for sale, and, the defendant being the highest bidder, had sold it to him for the sum of twelve dollars. The contention of the respondent is that these recitals contained in the deed ⁴⁴² from the tax collector to the defendant are sufficient evidence of the previous sale of the interest of Symonds to the state at the sale for delinquent taxes and of the deed of the tax collector to the state in pursuance thereof.

This claim cannot be sustained. The only authority for such a proposition is found in sections 3897 and 3898 of the Political Code. Section 3897 provides that whenever the state has become the owner of any property sold for taxes, and the deed to the state has been filed with the controller,

as provided in section 3785, the controller may thereupon in writing authorize the tax collector of the county to sell the property or any part thereof as he may deem advisable, at public auction for cash, after certain prescribed notice of the sale, and that the tax collector may thereupon sell the same in the manner prescribed. Section 3898 provides what shall be done with the money received at such sale, and thereupon proceeds as follows: "On receiving the amount bid, as prescribed by the preceding section, the tax collector must execute a deed to the purchaser, reciting the facts necessary to authorize such sale and conveyance, which deed shall convey all the interest of the state in and to such property, and shall be prima facie evidence of all the facts recited therein." This does not go so far as the respondent contends. It cannot be allowed to have the effect of operating as proof of the execution of a previous deed whereby the title of the taxpayer had been transferred from him to the state. It would be most extraordinary if it had been intended to provide that proof of such divestiture of title to property could be made by the mere ex parte recital of an executive officer set forth in a subsequent conveyance to which the owner was not a party. No such purpose was contemplated by the legislature. The statement that the deed should be prima facie evidence of all facts recited therein cannot enlarge the office of such recitals so as to make them evidence of facts not required to be recited therein. The requirement that the deed shall recite the facts necessary to authorize the sale and conveyance refers only to the facts necessary to authorize the tax collector to sell the title of the state, the title which the state had previously acquired. It does not authorize or require the recital of the chain of title or of the facts and proceedings whereby the state obtained title to the property. ⁴⁴³ Evidence of those facts is provided for by section 3787, referring to the deed of the tax collector to the state when the tax sale is not redeemed. It declares such deed to be "conclusive evidence of the regularity of all other proceedings from the assessment by the assessor, inclusive, up to the execution of the deed." The recitals required by the provisions of section 3898, above quoted, refer to the authorization of the sale by the controller, and the proceedings for the sale made in pursuance of such authority, and perhaps of the fact of the filing of the deed in the office of the controller, those being acts oc-

curing subsequent to the vesting of title in the state, and the latter being necessary to give the controller authority to act in the matter. So far as it recites other matters, it is ineffectual as evidence, and the proof of the defendant was therefore not sufficient to show that he had acquired the title of the original owner, Symonds.

Other questions are presented and argued which are not necessary to the decision of this appeal, but which may arise upon a new trial in the lower court. As we cannot perceive with certainty precisely what questions will arise, nor the particular phase of them that may be presented, we cannot discuss them intelligently, and we therefore refrain from expressing any opinion thereon. The findings that the defendant is the owner of the land and that the plaintiff is not the owner thereof are not sustained by the evidence and the motion for a new trial should have been granted.

The order denying a new trial is reversed.

Angellotti, J., and McFarland, J., concurred.

When Judicial Proceedings are Collaterally Attacked, all intendments and presumptions are in their favor: In re Sullivan's Estate, 40 Wash. 202, 111 Am. St. Rep. 895, and cases cited in the cross-reference note thereto. A judgment of a court of general jurisdiction cannot be collaterally attacked, unless the record affirmatively shows want of jurisdiction: Sodini v. Sodini, 94 Minn. 301, 110 Am. St. Rep. 371.

The Fact of Service of Process, not the Proof thereof, gives a court jurisdiction: Burke v. Interstate Sav. etc. Assn., 25 Mont. 313, 87 Am. St. Rep. 416, and cases cited in the cross-reference note thereto.

LYON v. UNITED MODERNS.

[148 Cal. 470, 83 Pac. 804.]

APPEAL—Waiver of Error in Denying Nonsuit.—Any error in denying a motion for a nonsuit is waived, so far as the defendant's evidence supplies the defects in the plaintiff's proofs. (pp. 292, 293.)

BENEFIT SOCIETY—Sufficiency of Proofs of Death.—A requirement in a certificate of insurance in a benefit society of "satisfactory proof of the death of the member and of the identity and right of the claimant and of the validity of the claim," does not exact a showing of the validity of the certificate, but only the proof of the death of the member and of the claimant's right and identity to such benefit as the certificate stipulates. (p. 294.)

BENEFIT SOCIETY—False Report by Medical Examiner.—If an applicant for membership in a benefit society makes truthful answers to questions concerning specific diseases, but the medical exam-

iner incorrectly transcribes them in his report, the society is estopped to assert the falsity of the answers as a defense to an action on the certificate of insurance. (p. 296.)

BENEFIT SOCIETY—Prior Rejection of Member.—A fraternal association, such as the Woodmen of the World, is not a "company" within the meaning of a question to an applicant for a benefit certificate, "Has any proposal or application to insure your life ever been made to any company upon which a policy has not issued?" (p. 297.)

J. W. McKinley, for the appellant.

Frank James and Bernard Potter, for the respondent.

471 ANGELLOTTI, J. This is an appeal from an order denying defendant's motion for a new trial, in an action brought by plaintiff to recover on a benefit certificate of membership of her deceased husband, issued by defendant corporation. Defendant is one of the many fraternal mutual beneficial associations existing in this country which pay benefits to **472** the beneficiaries named in the certificate of membership, upon the death of a member, in such amount as may be set forth in the certificate. Deceased became a member of one of the subordinate lodges of defendant in September, 1901, when a certificate of membership was issued, under the terms of which it was agreed that three thousand dollars should be paid plaintiff within ninety days after "satisfactory proof of the death of said member, and of the identity and right of claimant and of the validity of the claim," provided, of course, that such certificate remained in force at the time of his death. Deceased died December 29, 1901. It was in effect admitted on the trial that the certificate was in full force at the date of his death, if it was not void in its inception by reason of alleged misrepresentations made by the deceased in his application for membership.

1. The first point made by defendant for a reversal of the order is that the court erred in denying its motion for a nonsuit, made at the close of plaintiff's evidence, upon the ground that plaintiff had not shown that satisfactory proof had been made to defendant of her right or the validity of her claim. Without considering the question as to whether the admissions made by defendant in its answer and its stipulation at the commencement of the trial sufficiently showed such compliance with this requirement as was necessary to make a prima facie case for plaintiff, we think there is nothing in the point made. Defendant did not rest its case upon

the denial of the motion for nonsuit, but introduced evidence in its own behalf. So far as the evidence introduced by defendant supplied any defects in plaintiff's proof, any error in denying the motion for nonsuit was waived: *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463; *Russell v. Pacific Can. Co.*, 116 Cal. 527, 48 Pac. 616; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728.

Defendant introduced in evidence the proofs of death which were in fact made. These proofs were made on blanks furnished by the defendant, and, in accordance with the laws of defendant, by officers of the subordinate lodge of which deceased was a member, and, concededly, *prima facie* fully established the rights of plaintiff to payment, except for one reason. The proofs were written on forms prepared ⁴⁷³ by the defendant for that purpose, and in answer to certain questions propounded thereon, the claimant and physician stated that deceased had nearly one year before making his application for membership been treated by a physician "for cold and a slight touch of pleurisy," while in the medical examiner's report, which was made a part of his application for membership, in answer to a question as to whether he had ever had any of forty-five enumerated "diseases," including "pleurisy," the answer, "No," had been written after each named disease. Concededly, by virtue of certain provisions of the contract, the certificate was void, if the deceased had in his application made material misrepresentations in his answers to the questions propounded on the application blank. It is now claimed that the blank showed such a misrepresentation, and that hence the proofs furnished as to the validity of the claim were not "satisfactory." The real point thus appears to be that, under the terms of the certificate, no action could be maintained by plaintiff on this certificate, until she made to the company such a showing as ought reasonably to satisfy defendant's officers that the defendant had no good defense against the claim on the ground of misrepresentation made in the application for membership. We are satisfied that the contract required no such proof on the part of the claimant as a prerequisite to the maintenance of an action. The words "and of the identity and right of claimant and of the validity of the claim" all have reference solely to her claim that she is the beneficiary named in the certificate, and entitled to recover thereon if the certificate was in force at the death of the insured, and cannot reasonably be construed

as requiring a showing as to the validity of the certificate issued to the deceased. Proof of death and proof of the claimant's right and identity to such benefit as was stipulated by the certificate were the only requisites. If the proof showed facts of which defendant might avail itself as a defense to an action on the certificate, this would not derogate from the sufficiency of the proofs in either respect, or bar the bringing of an action: *Insurance Co. v. Rodel*, 95 U. S. 232, 24 L. ed. 433.

2. The medical examiner's report showed, as already indicated, the answer "No" to the question: "(3) Have you ever had any of the following diseases? Answer yes or no in ⁴⁷⁴ each space, and give particulars under the head of remarks: Pleurisy." Some forty-five so-called diseases were here enumerated. It further showed the following question and answer, viz.: "(6) Have you consulted or been advised by any physician regarding your health within the last five years? If so, whom, when, and for what ailment? A. Grippe, 1900. Dr. La Doux." It appeared from the evidence that all the answers in this very lengthy report were written by the medical examiner of defendant in the presence of the applicant, and as the result of his inquiry of the applicant, and that the applicant was then called upon to sign, and did sign, a statement at the end, to the effect that he warranted the "answers as written to the above questions put by the medical examiner are full, complete and true, and the same shall be made a part of the herein referred to application for membership." In the application proper was a similar warranty followed by this statement: "And I do hereby acknowledge and consent and agree that any untrue statement made herein by me or on my behalf, or to any medical examiner, whether written by my own hand or not, or any concealments of facts by me or anyone else, shall forfeit and cancel all rights to any benefit under the above-named application." The certificate recited that it was issued "in consideration of the statement made in the application for beneficiary certificate, and in answer to questions asked in the medical blank (the truth of which said member guarantees)." There was evidence tending to show that during, or while convalescing from the attack of "grippe" referred to in the medical report, the deceased had a pleural pain, "not so very, very severe," the attending physician testified, "but a little touch of pleurisy."

The physician further testified that there was not much inflammation, hardly any fever, that it was not "regular pleurisy," just "the very first symptoms of pleurisy," and "it terminated there" at once. The evidence in regard to the matter is such that a jury might well have been warranted in concluding that the applicant had never had the "disease" of "pleurisy" within the meaning of the question relative thereto, and that the written answer was therefore not false. But in view of evidence admitted and instructions of the trial court, we are not able to determine that they so concluded. The ⁴⁷⁵ plaintiff was allowed, over defendant's objection, to show what took place between the medical examiner and the applicant at the time the medical report was written. Under this ruling plaintiff testified that all the medical examiner asked the applicant as to diseases was whether "he had ever been sick any," and that the applicant answered that he had never had anything but smallpox and typhoid fever, "until January, 1901, he had the grippe and a slight attack of pleurisy," and that the examiner did not say anything, but simply apparently wrote down the answers. The only other testimony regarding this interview was that of the examiner, who admitted that plaintiff was present during at least a portion of the interview, and who said he had no recollection of the applicant saying anything about pleurisy, and that he could not say as to whether he asked the applicant as to each of the diseases enumerated on the blank; that it was his custom so to do, and always to write down the full reply.

Upon this matter the court instructed the jury in effect that if the applicant had prior to the application been afflicted with the disease of "pleurisy," and that when asked whether he had ever had such disease, answered "No," his statement would be a misrepresentation of a material fact, which would avoid the policy, and that if, on the other hand, he told the examiner that he had "an attack, slight or otherwise, of pleurisy, and the medical examiner either neglected or omitted to write the answer in his report," the insured was not responsible for such omission or neglect, unless he had actual knowledge of the fact that the answer had been imperfectly or incorrectly written. There was no pretense that he had any actual knowledge of the contents of said report, or that he had been asked to read the same, or to do anything but sign his name to the statement at the end thereof. There was

no error in the action of the court in admitting this evidence, or in giving this instruction.

In Cooley's Briefs on the Law of Insurance (volume 3, page 2594) it is said: "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, ⁴⁷⁶ the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, though it is so stipulated in the application or policy."

An examination of many of the authorities satisfies us that while there is some conflict in the cases on some of the matters included in this statement, the great weight of authority is with the statement as a whole, where the insured acts in good faith and is himself without fault. This court has already indicated its support of the rule enunciated. In *Menk v. Home Ins. Co.*, 76 Cal. 53, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117, a fire insurance case, it said: "The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company, nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is plainly to hold all these conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud": See, also, *Wheaton v. North British etc. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758; *Maxson v. Llewelyn*, 122 Cal. 195, 199, 54 Pac. 732; *Bayley v. Employers' etc. Corp.*, 125 Cal. 345, 58 Pac. 7; *Parrish v. Rosebud etc. Co.*, 140 Cal. 635, 74 Pac. 312. In *Maxson v. Llewelyn*, 122 Cal. 195, 54 Pac. 732, it is pointed out, quoting approvingly from *Union etc. Ins. Co. v. Wilkinson*, 13 Wall.

222, 20 L. ed. 617, that this principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing was procured under such circumstances by the other side as estops that side from using it or relying on its contents—not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the ⁴⁷⁷ party whose name is signed to it. The rule is as applicable to life and accident insurance as it is to fire insurance, and, where the applicant is not a member until after the making of his application, to mutual fraternal societies as it is to what is known as “regular insurance.”

3. On the application proper the answers to the printed questions were written by an officer of defendant, and the paper, when so completed, was handed to the applicant for signature and signed by him. The following question was contained thereon, viz.: “(7) Has any proposal or application to insure your life ever been made to any company, or agent, or medical examiner, upon which a policy has not been issued? If so, state full particulars.” The written answer was “No.” The defendant sought to show that in December, 1900, deceased had applied for membership in, and a death benefit certificate from, the “Woodmen of the World,” a well-known fraternal association, which, as a part of its plan, issued death benefit certificates similar in all particulars material to the question here presented to those of this defendant, and that his application had been disapproved by the “head physician” of the order, and no certificate had ever been issued thereon. The trial court sustained the objection made to all such testimony, and this ruling is assigned as error. We are of the opinion that the “Woodmen of the World” was not a “company,” within the meaning of the question on the application blank, and that therefore the offered evidence was not material. There is some conflict in the cases as to whether a question of the general character of the one under consideration should be held to refer to any organization other than regular insurance companies, or whether it also includes fraternal associations organized for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money on the death of the members; but where the question stated on the application blank is as uncertain in its terms as the one un-

der consideration the better reasoning appears to be in favor of excluding all except regular insurance companies.

It must be recognized that the rule applicable in the construction of insurance contracts of construing the contract in favor of the assured and against the insurer, where it is ⁴⁷⁸ reasonably susceptible of such construction, is applicable in such cases, and therefore, as said in one of the cases, "where an insurance company or association seeks to avoid a policy or certificate of membership on the ground of falsity in an answer to a question which is by the terms of the contract made material, the court will construe the question and answer strictly as against the company, and liberally with reference to the insured," and "if any construction can reasonably be put on the question and the answer such as will avoid a forfeiture of the policy on the ground of falsity of the answer, that construction will be given, and the policy will be sustained": *Newton v. Southwestern Mut. Life Assn.*, 116 Iowa, 311, 90 N. W. 73. The law of this state recognizes a distinction between regular insurance companies and such associations, which are not conducted for profit, by declaring the associations "not to be insurance companies in the sense and meaning of the insurance laws of this state," and exempting them from the provisions of such insurance laws (Civ. Code, sec. 451; *Marshall v. Grand Lodge*, 133 Cal. 686, 66 Pac. 25); and there is such a difference between the two classes as to reasonably justify one in concluding that an association or order of the class mentioned is not an "insurance company" within the general acceptance of that term. If this be so, the applicant here was justified in concluding that only regular insurance companies were meant by the question, and we must construe the question as calling for nothing more. If the association wanted anything more, it would have been a simple matter for it to have framed the question on its carefully prepared blank in terms so precise and definite as to have left no room for doubt. Again, quoting from *Newton v. Southwestern Mut. Life Assn.*, 116 Iowa, 311, 90 N. W. 73: "When an applicant for insurance answers categorically the questions asked, and his answers are correct in any view of the question which can be reasonably taken, then the insurance company or association, as the case may be, ought not to be allowed to escape its liability on the ground that the answer is false": See, also, *Fidelity Mutual Life Assn. v. Miller*, 92 Fed. 63, 34 C. C. A. 211; *Pennsylvania*

Mut. etc. Co. v. Mechanics' etc. Trust Co., 72 Fed. 413, 19 C. C. A. 286; 3 Cooley's Briefs on the Law of Insurance, p. 2079.

⁴⁷⁹ A contrary view of the matter has been taken by the New York court of appeals in *Alden v. Supreme Tent*, 178 N. Y. 535, 71 N. E. 104, where the question was, "Have you ever been rejected by any life insurance company or association?" and also by the supreme court of that state: *McCullum v. Mutual Life Ins. Co.*, 55 Hun, 103, 8 N. Y. Supp. 249. It will be observed that the question in the New York court of appeals case included the word "association" as well as "company," which might reasonably be held to indicate more to the applicant. In *Bruce v. Connecticut Mut. Life Ins. Co.*, 74 Minn. 310, 77 N. W. 210, the question was, "Has any company or association ever declined or postponed granting or receiving insurance on your life, either for any particular amount, or in any particular form," and it was held that the question included fraternal associations issuing death benefit certificates. Here, again, the question was so unlike the one involved in this case as to present an entirely different question. We are of the opinion that where the question asked is materially the same as the one we are considering, the other line of authorities is supported by the better reasoning.

4. Complaint is made that the trial court refused to give to the jury the following instruction, viz.: "The burden rests upon each party to establish by preponderance of evidence affirmative allegations of its pleadings. In this case the plaintiff claims that the fact that James B. Lyon had had pleurisy was communicated to defendant, and the burden rests upon plaintiff to show that such fact was communicated to defendant." Regardless of the question as to where the burden lay to show the facts constituting an estoppel, we are of the opinion that the court was justified in refusing the requested instruction, for the reason that it assumed a fact that under the evidence was in issue and for the jury to decide—viz., that the applicant had suffered from the disease of "pleurisy." As we have already shown, the evidence was such as to warrant a conclusion that he had not had such disease within the meaning of the printed question, but had had only the first symptoms thereof—had only been threatened with the same. The question as to whether he had the disease was one of the questions submitted to the jury for decision by the charge of the court. The requested instruction in effect declared it to be a fact that the deceased had the disease, and

480 that the answer, as written on the medical examiner's report, was false. We are also satisfied that, under the circumstances shown by the record, the defendant could not have been prejudicially affected by the absence of any specific instruction as to where the burden of proof rested to show an estoppel in the respect designated.

5. Various other rulings of the trial court in the matter of instructions are complained of, but we find none that requires special mention. As to defendant's other requested instructions, so far as proper, they appear to have been fully covered by other instructions given, and those portions of the charge of the court that are complained of were in accord with the views we have already expressed in discussing the question as to the right of the plaintiff to show that the answers given by the applicant to the medical examiner were correct, and the question as to whether the "Woodmen of the World" was an insurance company within the meaning of the phrase used in the printed application.

The order appealed from is affirmed.

Shaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

If an Applicant for Insurance gives truthful answers to a medical examiner appointed by the insurer, and the examiner omits to insert them in his report, or incorrectly transcribes them therein, the policy subsequently issued is not invalidated thereby: See the monographic note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 110.

As to Whether Benefit Associations are regarded as insurance companies, see *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. 99, 35 Am. St. Rep. 810; *Chartrand v. Brace*, 16 Colo. 19, 25 Am. St. Rep. 235.

STONER v. ZUCKER.

[148 Cal. 516, 83 Pac. 808.]

PAROL LICENSE—When not Revocable.—Where one enters upon the land of another under a parol license and expends money or labor in the execution of the license, it becomes irrevocable for so long a time as the nature of it calls for its continuance. (p. 304.)

A PAROL LICENSE to Construct an Irrigating Ditch, when executed by the construction of the ditch, becomes in all essentials an easement for such length of time as the use itself may continue. (p. 304.)

Collier & Carnahan, for the appellant.

E. W. Freeman and Henry J. Stevens, for the respondent.

517 HENSHAW, J. Plaintiff pleaded that defendants had entered upon his land in 1899 under license, and had constructed thereon and thereover a ditch for the carrying of water; that he never conveyed or agreed to convey to the defendants any right of way, easement, or interest in the land for the purpose, and their right to construct and maintain the ditch rested wholly upon this license; that in 1900 he served notice upon them that the license to construct and operate the ditch had been revoked and abrogated by him. Notwithstanding this notice of revocation and abrogation, the defendants, disregarding it, have continuously entered upon plaintiff's land, making repairs upon the ditch and restoring the same where it was broken and washed away, and defendants threaten to continue this trespass upon the lands of the plaintiff. Plaintiff therefore prayed that the defendants be adjudged trespassers and be enjoined from the use of the ditch or from in any manner entering upon the lands of the plaintiff to repair or otherwise maintain it. The evidence established without controversy that defendants constructed the ditch for the purpose of carrying water for irrigation to their own and other lands, and had expended upon the ditch the sum of seven thousand and more dollars. The court found that "a right of way for the construction and maintenance of the ditch for the purpose of taking water from Santa Ana river for use in connection with and upon defendants' lands was given and granted by the plaintiff to the defendants, and that the defendants are the owners of a right of way for said ditch for the purpose aforesaid." The court

further found that there was a consideration for the "granting of said right of way, in that defendants contracted and agreed with the plaintiff to deliver to and for the use of the plaintiff on his land lying under said canal sufficient water to irrigate the land, and the defendants have at all times delivered said water so agreed to be delivered." This last finding derives no support from the evidence, and the first finding, to the effect that the plaintiff "granted" a right of way, can be supported only upon the understanding that the court by "grant" meant that "permission" was given to defendants for the construction and maintenance of the ditch. So construing the findings, the question is squarely presented as to the revocability or nonrevocability of an executed parol license, whose execution has ⁵¹⁸involved the expenditure of money, and where, from the very nature of the license given, it was to be continuous in use.

Appellant contends that a parol license to do an act upon the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor, so that no further acts may be justified under it, and this, although the intention was to confer a continuing right, and money has been expended by the licensor upon the faith of the license; and that such a license cannot be changed into an equitable right on the ground of equitable estoppel. To the support of this proposition is offered authority of great weight and of the highest respectability. The argument in brief is that a license in its very nature is a revocable permission; that whoever accepts that permission does it with knowledge that the permission may be revoked at any time; that the rule cannot be changed, therefore, because the licensee has foolishly or improvidently expended money in the hope of a continuance of a license, upon the permanent continuance of which he has no right in law or in equity to rely; that to convert such a parol license into a grant or easement under the doctrine of estoppel is destructive of the statute of frauds, which was meant to lay down an inflexible rule; and finally, that there is no room or play for the operation of the doctrine of estoppel, since the licensor has in no way deceived the licensee by revocation, has put no fraud upon him, and has merely asserted a right which has been absolutely reserved to him by the very terms of his permission. No one has stated this argument more clearly and cogently than Judge Cooley, who, holding to this construction of the law, has expressed

it in his work on Torts: Cooley on Torts, 2d ed., 364. But that the same eminent jurist recognized the injustice and the hardship which follow such a conclusion is plainly to be seen from his opinion in *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N. W. 639, where, discussing this subject, he says: "But the injustice of a revocation after the licensee, in reliance upon the license, has made large and expensive improvements, is so serious that it seems a reproach to the law that it should fail to provide some adequate protection against it. Some of the courts have been disposed to enforce the license as a parol contract which has been performed on one side." Indeed, the learned jurist with equal accuracy ⁵¹⁹ might have stated that the majority of courts have so decided, in accordance with the leading case of *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497. That case was carefully considered, and it was held that it would be to countenance a fraud upon the part of the licensor if he were allowed, after expenditure of money by the licensee upon the faith of the license, to cut short by revocation the natural term of its continuance and existence, and that under the doctrine of estoppel, the licensor would not be allowed to do this. The decision was that the licensor would be held to have conveyed an easement commensurate in its extent and duration with the right to be enjoyed. In that case there was a parol license without consideration to use the waters of a stream for a sawmill, and it was held it could not be revoked at the grantor's pleasure, where the grantee, in consequence of the license, had erected a mill. The court in that case says, after discussion: "It is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent. A right under a license, when not specifically restricted, is commensurate with the thing of which the license is an accessory." And the court said further: "Having in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money a right indefinite in point of duration, which cannot be forfeited by a nonuser unless for a period sufficient to raise the presumption of a release. The right to rebuild in case of destruction or dilapidation and to continue the business on its original footing may have been in fact as necessary to his safety, and may have been an inducement of the particular investment in the first instance."

It will not be necessary to multiply citations of authority upon this point. It is sufficient to refer to the very instructive comment of Professor Freeman on the case of *Rerick v. Kern*, 14 Serg. & R. 267, reported in 16 Am. Dec., at page 497. The learned author of the note concludes his review by saying, as he shows, that "it will be seen that the doctrine of the principal case, though not recognized in some of our state courts, is, nevertheless, expressive of the law as administered by the majority of them, and that the preponderance of recent judicial opinions is in harmony with the views of Judge Gibson." This court, in the case of *Flickinger v. Shaw*, 87 Cal. 126, 22 ⁵²⁰ Am. St. Rep. 234, 25 Pac. 268, 11 L. R. A. 234, discussed and approved the case of *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497. It was not called upon there to pass upon the precise question here presented, because in that case defendant had entered and expended money upon a parol agreement to convey a right of way, and the court was called upon merely to decide in consonance with undisputed equitable principles that that parol agreement was enforceable, but in *Smith v. Green*, 109 Cal. 228, 41 Pac. 1022, the exact principle here announced is distinctly recognized, and it is said: "The general rule, no doubt, is that one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce. But there are many cases where a mere parol license which has been executed, and where investments have been made upon the faith of it, has been held irrevocable: *Gould on Waters*, secs. 232, 324." The recognized principle, therefore, is that where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for. Thus, for example, where the license was to erect a lumber-mill, the license came to an end when the timber available for use at that mill had been worked up into lumber. The same has been held as to a mill-dam, the right to maintain the dam continuing so long as there was use for the mill, and the right being lost by abandonment and disuse only when the nonuser had continued for a period sufficient to raise the presumption of release. In the case of irrigating ditches, drains,

and the like, the license becomes in all essentials an easement, continuing for such length of time under the indicated conditions as the use itself may continue.

For these reasons the judgment and order appealed from are affirmed.

McFarland, J., and Lorigan, J., concurred.

Rehearing denied.

A Parol License to enter upon land is generally revocable at the pleasure of the licensor: Hodson v. Kennett, 73 N. H. 225, 111 Am. St. Rep. 607; Miser v. O'Shea, 37 Or. 321, 82 Am. St. Rep. 751. Whether or not this rule is applicable where the licensee has expended money or labor in the execution of the license, the authorities are conflicting, although on principle the doctrine of the principal case would seem free from doubt or criticism: See the note to Lawrence v. Springer, 31 Am. St. Rep. 715-719; Entwistle v. Henke, 211 Ill. 273, 103 Am. St. Rep. 196; Huber v. Stark, 124 Wis. 359, 109 Am. St. Rep. 937.

WEBB v. CARLON.

[148 Cal. 555, 83 Pac. 998.]

MINING CLAIM—Error in Date of Location.—The date of the location of a mining claim as fixed by the locator upon his notice does not absolutely control in case the claim is also located by another. The conflicting rights of the parties are governed by the fact of the prior location, of which the written date of the notice is, at the most, only evidence. An error, if any, in the date must give way to the proved fact. (p. 306.)

MINING CLAIM—Error in Date of Location.—Where a notice of location is placed on a mining claim, and the boundaries are marked, one who makes a subsequent location of the property cannot be misled by the erroneous date of the notice nor heard to say that he has been injured by the error. (p. 307.)

F. W. Street, for the appellants.

J. B. Curtin, for the respondents.

556 HENSHAW, J. Plaintiffs' action was to quiet their title to a piece of mining ground to which defendants claim the possessory right by prior location of one Cleveland. The court found that Cleveland, in 1899, being duly qualified to locate and hold mineral lands, made a discovery of a lode of quartz carrying gold in sufficient quantities to justify exploration, and duly located his claim, and then, in accordance and in conformity with the mining rules and regulations of Tuol-

umne county regarding recordation, placed the fee for such recordation (five dollars in gold coin), with a copy of his notice, in an envelope, addressed to the mining recorder of Tuolumne Mining District, in Sonora, Tuolumne county, California, with postage prepaid thereon, and deposited the envelope in the United States postoffice at Groveland. This letter never reached the mining recorder, and consequently no recordation was made of his claim. Cleveland did not discover this fact until shortly before the twentieth day of October, 1900. He then went upon the claim, relocated it in all respects as required by the laws of the United States and the mining rules and regulations of Tuolumne county, and caused recordation to be made, as the rules required, within thirty days thereafter. The only irregularity in these proceedings is, as the court finds, that while the location was actually made upon October 20th, the notice of the location was dated October 23d. The court, upon this, says that Cleveland dated the notice ⁵⁵⁷ of location as of October 23d, for the reason that one Conwell, whose name is signed to the notice of location as a witness thereof, had previously promised and agreed with Cleveland to be on the land on October 23d and witness the location. Plaintiffs Webb and Curley entered upon the land and made their location upon October 22d, and their location likewise complied with the statutes of the United States and the local mining regulations. The court, upon these facts, found that the Cleveland location of October 20th, being prior in time, was better in right, and rendered judgment accordingly. The single question presented upon this appeal is whether, as appellant contends, Cleveland is bound by the date which he gave in his notice and is estopped from denying that October 23d was the true date of his relocation. If he is, then plaintiffs' location of October 22d takes precedence.

Section 2324 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1426) provides that all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, etc. It is upon this language that the appellant insists that the date of location as fixed by the locator upon his notice must absolutely govern and control. Such a rule, however, would deprive an innocent party of any relief for fraud, ignorance or mistake. The truth is that these rights are defined by the fact of location, of which the written date of the notice, at the most, is but evidence. The error in the notice of location, however

caused, must give way to the proved fact. The land department of the United States has always been liberal in its rulings in these matters, and properly so, since it is not to be supposed that pioneers and settlers upon the government lands, and mineral prospectors following their vocations in mountain wilds, are men either versed in the intricacies of the law or with experience and knowledge sufficient to warrant their being charged with a rigid and technical compliance with all its requirements. Indeed, they may often have lost track of the date, and, as is said by Commissioner McFarland (1 Land Dec. Dep. Int. 453): "The date of settlement is not only a question of fact, but one of mixed law and fact. Many settlers, through ignorance of what constitutes valid settlement, allege a date anterior or subsequent to the actual date, such allegation being on their part to a large extent a conclusion of ⁵⁵⁸ law, and the uniform practice of this office has been in contested and ex parte cases to find the date of settlement from the evidence in the case, and that date so found must control the adjudication of their right without regard to the alleged date." In *Zinkand v. Brown*, 3 Land Dec. Dep. Int. 380, the Secretary of the Interior lays down the same rule. In *Campbell v. Rankin*, 99 U. S. 261, 25 L. ed. 435, the supreme court, speaking of the rules and customs of a mining community, says: "Such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact." The location of Cleveland having been made before plaintiffs entered upon the land, and the notice being there visible and the boundaries marked, they could not have been misled by the erroneous date. They must have known that a location had been made prior to their own attempted one, and they certainly cannot be heard to say that they were in any way injured by Cleveland's error.

The judgment appealed from is therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

If a Mining Location is made in good faith, the locator is not held to a strict compliance with the law in respect to his location notice. The statute respecting the location of claims is construed liberally: Farmington Gold Min. Co. v. Rhymney Gold etc. Co., 20 Utah, 363, 77 Am. St. Rep. 913.

BERENTZ v. BELMONT OIL MINING COMPANY.

[148 Cal. 577, 84 Pac. 47.]

MECHANIC'S LIEN on Leased Mining Claim.—In the foreclosure of a mechanic's lien on a leased mining claim, a default judgment against the owner is erroneous, if the complaint does not allege the lessee's authority to develop the mine, nor the lessor's knowledge of the work, and the mine is charged with a lien for a larger amount than the demand stated in the summons, which in this particular does not correspond with the prayer in the complaint. (pp. 309, 310.)

MECHANIC'S LIEN on Oil Lands.—A Tract of Land in process of development as an oil mine is a mining claim within the meaning of the mechanic's lien law. (p. 311.)

MECHANIC'S LIEN on Oil Lands.—When Labor or Material is expended in developing an oil claim, a mechanic's lien attaches thereto. If it is the claim of a single locator to twenty acres, the lien covers the twenty acres; if it is a consolidated claim of several locators, worked as a whole, the lien covers the entire consolidated claim. (p. 313.)

MECHANIC'S LIEN—Unrecorded Contract.—If a contract for more than one thousand dollars is void because not recorded, payment by the owner to the contractor is no defense to a claim of lien by employes. (p. 313.)

CONTINUANCE Because of Counsel's Other Engagements.—It is not an abuse of discretion to refuse a motion for a continuance, based on the sole ground that the party's counsel is detained by previous professional engagements in another county. (p. 314.)

William P. Veuve and A. B. Bigler, for the appellants.

E. B. Coil and J. W. Wiley, for the respondent.

579 BEATTY, C. J. This is an action to foreclose liens of laborers employed in sinking an oil-well. The defendant, the Belmont Oil Company, owned the south half of a certain quarter section of land in Kern county known as the "Baradino Placer Mining Claim." The land was leased to its codefendant, the Kern King Oil and Development Company, and that company had contracted with the defendants Martin and Berry for its development by sinking one or more oil-wells thereon. The contract between the Kern King Company and Martin and Berry was in writing, but was not recorded. Plaintiff and his assignors were employed by Martin and Berry, and performed labor in sinking one of the wells contracted for by the Kern King Company, and they claim a lien upon the entire tract of eighty acres as a "mining claim" within the meaning of that expression as used in the lien law:

Code Civ. Proc., sec. 1183 et seq. By the decree of the superior court it was adjudged that the plaintiff had a valid lien for the amount found due from Martin and Berry, together with interest and counsel fees, upon the whole of the eighty acres, and that the lien attached not only to the leasehold interest of the Kern King Company, but to the fee. The usual order followed for a sale of the premises, application of the proceeds to payment of costs and satisfaction of the liens, and for a deficiency judgment against the contractors. The two corporations have joined in an appeal from the judgment, which was taken less than sixty days after its rendition, and they have included in the transcript a settled statement on motion for a new trial, claiming, along with other assignments of error, that one of the material findings is unsupported by the evidence. The appeal was taken to this court before the recent amendment of the constitution, and was subsequently assigned to the district court of appeal for the second district, where the judgment of the superior court was reversed as to both appellants: 84 Pac. 45. The cause is now for decision after rehearing in this court.

As against the Belmont company and Martin and Berry, the judgment was entered upon their default. The Kern King Company demurred, and, its demurrer being overruled, answered the complaint, but failed to appear at the trial.⁵⁸⁰ We think it was rightly held by the district court of appeal that the judgment against the Belmont company is erroneous. As to it the only evidence of service of summons was a certificate of a constable, while, except in case of service by a sheriff, the Code of Civil Procedure requires proof by affidavit: Code Civ. Proc., secs. 410-415. There is, however, a question whether this rule has not been relaxed in favor of constables by section 153 of the county government bill of 1897 (Stats. 1897, p. 492, c. 277), and since that question has not been argued we leave it undecided; for, even if there had been proof or finding of due service of the summons on the Belmont company, the default judgment as to it would have been erroneous, for two reasons: 1. There is no allegation in the complaint that the Kern King Company had authority as lessee to develop the mine, or that the Belmont company had knowledge that the work was being done; and 2. The mine is charged with a lien for a larger amount than the demand stated in the summons, which in this particular does not correspond with the prayer of the complaint. For these

reasons the judgment against the Belmont Oil Company must be reversed, and this leaves nothing to be considered except the right of the plaintiff to a lien upon the leasehold interest of the Kern King Oil and Development Company.

The more important questions presented by the appeal of that company relate to the construction of the lien law in its application to claims for labor in the development of mineral oil lands. The law contains express provisions as to "mining claims" to the effect that a miner working on a claim, or a mechanic erecting reduction works or other structures useful in connection with mining operations thereon, has a lien upon the entire claim for his wages, or the value of his material: Code Civ. Proc., secs. 1183-1187; *Williams v. Mountaineer etc. Co.*, 102 Cal. 134, 34 Pac. 702, 36 Pac. 388. But with respect to other lands the lien attaches only to the ground upon which the building or other structure stands, together with a convenient space about the same, or so much as may be found by the court necessary for the convenient use and occupation of such structure: Code Civ. Proc., sec. 1185. In construing this law the district court of appeal followed ⁵⁸¹ what it understood to be the decision of this court in *Williams v. Mountaineer etc. Co.*, 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, and held that there are two distinct categories of liens provided for, and that they are mutually exclusive—viz., liens for labor or materials employed or used in the construction of "any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, or other structure" where the lien attaches only to so much land adjacent to that upon which the structure stands as may be found necessary for its convenient use, and liens for labor and materials employed or used on mining claims, where the lien attaches to the entire claim and all its appurtenances. It is also held that a tract of land, though known as a placer mining claim and in process of development for the discovery and production of mineral oil, is not a mining claim within the meaning and intention of the lien law. The conclusion necessarily followed that the lien in question here fell within the category of those which attach to the structure only and a convenient space about it, and the judgment of the superior court was reversed for the reason that there was neither allegation, evidence, nor finding that the whole eighty acres was necessary or convenient for the use and occupation of the well. We think the district court of appeal misconstrued the decision in *Williams v.*

Mountaineer etc. Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, as holding that the two categories of liens are mutually exclusive. The appellant in that case had furnished material for the construction of a mill, a tramway, a boarding-house and other buildings, every one of them "structures" included in the first category upon which, with a convenient space about them respectively, he would have had a separate lien if they had been erected for different owners for purposes other than the working of a mine, but because they were built for a mine owner for use in working his mine, the appellant's claim of a separate lien upon them was disallowed, and his security was completely lost because he had not described the mining claim in his notice of lien. The effect of that decision, in short, is to transfer any building or other structure from the first to the second category whenever it is an adjunct or appurtenance to a mining claim; and if a tract of land upon which a well is being drilled for the purpose of extracting mineral oil is a mining claim, the well, notwithstanding the inclusion of ⁵⁸² wells in the enumeration of structures upon which separate liens are allowed, is an essential part of the mine, and for that reason the lien of those who have made it extends to the whole claim, and would be lost if less was described in the lienor's notice.

The question, therefore, is whether this eighty-acre tract of land in process of development as an oil mine is a mining claim within the meaning of the lien law, and we think that in any view of the case this question must be answered in the affirmative. Under the act of Congress of 1897 (Act Feb. 11, 1897, c. 216, 29 Stats. 526 [U. S. Comp. Stats. 1901, p. 1434]), the location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of placer mining claims, and if land is located and held under this law, it is a mining claim before patent in every sense of the word, and for the purpose of the lien law it does not cease to be a mining claim when, by a patent from the government, the fee is transferred to the locator or his assigns. This was clearly held in *Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389, and the authority of that decision has never been questioned. Something said obiter by Justice Sharpstein in the course of his opinion in regard to lands granted by the Mexican government was disregarded in *Morse v. De Ardo*, 107 Cal. 622, 40 Pac. 1018, but it was not there decided that ground actually worked as a mine within a larger tract of

agricultural land was not subject to a lien as such. The judgment of the lower court decreeing a lien upon twenty-six out of one hundred and sixty acres of land, including the mining works, was reversed for want of a finding that the smaller tract was a mining claim. The question for decision here is therefore unembarrassed by any previous decision of the court inconsistent with the view above expressed, and we have only to deal with the points advanced in the argument in support of the opposite view. It is contended that the lien law, in speaking of mining claims, refers to mines of ore exclusively, but we think there is nothing in the language or policy of the law to justify that construction. By the act of Congress passed in 1897, oil locations were brought within the category of mining claims, and if the legislature, in re-enacting section 1183 of the Code of Civil Procedure in 1899, had intended to restrict its operation ⁵⁸³ to mines of ore, it would have made an express exception of oil locations. But not only was no such exception made, there was good reason why it should not be made. The constitution of the state gives to mechanics, materialmen, artisans and laborers of every class a lien upon the property upon which they have bestowed labor, or for which they have furnished material, for the value of such labor and material, leaving to the legislature only the task of providing for the speedy and efficient enforcement of such liens: Art. 20, sec. 15.

There may be a question whether the legislature has thoroughly fulfilled its duty in this respect, but the law, such as it is, should be given a construction as fully in harmony with the constitution as its terms will admit, and since there is no reason for making a discrimination against those who contribute to the development of oil claims, they should have the full benefit of the literal terms of the statute. This, indeed, is necessary to preserve its harmonious operation. The constitution and the law alike purport to give the artisan, laborer, or materialman a lien upon "the property" which his labor or materials have created or improved. If labor or materials have gone into a building or other structure, the lien attaches to the structure, to the ground upon which it stands, and to a space about it sufficient for its convenient use or occupation, that being deemed—and rightly so—the property created or improved. In case of labor or material contributed to the development or working of a mine, the rule, though expressed in different terms, is in effect the same.

For mining claims have always been restricted by the rules and customs of miners prior to the enactment of the mining laws, and since that time by the laws themselves, to what is regarded as a reasonable quantity of placer ground, and in case of lode claims to so much only of the ground adjacent to the lode as is required for convenient working. The statute, therefore, does not in reality contain two rules for determining what is subject to a laborer's or materialman's lien. It contains but one rule, and that the rule of the constitution which fastens a lien upon the property improved or benefited; and oil claims, being within the reason as well as the letter of the law, are, as they should be, governed by the same rule. When labor or material is expended ⁵⁸⁴ in developing an oil claim, the lien attaches to the claim. If it is the claim of a single locator to twenty acres, the lien covers the twenty acres, and if it is a consolidated claim of several locators the lien will cover the whole of the consolidated claim, if it is being worked as a whole. In this case the land—eighty acres—is only half the size permitted by law to be located as a consolidated claim. It is known as the "Baradino Placer Mining Claim." It is described in the complaint as a mining claim. It is not denied in the answer of the Kern King Company that it is a mining claim. The court finds that said company had a lease of the claim with power to develop it, and that it owns all the apparatus and improvements on the ground. There was really no issue between the plaintiff and the Kern King Company as to the land being a mining claim—so far as oil land can, under any circumstances, be a mining claim—and if there had been an issue it is found in favor of the plaintiff. The superior court, therefore, did not err in holding that plaintiff's lien extended to the whole eighty acres. This conclusion disposes of all the exceptions based upon the failure of plaintiff to allege, and of the court to find, that the whole of the eighty acres is necessary to the convenient use and occupation of the well.

Several assignments of error are based upon the failure of plaintiff to allege that the contract with Martin and Berry was in writing, or that it was for more than one thousand dollars. When no contract between the owner of land and his contractor is recorded, those who work under the contractor have no means of knowledge whether the contract is in writing or not, or whether it is for more or less than one thousand dollars, and these facts being peculiarly within the

knowledge of the owner, he suffers no detriment from the failure of plaintiff to make them the subject of conjectural allegation. Here the facts that the contract was in writing and that it was for more than one thousand dollars, were clearly proved and found by the court, and the error, if any, in overruling the special demurrer directed to this point was harmless. This view also disposes of the objection to the second and third counts of the complaint for failing to allege that anything was due the contractors when the lien notices were filed. The contract being void, payment by the owner to the contractor is no defense to the claim of lien.

585 We cannot say that it was an abuse of discretion to deny the Kern King Company's motion for a continuance, based upon the sole ground that its counsel was detained by previous professional engagements in Santa Clara county. It should have been made to appear that under the circumstances other professional advice was unavailable, and that there was a meritorious defense to the action, which could not be effectively presented without the presence of the absent attorney. Nothing of this kind was shown.

We find no error in the proceedings of the superior court prejudicial to the Kern King Oil and Development Company, and the judgment against it is therefore affirmed. The judgment against the Belmont Oil Company is reversed, and the cause remanded for further proceedings against that company as the plaintiff may be advised.

Henshaw, J., Shaw, J., McFarland, J., Angellotti, J., and Lorigan, J., concurred.

Petroleum Oil is regarded as a mineral: *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740; *Marshall v. Mellon*, 179 Pa. 371, 57 Am. St. Rep. 601. And the location of oil lands is governed by the mineral laws of the United States applicable to the location of placer mining claims: *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63. Mechanics' liens against mining claims are discussed in *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49; *Williams v. Toledo Coal Co.*, 25 Or. 426, 42 Am. St. Rep. 799; *Idaho Gold Min. Co. v. Winchell*, 6 Idaho, 729, 96 Am. St. Rep. 290; *Higgins v. Carlotta Gold Min. Co.*, 148 Cal. 700, post, p. 344.

HEWITT v. STATE BOARD OF MEDICAL EXAMINERS.

[148 Cal. 590, 84 Pac. 39.]

PHYSICIANS.—The Right to Practice Medicine is, like the right to practice any other profession, a valuable property right, under the constitution and laws of the state, one which is entitled to be protected and secured. (p. 317.)

PHYSICIANS—Revocation of License.—A Statute authorizing the state board of medical examiners to revoke the license of a physician for making “grossly improbable statements” in advertising his medical business, which does not define what constitutes such statements, but leaves the determination of that question to the board of examiners, is unconstitutional. (p. 319.)

John D. Pope, for the petitioner.

William Taft, for the respondent.

590 LORIGAN, J. This is an original proceeding in certiorari to annul an order of the board of medical examiners of this state revoking the certificate of petitioner authorizing her to practice medicine and surgery. The legislature in 1901 (Stats. 1901, p. 56, c. 51) passed an act for the regulation of the practice of medicine and surgery and for the appointment **591** of a board of medical examiners in the matter of such regulation. Various powers are conferred upon the state board under the act, among others the power to revoke the certificate of a physician or surgeon for “unprofessional conduct,” and the act undertakes to declare what shall constitute “unprofessional conduct” so as to warrant such revocation. It specifies seven particulars in which the conduct of a physician shall be deemed unprofessional. Six of these designate precise and specific acts, the commission of which shall be deemed unprofessional, and as to the seventh (designated in the act as the fourth), it is provided that “all advertising of medical business in which grossly improbable statements are made” shall also constitute unprofessional conduct.

On April 26, 1905, petitioner was engaged in the practice of medicine and surgery in the city of Los Angeles under and by virtue of a certificate issued to her by the board of managers of the Eclectic Medical Society of this state, and on that date a complaint was filed against her before the state board of examiners charging her with unprofessional conduct in

advertising medical business in which grossly improbable statements appeared—namely, in advertising in the “Times,” a public journal in Los Angeles, the following: “Cancer Cured. The Mrs. S. J. Bridge Remedy, the only sure cure known in the world”—with notice to call at her office in said city and investigate. Upon a hearing before said board, the petitioner appearing, answering, and contesting the charge, an order was entered by the board on August 18, 1905, revoking her certificate. Petitioner, by this proceeding in certiorari, seeks to annul the order of said board, on the ground that the board was without jurisdiction to make it under the particular provision relating to unprofessional conduct, to which we have heretofore referred, and under which it assumed to act in doing so.

It is insisted by petitioner that this particular provision of the act is unreasonable, uncertain, and indefinite; that neither the act itself nor the law defines what shall be deemed “grossly improbable statements”; that the provision in question leaves it entirely to the opinion of the persons who at any time may constitute the board to determine whether a given statement is “grossly improbable,” and confers authority upon such board to create an offense under the act ⁵⁹² and inflict punishment for its commission; and that for all these reasons this particular provision of the act in question is void. We think this position of the petitioner must be sustained. In considering this point we are not concerned with the particular merits of the proceeding before the board, but only with the principles of law which are involved in a consideration of the validity of the provision of the statute under which it acted. Legislation of the character embraced within the general scope of the act in question, in so far as it provides for the revocation of the certificate of a physician (the only matter we are concerned with), is sustained upon the ground that the legislature has authority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety or morals, and with this object in view to provide for the dismissal from the medical profession of all persons whose principles, practices and character render them unfit to remain in it. As the duty of determining whether such professional or moral unfitness exists must necessarily be vested in somebody other than the legislature, it is usually committed by appropriate legislation

to boards composed of men learned in their profession. Such power, however, to revoke the license of a practitioner when conferred upon a board must be under provisions of law which are reasonable, must apply to matters of conduct upon the part of the practitioner which affect the health, morals or safety of the community, and the acts or conduct which shall render him liable to the penalty of forfeiture of his right to practice his profession must be declared with such certainty and definiteness in the act that he may know exactly what they are. The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the constitution and laws of the state, one is entitled to be protected and secured.

Now, to consider how the provision of the act as to "grossly improbable statements," warranting an invasion of this right and its destruction, accords with the principles of law announced. While the other particular acts which shall constitute unprofessional conduct are specially designated and defined in the act, it is nowhere therein pretended to define what shall constitute "grossly improbable statements." While, as we have said, the right of the legislature to confer power ⁵⁹³ upon a medical board to revoke the license of a physician is granted upon the authority of the legislature to legislate in the interest of public health, safety and morals, there is nothing in the terms of this provision authorizing the board to revoke a certificate to practice medicine on account of publication of "grossly improbable statements," from which it can be even inferred that any of these considerations prompted the legislative mind in conferring the power of revocation upon the board, or that any of them are to be taken into consideration by that body in determining whether a given statement is "grossly improbable" or not. Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health and safety. It is a matter of no moment under the provision of the act, and is entirely immaterial whether the statement is true or false, beneficial or injurious. If, in the opinion of the board, the statement is "grossly improbable," the certificate to practice is to be

revoked. The right of the physician to be secure in his privilege of practicing his profession is thus made to depend not upon any definition which the law furnishes him as to what shall constitute "grossly improbable statements," but upon the determination of the board after the statement is made and simply upon its opinion of its improbability. No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business; nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed "grossly improbable" by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. The advertisement in connection with his medical business may be made in entirely good faith; the statement may be of such a character that it involves no moral delinquency on the part of the physician, nor in any degree tends ⁵⁹⁴ to deceive or injure the public. These matters, however, have no controlling effect. If in the judgment of the board such statements are "grossly improbable" the right to practice is forfeited. Instead of furnishing some standard by which the physician can determine in advance what statements shall be treated as "grossly improbable," some definition of that term which will be a protection to him in his legal right to advertise his business, the statute, as far as his action is concerned, leaves that matter at large, but provides that after he has made the advertisement an ex post facto judgment of the board shall determine whether his statement is "grossly improbable" or not.

And the provision of the act, even as to the judgment of the board, furnishes no standard by which that determination shall be arrived at. Taking a given advertisement by a physician, the members of one board might conclude that it contained "grossly improbable statements," while another board might reach an entirely opposite conclusion. One might conclude that the statement, while "improbable," was not "grossly" so. The advertisement of a physician which one board had determined did not come within the inhibition of the rule according to its judgment, a succeeding board might conclude did. As the provision of the act in question does not define what shall constitute "grossly improbable state-

ments," but leaves it to be determined according to the opinions of the particular members of the board who happen to constitute it when the matter of revoking a physician's license therefor is before them, it is obvious, if such a provision can be sustained, that it could operate disastrously not only upon individual physicians, but upon physicians of a particular school. And this act in itself is capable of furnishing the illustration. It provides that the state board of medical examiners shall consist of three different schools of medicine, the majority of the board to be elected from one particular school. It is matter of common knowledge that each school of medicine is governed in the treatment of diseases and injuries by rules, principles, and practices in material respects fundamentally and essentially different, the adherents of each implicitly believing that the eradication or alleviation of disease can only be successfully attained under the peculiar principles and practices of the particular school to which he belongs; that the successful treatment of a particular disease ⁵⁹⁵ under radically different principles of medicine practiced by another school cannot be attained. Granting the validity of the provision of the act in question for the purposes of the illustration, it is obvious that under such circumstances any advertisement of medical business by a physician whose school is represented by a minority vote on the board of medical examiners stating that a given disease can be cured by him under a method peculiar to his school of medicine, different in principle and practice from that taught by the school of which the majority of the board is composed, would subject his license to revocation under the conscientious professional opinion of the majority of the board that his statement was "grossly improbable."

We hardly think it necessary to further pursue this subject. The right which a person possesses under the constitution and the laws to practice his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain and indefinite as is the provision we have been considering. If a physician's license is to be revoked for "grossly improbable statements"; if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made "grossly improbable statements" in advertising his medical business—it is requisite that the

statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them. It is an easy matter for the legislature to declare what statements in the advertisement of medical business shall be deemed "grossly improbable," and it must do so, and not leave it to a board of medical examiners after the publication is made to determine in its judgment whether the statements were or were not "grossly improbable," and according to its particular view of the matter revoke or refuse to revoke the license. The right to practice medicine cannot be made to depend upon such a vague, uncertain and indefinite provision. The conclusion we reach as to the invalidity of this provision is, in our judgment, sustained by the general principles announced in the main and concurring opinions in *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237, and in *Matthews v. Murphy*, 23 Ky. Law Rep. 750, 63 S. W. 785, 54 L. R. A. 415.

⁵⁹⁶ We are of opinion, for the reasons given, that the provision of the statute in question, as far as it attempted to authorize the board of medical examiners to revoke the certificate of a physician for "grossly improbable statements" in an advertisement of medical business, is void; that in the matter at bar the state board of medical examiners had no jurisdiction to revoke the certificate of petitioner under this provision of the act; that its order in that regard was void; and it is hereby annulled and set aside.

Henshaw, J., McFarland, J., Angellotti, J., and Shaw, J., concurred.

Beatty, C. J., concurred in the judgment.

The Right to Practice Medicine is subject to such reasonable regulations or conditions as the state, in the exercise of the police power, may prescribe: *State v. Marble*, 72 Ohio St. 21, 106 Am. St. Rep. 570; *State v. Randolph*, 23 Or. 74, 37 Am. St. Rep. 655; *State v. Brown*, 37 Wash. 97, 107 Am. St. Rep. 798. As bearing on the authority to revoke a physician's license to practice, see *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257; *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206.

THOMPSON v. BASLER.

[148 Cal. 646, 84 Pac. 161.]

PUBLIC LANDS—Title of Entryman Before Issuance of Patent.—Although the title to public land does not finally pass from the United States until the issuance of a patent, the receiver's receipt, issued to a homestead entryman in possession and claiming under section 2290 of the Revised Statutes, constitutes ample title to enable him to maintain or defend any suit concerning the land. (p. 322.)

PUBLIC LANDS—Jurisdiction of Land Department.—The land department has exclusive power to determine the facts of residence and cultivation with relation to homestead entries, and its determination of these questions is conclusive upon the courts. (p. 322.)

PUBLIC LANDS—Jurisdiction of Land Department.—When a question is under the consideration and within the control of the land department, the courts will not render a decree in advance of the action of the government officials and thereby render such action nugatory. (p. 323.)

PUBLIC LANDS—Conflict Between Homestead and Mining Claimant.—Where a homestead entryman brings ejectment against a mining claimant who has made a location after the issuance of a receiver's receipt to the plaintiff, evidence of the receipt, coupled with evidence of possession, prima facie establishes a right of recovery, and the defendant cannot attack such right by evidence that the plaintiff has failed to reside on the land and cultivate it as required by statute. (p. 323.)

Holl & Dunn and Johnson & Chase, for the appellant

McCoy & Gans, for the defendant.

647 SLOSS, J. The plaintiff, claiming possession of and title to one hundred and sixty acres of land as a homestead entryman, under the land laws of the United States, commenced this action of ejectment against the defendant to recover the possession of a portion of the premises, and one hundred dollars damages. Judgment went for the plaintiff according to the prayer of his complaint, and the defendant now appeals from an order denying his motion for a new trial.

It appears that on April 16, 1900, there was issued to the plaintiff the receipt of the receiver of the land office for the entry of one hundred and sixty acres, under section 2290 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1389), and that shortly thereafter he took possession of the land described in his receipt as his homestead entry thereunder. In the autumn of 1902 the defendant came upon the land, took possession of about

twenty acres, began to run a tunnel therein for mining purposes, and posted and recorded notices of location for the purpose of acquiring tunnel rights under the laws of the United States: U. S. Rev. Stats., sec. 2323 (U. S. Comp. Stats. 1901, p. 1426). The claim of the defendant, as stated in his brief, is: "That the plaintiff did not comply with the homestead laws of the United States after making his application and obtaining the receiver's receipt." In support of this claim, he introduced testimony tending to show that subsequent to the entry the plaintiff had ⁶⁴⁸ not resided on the land, and that he had failed to make the cultivation of the land required to obtain a patent thereto under section 2291 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1390).

Although title does not finally pass from the United States until the issuance of a patent, it is well settled that the receiver's receipt issued to a homestead entryman in possession and claiming land under section 2290 of the Revised Statutes of the United States, constitutes ample title to enable him to maintain or defend a suit concerning the land: Code Civ. Proc., sec. 1925; *Goodwin v. McCabe*, 75 Cal. 584, 17 Pac. 705; *Morrison v. Coleman*, 87 Ala. 655, 6 South. 374, 5 L. R. A. 384; *Case v. Edgeworth*, 87 Ala. 203, 5 South. 783; *Gulf etc. R. Co. v. Clark*, 101 Fed. 678, 41 C. C. A. 597. The plaintiff having by the offer of the receipt, coupled with evidence of possession, made a prima facie showing of a right to sue in ejectment, the question is whether it was open to the defendant, claiming to enter under a tunnel location, to attack plaintiff's right by showing that there had been a failure to comply with the statutory provisions requisite to ripen the homestead right into a perfect title by patent. Under section 2291 of the Revised Statutes a patent may issue to the person making the entry upon proof of residence and cultivation for the period of five years and compliance with certain other conditions. And section 2297 (U. S. Comp. Stats. 1901, p. 1398) provides for a forfeiture of the right and the reverting of the land to government upon proof to the satisfaction of the register of the land office, after notice to the settler, that such settler has changed his residence or abandoned the land for more than six months at any time. The necessary effect of these provisions, taken in connection with the statutes

creating the federal land department, is to confer upon the officers of that department the exclusive power to determine the facts of residence and cultivation with relation to homestead entries. "The land department of the United States has been created as the tribunal for determining the right under the laws of the United States of any person to receive a patent for any of the public lands, and that tribunal is vested with jurisdiction to determine all questions of fact that may arise in any controversy respecting such right": *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 649 710. Where the land department has passed upon such questions of fact, its determination is (in the absence of a showing of fraud or imposition) conclusive upon the courts: *Stewart v. McHarry*, 159 U. S. 643, 16 Sup. Ct. Rep. 117; *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710, 40 L. ed. 290. And similarly, while a question is under the consideration and within the control of the land department, the courts will not render a decree in advance of the action of the government officials and thereby render such action nugatory: *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Casey v. Vassor* (C. C.), 50 Fed. 258; *Humbird v. Avery* (C. C.), 110 Fed. 465.

In this case the question of plaintiff's residence and cultivation were within the control of the land department, and could have been determined by it either on an application for patent or on proceedings to have the land revert to the government, pursuant to section 2297 of the Revised Statutes. Since no steps had been taken to cancel the entry under the provisions of section 2297, the lower court rightly held that it had no power to determine whether or not the plaintiff had forfeited his rights for failure to reside on the land and cultivate it. The land in question having been, by a homestead entry, valid on its face, and subsisting of record, withdrawn from entry under any law of the United States (see *Hastings etc. R. R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112, 33 L. ed. 363), the defendant was not by virtue of his tunnel location in a position to attack plaintiff's right in this action. These views necessarily dispose of the contention that the findings as to the title and possession of the plaintiff are not sustained by the evidence. And we think the finding that the plaintiff sustained damage in the sum of one hun-

dred dollars finds sufficient support in the record. No other points are made for reversal.

The order denying a new trial is affirmed.

Angellotti, J., and Shaw, J., concurred.

The Decisions of the Land Department as to matters within its jurisdiction are generally conclusive on the courts: *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, and cases cited in the cross-reference note thereto. Its decision, for example, as to the residence of a homestead entryman on the public lands, and the bona fides of his settlement thereon, is conclusive on the courts, in the absence of fraud or imposition: *Small v. Bakerstraw*, 28 Mont. 413, 104 Am. St. Rep. 691.

Attack Upon Patents Because the Land covered by them is mineral is discussed in *Board of Education v. Mansfield*, 17 S. Dak. 72, 106 Am. St. Rep. 771; *Paterson v. Ogden*, 141 Cal. 43, 99 Am. St. Rep. 31.

CHURCHILL v. WOODWORTH.

[148 Cal. 669, 84 Pac. 155.]

ESTATE OF DECEDENT—Mortgage Foreclosure—Parties.—In an action by administrators to foreclose a deed intended as a mortgage, one of their number to whom the deed was executed is not, as an individual, a necessary party. (p. 327.)

ESTATE OF DECEDENT—Mortgage Foreclosure—Parties.—Where an action to foreclose a mortgage has been brought against the heirs of the mortgagor, the court may, after the subsequent appointment of an administrator, order him to be brought in as a party, and direct the service of summons on him more than a year after the commencement of the action, the time within which an action might be brought against him as a personal representative of the deceased not yet having expired. (p. 327.)

ESTATE OF DECEDENT—Mortgage Foreclosure—Parties.—The right to maintain an action to foreclose a mortgage against an administrator within a year after the issuance of letters is not waived by bringing the action against the heirs before his appointment. (p. 327.)

LIMITATION OF ACTIONS—Mortgage Debt.—If the statute of limitations is running against a mortgage debt, including advances made by the mortgagee to discharge paramount liens, it continues to run against the advances, upon the giving of a new note which does not include them. (pp. 329, 330.)

LIMITATION OF ACTIONS—Sufficiency of Plea.—A plea that an action is barred by a certain section of the code, without specifying the subdivision thereof which alone can apply to the action, is not a nullity, and the objection to pleading the statute in this manner is waived by a failure to raise the question in the trial court. (pp. 330, 331.)

Jones & Weller, for the appellant.

Hunsaker & Britt and Gillis & Tapscott, for the respondents.

670 ANGELLOTTI, J. This is an action brought by plaintiffs to have a deed absolute in form declared to be a mortgage, and to foreclose the same. Plaintiffs had judgment, and defendant Jones, administrator of the estate of L. B. Woodworth, deceased, appeals from the judgment and from an order denying his motion for a new trial.

Said Woodworth, on November 8, 1894, being indebted to plaintiffs as administrators of the estate of Charles B. Boyes, deceased, executed to Jerome Churchill a deed conveying certain real estate in the city of Los Angeles, which deed was in form an absolute conveyance, but was executed solely as security for the existing indebtedness to plaintiffs and such future indebtedness to them as might accrue. On November 13, 1897, upon an accounting had between the parties, it was found that the amount of such indebtedness then due was fifteen thousand four hundred and sixty-two dollars and sixty cents, for which sum Woodworth executed his note to plaintiffs, which note was made payable one day after date. No part thereof or of the interest accruing thereon has ever been paid. Woodworth died intestate October 27, 1900. On November 14, 1901, no administration of the estate of Woodworth having been commenced, plaintiffs commenced this **671** action against the heirs of deceased. On December 16, 1901, appellant was appointed administrator of the estate of Woodworth, and letters were issued to him. On November 12, 1902, summons was issued upon the original complaint. On December 10, 1902, the court, upon the application of plaintiffs, allowed the filing of an amended complaint bringing appellant in as a party defendant, and ordered that summons be issued and served upon appellant, which was done.

Plaintiffs allege in their complaint, and the court found, that Jerome Churchill, in order to protect the security for the indebtedness, discharged certain paramount liens upon the mortgaged property, as follows, viz.: 1. By the payment of three thousand two hundred and seventy-six dollars on May 6, 1896, a mortgage executed by Woodworth and his wife to one Klokke, securing an indebtedness amounting on that

date to such sum; 2. By the payment of three thousand four hundred and seventy-six dollars and sixty-five cents on May 6, 1896, a mortgage of Woodworth and his wife to the Columbia Savings Bank, securing an indebtedness amounting on that date to such sum; and 3. By the payment of fourteen hundred and seventy-nine dollars and ninety-eight cents, on April 15, 1896, a delinquent street assessment to the city of Los Angeles, for the widening of Los Angeles street. The court allowed these amounts, with interest at the rate of seven per cent per annum from the respective dates of payment. Plaintiffs further allege in their complaint that Jerome Churchill was compelled to borrow seven thousand dollars of the amounts so advanced from the Los Angeles Savings Bank, and that he had on April 16, 1896, executed his note bearing seven per cent interest to said bank in said amount and gave as security therefor a mortgage to said bank upon the property held by him under such deed, and subsequently, in December, 1900, renewed said note and mortgage, and "that no part thereof has been paid, and the same is now a valid and subsisting lien upon said premises." Defendants admitted the execution of such notes and mortgages by Churchill, and simply deny in general terms that Churchill had any right or authority to execute the same. The court found that the notes and mortgages were executed as alleged, and the proceeds used for the payment of the liens as alleged. If the mortgage executed by Churchill to the bank was originally a valid lien on the property, it must be held under the pleadings and findings that it continued to be such for the full amount due thereon at the time of judgment. The trial court, while ⁶⁷² crediting plaintiffs with all the amounts expended by them, including the seven thousand dollars which was so borrowed, made no provision in the judgment for the freeing by plaintiffs of the land from the mortgage lien of the bank, but directed the sale of the land and the payment to plaintiffs of the aggregate amount found due—thirty-nine thousand nine hundred and seventy-nine dollars and ninety-seven cents—which included the seven thousand dollars and eighty cents borrowed. Upon these facts, several points are made for reversal.

1. It is urged that Jerome Churchill, to whom the deed was made, was a necessary party plaintiff. As between plaintiffs and the appellant, the plaintiffs are the real par-

ties in interest, and there can be no question as to their right to bring the action in their own names. Their agent or trustee, Jerome Churchill, as an individual, was not a necessary party: See Code Civ. Proc., sec. 367; *Anglo-Californian Bank v. Cerf*, 147 Cal. 384, 81 Pac. 1077.

2. We can see no force whatever in the contention that the court was not authorized to bring appellant in as a party and direct the issuance and service on him of summons more than a year after the commencement of the action. As already noticed, summons had been issued as against the original defendants within the year, so the court had not lost jurisdiction of the case under subdivision 7 of section 581 of the Code of Civil Procedure. Appellant, upon his appointment as administrator (December 16, 1901), certainly became a proper party to be made defendant. It is apparent that a complete determination of the controversy could not be had without the presence of the administrator, representing as he did the other creditors of the deceased. The time within which an action might be brought against him as a personal representative of the deceased had not expired when the order was made and summons issued, for, under section 353 of the Code of Civil Procedure, such action might be commenced at any time "within one year after the issuing of letters testamentary or of administration." Under section 389 of the Code of Civil Procedure, therefore, the court then had the right to order him to be brought in as a party, and to that end "order amended and supplemental pleadings, or a cross-complaint, to be filed, and summons thereon to be issued and served." Plaintiffs were under no obligation to procure the appointment of an administrator earlier. "Under that section [section ⁶⁷³ 353 of Code of Civil Procedure] a party having a cause of action against the estate of a deceased person is not bound to cause administration to be had, because the statute expressly extends his time for one year after the issuance of letters": *Davis v. Hart*, 123 Cal. 384, 55 Pac. 1060.

3. We are unable to see any merit in the contention that plaintiffs waived their right to bring an action against the administrator within a year after the issuance of letters by commencing the action against the heirs of deceased before the appointment of an administrator.

4. The advances made to discharge liens on the mortgaged property, for the purpose of protecting the security, were all made in April and May, 1896, while Woodworth did not die until October 27, 1900, more than four years thereafter. Appellant contends that the right of plaintiffs to recover the amount of these advances is barred by section 337 or section 339 of the Code of Civil Procedure, both of which sections were pleaded in bar by appellant. We are unable to see any good answer to this contention. It may freely be conceded, as contended by plaintiffs and upheld by many authorities, that the amount advanced for the protection of the security became at once a part of the debt secured by the mortgage, so that payment thereof could at one time have been enforced as a part of the claim for which the lien existed, but this concession does not materially assist them. It might bring these advances within the statute applicable to the original indebtedness, and thus enable them to be recovered with such indebtedness at any time before the statute had run against the same, but it could accomplish nothing more. The original indebtedness then existing would have been barred by the statute at the death of Woodworth, had it not been for the new note for fifteen thousand four hundred and sixty-two dollars and sixty cents given on November 13, 1897. Plaintiffs contended, and the trial court concluded, that no part of these advances was included in the new note, and it is manifest that the only theory upon which a recovery of such advances, in addition to the amount due on the new note, can be sustained, is that such advances were not included. If the statute was running against the whole mortgage debt, including these advances, at the time of the giving of the new note, why did it not continue to run, regardless of such new note, against any portion of the debt that was not included therein? If ⁶⁷⁴ I owe one thousand dollars, secured by mortgage, and immediately prior to the completion of the statutory period give a new note for five hundred dollars only, it would not be contended that the giving of such note affected the running of the statute as to the other five hundred dollars. We can see no distinction material here between such a case and the one at bar. The statute was running against the whole of this debt, including these advances, and a new note was given as a portion only of the debt. This necessarily excluded from the effect of the new note such

portions of the debt secured by the mortgage as were not included therein. It is entirely immaterial that the excluded portions became a part of the mortgage debt solely by reason of the fact that they were made to protect the security. They either became a part of the mortgage debt, or they did not. If they became a part of the mortgage debt, they could only be relieved from the effect of the statute, which would, in due course, bar the debt, by some act on the part of the mortgagor which purported to include them. The giving of a new note by him for a specified amount not including them was not such an act. If they did not become a part of the debt, they necessarily became barred by the provisions of section 339 of the Code of Civil Procedure providing that actions must be brought within two years upon a contract, obligation, or liability not founded upon an instrument of writing. The effect of the new note was to keep the mortgage alive only as to such debt as was evidenced thereby. In this state the rule is that a mortgage is only an incident of the debt, and that when the debt is barred in whole or in part the mortgage is correspondingly barred. It cannot, of course, be successfully contended that portions of a debt secured by a mortgage may not become barred by the statute, although as to other portions the statute has not run.

We find no case in which the precise question here presented has ever been decided. There is some general language in some of the decisions relative to the right of the mortgagee to add to his own lien the amount of advances necessary for the protection of his security and collect the whole amount upon foreclosure of the mortgage, but the particular question here presented was not involved in any of the cases cited. In none of them did it appear that the ⁶⁷⁵ statute had run against any part of the original indebtedness. It must be borne in mind also that in the majority of states the rule is that the equitable remedy to enforce the lien of the mortgage exists notwithstanding the debt itself may be barred, provided the statute has not run against the mortgage. Under that rule, so long as the mortgage is kept alive, no part of the debt secured thereby can be barred in the sense that the mortgagee loses his right to enforce it against the mortgaged property. This appears to have been the rule in all the states from which cases are cited by plaintiffs, at the time such decisions were

rendered. With us, however, as already observed, the mortgage is enforceable only for such portions of the debt as are not barred. It must also be borne in mind that we are discussing the case of a mortgage containing no provision as to the right of the mortgagee to make such advances or the manner in or time at which they shall be repaid. Section 2876 of the Civil Code, providing that where the holder of a subsequent lien is compelled to satisfy a prior lien for his own protection he "may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists," if applicable here, does not assist plaintiffs in this regard. It accomplished no more at most than to make the amounts paid a part of plaintiffs' then existing claim, subject to the same rules of limitation, but when such amounts were excluded from the new note the statute then running against the whole indebtedness continued to run against them. We are satisfied that recovery of these advancements must be held to be barred either by section 337 of the Code of Civil Procedure or by section 339 of the Code of Civil Procedure, and it is immaterial here which section is applicable.

It is urged that the plea in bar of section 339 of the Code of Civil Procedure was insufficient in that it omitted to state the subdivision of the section referred to, the section containing three subdivisions, and section 458 of the Code of Civil Procedure, providing that in pleading the statute of limitation it is not necessary to state the facts showing the defense, "but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure." Defendant ⁶⁷⁶ here alleged simply "that the indebtedness sued on herein is barred by the provisions of section 339 of the Code of Civil Procedure of the state of California." Subdivision 1 of the section in question was the only provision thereof that could by any possibility be applicable to this case. Subdivision 2 relates to actions against sheriffs, coroners, and constables, and subdivision 3 to actions to recover damages for the death of one caused by the wrongful act or neglect of another. No demurrer was interposed to the answer, which, for the purposes of the trial, was assumed to sufficiently present the defense, and the court made its findings thereon. Under these circumstances, we are satis-

fied that the attempt to plead subdivision 1 of section 339 should not be treated as a nullity, and that the objection to the manner of pleading it was waived by the failure of plaintiffs to urge such objection in the trial court. The appellant's specifications of insufficiency of evidence to sustain the findings upon the issues as to the statute of limitations are sufficient to present the question here under the liberal rule laid down by the more recent decisions, and whatever may be the rule as to a waiver of points by a failure to discuss them in the opening brief, we are satisfied that appellant's brief was not such as to indicate any waiver of his defense of the statute of limitations.

5. In view of our conclusions upon the question of the effect of the statute of limitations, it is unnecessary to consider at length any of the remaining points on which appellant states in his closing brief that he "especially relies for a reversal." There was sufficient evidence to support the findings as to the advances made for the protection of the security. While the findings are not clear and definite as they might have been upon the question as to whether these advances were included in the fifteen thousand four hundred and sixty-two dollars and sixty cents note of November 13, 1897, when construed liberally in support of the judgment, we think that they sufficiently show that they were not so included. There was sufficient evidence to support a finding that they were not included. As to the Churchill mortgage to the Los Angeles Savings Bank, assuming the same to be a valid lien upon the property, we are of the opinion that the appellant is entitled to no relief in this action, in the event that plaintiffs are not allowed to recover the amounts advanced, by reason of the plea of the statute of limitations. ⁶⁷⁷ The whole of the money borrowed by Churchill on his note and said mortgage was devoted to the payment of amounts constituting paramount liens on said land—were necessarily made for the protection of the property of appellant, constituting plaintiff's security, and appellant should not be granted the affirmative relief of having the property cleared of the lien without repaying the amount which was so borrowed and properly advanced by plaintiffs for the protection of their security. We find no other point requiring attention.

The judgment and order denying a new trial are reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Shaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

In a Suit to Foreclose a Mortgage after the death of the mortgagor, his personal representatives are proper parties defendant: *Hodgdon v. Heidman*, 66 Iowa, 645, 24 N. W. 257; *United Security etc. Co. v. Vandegrift*, 51 N. J. Eq. 400, 26 Atl. 985. They are not always regarded as necessary parties, however: *Roberts v. Platt*, 42 Ill. App. 608; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653; *Rickards v. Hutchinson*, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702; *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159; *Butler v. Williams*, 27 S. C. 221, 3 S. E. 211. In some jurisdictions, the heirs are not necessary parties defendants in an action to foreclose brought against the administrator: *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486. See, too, *Hall v. Klepzig*, 99 Mo. 83, 12 S. W. 372; *Kelsey v. Welch*, 8 S. Dak. 255, 66 N. W. 390.

KOCH v. SOUTHERN CALIFORNIA RAILWAY COMPANY.

[148 Cal. 677, 84 Pac. 516.]

RAILWAY CROSSING—Open Safety Gates.—The fact that safety gates at a railway crossing are open is not such an assurance of safety as justifies a traveler on the highway in driving across the tracks regardless of all ordinary precautions against any danger from approaching trains. (p. 334.)

Edward F. Wehrle and Anderson & Anderson, for the appellant.

C. N. Sterry, T. A. Norton, Paul Burks and E. E. Milliken, for the respondent.

678 HENSHAW, J. Plaintiff sued to recover damages for personal injuries occasioned him by reason of the alleged negligence of the defendant in so operating its trains that plaintiff was struck by one of them at the crossing of a street in the city of Pasadena. The negligence charged was the omission upon the part of the defendant company to sound the bell and to close the gates maintained at the crossing at the time of the approach of the train. Upon the taking of all the testimony the court instructed the jury

to find a verdict for defendant, which the jury did, and the court's ruling in this regard is the subject of this appeal.

The consideration of the question necessitates the presentation of the evidence, which is here given, as favorably to the plaintiff as the facts warrant. Plaintiff, about 10 o'clock at night, was driving two horses attached to a light spring wagon toward the railroad track at a gait which he describes as "a pretty fair trot," and which others describe as a "brisk trot." Colorado street, upon which he was driving, is seventy-five feet wide, with an electric railroad track running along it a little south of the middle of the street. The sidewalk on the south side of the street is eleven feet wide. An alley thirty feet wide crosses Colorado street at right angles, and defendant's railroad track also crosses the street in the center of that alley. The train which struck plaintiff's spring wagon consisted of a locomotive, thirteen loaded freight-cars, and a caboosse. It came from the south through this alley up a steep grade at a speed of about four miles an hour, and having come almost to a standstill at a station just beyond, ⁶⁷⁹ the engine was laboring heavily to get under way on the upgrade and "was puffing very hard with a loud exhaust." There was evidence tending to show that the engine-bell and the whistle were silent, and it will be assumed that they were. There were gates across the street on each side of the railroad track, and these gates were not closed as the train crossed the street. Colorado street was paved with asphalt, and plaintiff's horses were newly shod with smooth shoes. He approached the track of defendant without checking the speed of his horses and "looking straight ahead." He says he could not see or hear the train, and first saw it when the noses of his horses were about on the railroad track. According to the map or plat of the locality found in the record, as well as according to the undisputed evidence of witnesses, the buildings in the vicinity were so disposed that, if the plaintiff had been on the alert and driving with reasonable caution, he might have caught sight of the approaching train in ample time to have avoided the accident. Plaintiff was, and had been for six years, familiar with the crossing, but he took no precautions whatever before driving upon it. He did not stop. He did not slow up. He did not look. He did not listen. The clattering of his horses' feet and the noise of his wagon would certainly have in-

terfered with his hearing the approaching train. He was moving faster than the train and failed to take any precautions by slowing up to listen, but had he been on the alert he could have heard and seen the train in time to have avoided the accident. It is difficult to understand, then, how he could have come into collision with this slow-moving locomotive, excepting that he either absent-mindedly or recklessly approached and drove on the track. Indeed, from his own testimony, it is plain that he approached the crossing with a total disregard of its dangers. In substantiation of this is his statement to one of the witnesses, which is not denied, that "My main idea was to get home. I was not paying any attention to anything." Under the facts, then, the plaintiff, after accepting the invitation to proceed, extended to him by the open gates, used no precaution whatsoever, did absolutely nothing for his own protection and safety. He did not lessen the speed of his horses; he did not listen for the approach of the train, which was made audible to others some time before he drew near the crossing; ⁶⁸⁰ he did not look for the train, as he himself testifies he kept his eyes straight ahead; and the first intimation he had of its approach was when his horses shied away from the engine.

The case thus presented is not one as to the degree or amount of care which should be exercised by one about to cross a railroad under the invitation to proceed given by the open gates, but whether under such circumstances a man may fail or decline to exercise any care whatsoever, treating the open gates as a positive assurance of safety. Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury. But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. If it is so submitted, it can only be upon the theory that the open gates were an absolute warranty of safety, justifying the plaintiff in proceeding without any heed or caution. It is for this proposition that appellant contends. But such we do not understand to be the law. A railway crossing is itself a place of danger and is an effectual warning of danger—a warning which must always be heeded, and the

exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company itself to exercise reasonable care: *Green v. Southern California Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651; *Lambert v. Southern Pacific Co.*, 146 Cal. 231, 79 Pac. 873. Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance: *Greenwood v. Philadelphia etc. Ry. Co.*, 124 Pa. 572, 10 Am. St. Rep. 614, 17 Atl. 188, 3 L. R. A. 44; *Rangeley's Admr. v. Southern R. R. Co.*, 95 Va. 715, 30 S. E. 386; ⁶⁸¹ *Pennsylvania etc. Ry. Co. v. Pfuelb*, 60 N. J. L. 278, 37 Atl. 1100; *Dawe v. Flint etc. Ry. Co.*, 102 Mich. 307, 60 N. W. 838; *Romeo v. Boston etc. R. R. Co.*, 87 Me. 540, 33 Atl. 24; *Thompson on Negligence*, sec. 1614.

The case of *Ellis v. Boston etc. R. R. Co.*, 169 Mass. 600, 48 N. E. 839, contains a critical review of the matter and it is said: "The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that if any engine or train was approaching the crossing on the inbound track a whistle would be sounded or a bell be rung. But in attempting to cross the railroad he was bound, in the exercise of ordinary care, to himself exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. No such inference can be drawn either from his own testimony or that of the other witnesses. The general rule that one who attempts to cross a railroad track must reasonably use his own powers of observation to assure himself that there is no danger from approaching trains is clear: *Chase v. Maine Coast R. R. Co.*, 167 Mass. 383, 45 N. E. 911, and cases cited. And the rule applies to one from whom a train approaching upon a second track is hidden by a train

which has just passed: *Bancroft v. Boston etc. R. R. Co.*, 97 Mass. 275; *Winslow v. Boston etc. R. R. Co.*, 165 Mass. 264, 42 N. E. 1133. While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more as to his own conduct than that he so relied: *Butterfield v. Western Ry. Corp.*, 10 Allen, 532, 87 Am. Dec. 678; *Merrigan v. Boston etc. R. R. Co.*, 154 Mass. 189, 28 N. E. 149; *Tyler v. Old Colony R. R.*, 157 Mass. 336, 32 N. E. 227. We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for defendant was rightly ordered. Exceptions overruled."

682 Excepting for the presence of gates, this case is parallel in its facts with *Hager v. Southern Pacific Co.*, 98 Cal. 309, 33 Pac. 119; but, as has been said, the presence of gates does not justify the total indifference and disregard to danger which was evinced by plaintiff in this case.

The judgment appealed from is therefore affirmed.

McFarland, J., Lorigan, J., Angellotti, J., and Shaw, J., concurred.

Beatty, C. J., Dissented, and said: "When the superior court instructs a jury to find for defendant, this court, in reviewing the judgment, must not only assume the entire truth of plaintiff's evidence, but must give him the advantage of every inference which can be fairly drawn from it. Conflicting evidence, and inferences from it, must be wholly disregarded. This proposition seems to be conceded by the court, and certainly it is fully supported by the first decision cited in its opinion on the principal question of law presented by the case: *Greenwood v. Philadelphia etc. Ry. Co.*, 124 Pa. 572, 10 Am. St. Rep. 614, 17 Atl. 188, 3 L. R. A. 44. I think, however, that in stating the case this rule has not been strictly observed with respect to important particulars. The statement that the plaintiff was moving faster than the train is based entirely upon the opinion of defendant's witnesses—the engineer and fireman—that they were going about four miles an hour, but this evidence was weakened by the admission that the average speed of the train between Los Angeles and San Bernardino was fifteen miles an hour, and

that the grade they were ascending at the place of the accident was but a minute fraction over one per cent (1.06). It was also in conflict with equally definite evidence on the part of the plaintiff, from which the jury would have been warranted in finding that the speed of the train was at least fifty per cent in excess of plaintiff's speed. Two entirely disinterested witnesses, Holloway and Simons, crossed the track going west just before the accident. They were in a buggy, proceeding at a slow trot. Holloway testified that they met plaintiff about one-fourth of the length of the block from defendant's track (about fifty feet), and Simons, testifying as a witness for defendant, stated that when they came in sight of the train at the crossing, it (meaning, I suppose, the headlight) was about midway between Green and Colorado streets, a distance of more than two hundred feet from the point of collision. Conceding that this character of evidence is somewhat indefinite, it is no more indefinite than the estimate of defendant's witnesses that the train was moving about four miles an hour, and, accepting it as approximately correct, it proves that while the buggy, proceeding at a slow trot, moved fifty feet from the track to the point where it met plaintiff's wagon, and while plaintiff, moving at a brisk trot, proceeded another fifty feet to the point of collision, the train had moved twice as far, necessarily at a rate of speed twice the average speed of the two vehicles, and probably at a rate much faster than that of the plaintiff. This fact has an important bearing upon another fact which is highly material, in view of the rule as to contributory negligence, to be considered hereafter. For, if plaintiff was moving six miles an hour (I assume this rate because in the discussion here it has been agreed that a brisk trot is equivalent to at least six miles an hour), the train was moving nine miles an hour, and it is susceptible of mathematical demonstration from other data supplied by the uncontradicted evidence of actual measurements that plaintiff could not have seen the headlight of the train until the heads of his horses were within twelve feet of the track (i. e., less than a second and a half of time). These data are: A solid row of brick buildings extending from a line fifteen and one-quarter feet west of the center of the track a distance of one hundred and fifty feet—the entire length of the block. It was dark. The first part of the train that plaintiff could have seen was the headlight, which was moving north on a line fifteen and one-quarter feet east of the brick building adjoining the alley. Plaintiff was moving east on a line about twenty-one feet north of the same building. His rate of progress was six miles an hour, equivalent to eight and four-fifths feet a second. The train, moving at the rate of nine miles an hour, would cover thirteen and one-fifth feet a second. Plaintiff sat fourteen feet back of his horses' heads. The hind wheels of his wagon extended four feet farther to the rear. The collision was with his hind wheel as he was clearing the track at the east rail.

"It will be seen in the ensuing discussion, as it appears from the opinion of the court, that in cases of this kind it is always a material question whether the plaintiff, after discovering his danger, was able to avoid it, and one of the questions here is whether this court can hold, as matter of law, that the plaintiff, within the brief space of a second and a half, could have reined in his horses or done anything more prudent after seeing the locomotive than to try to cross ahead of it. It will be seen that in the opinion of the court the conduct of the plaintiff and his whole case takes its color from the assumed slow motion of the train and his own reckless speed. If it be true that upon this point there is, as I have attempted to show, evidence warranting the inference that the speed of the train was fifty per cent in excess of the plaintiff's speed, we must for the purposes of this appeal take that as a fact proven, and we are not then forced to conclude that it was the mere recklessness or absence of mind of the plaintiff which placed him in front of the locomotive. For he tells us plainly what he was doing and why he did it. He knew the crossing, and he knew that the defendant guarded the crossing by gates which, from his observation, were always lowered when trains were passing. He knew he was approaching the crossing, and he 'kept his eyes straight ahead in order to see if anything was in the way.' His idea was—as is probably the belief of a majority of men—that where the state of traffic calls for the erection of crossing-gates, the duty and the practice of the railway company is to employ men to attend them and to close them on the approach of a train, and not alone in the daytime, but at all times at which trains may be expected to pass. So believing, and seeing the gates open and motionless, he took it as an assurance of safety and an invitation to proceed. A fair construction of his testimony shows that he was acting consciously upon this view of the situation, and not with a mind solely intent upon getting home, and oblivious to everything else. It is true he did not go upon the stand and formally deny the statement of one of the defendant's witnesses, which is quoted in the opinion of the court, to the effect that he was not paying attention to anything, but that evidence was contradicted in advance by the whole tenor of his testimony in chief, and the expression itself, admitting it to have been reported with literal fidelity, was used within twelve hours after the accident, very shortly after he recovered consciousness, and while he was acutely suffering from concussion of the brain. Considering that of the three agents of defendant who were sent to the hospital to obtain plaintiff's statement, one, its 'special inspector,' did not testify; that another, a surgeon, testified to a statement not at all at variance with plaintiff's testimony at the trial; and that only one, the operator at the Pasadena station testified to the expression quoted—I do not think we can assume as a fact that the plaintiff in approaching the crossing was not paying attention to anything. On the contrary, the case,

as the plaintiff might reasonably have asked the jury to view it, and we therefore are bound to view it in considering the instruction to find for the defendant, was simply this: The plaintiff, perfectly aware that he was approaching a city crossing guarded by gates which, according to his experience, were always lowered on the approach of a train, drove forward without slackening the brisk pace of his horses because he saw the gates standing open, and because he regarded the open gates as an assurance of safety and an invitation to pass. He looked straight ahead to see if there was anything in the way, and was entirely excused from looking in the direction of the approaching train, because his view in that direction was cut off by a solid row of brick buildings which prevented him from seeing the locomotive until it was too late to have avoided the accident. He might, however, have heard the sound (the loud exhaust of the engine) made by the train if he had stopped to listen. Or if he had so slackened his pace as to leave him in perfect control of his team, he would have seen the locomotive in time to have pulled up while the train was passing. The question is whether it was his duty under the circumstances to stop for the purpose of listening, or to approach the gates so cautiously that he could rein in his horses instantly on the sudden appearance of the train emerging from behind the building which obstructed his view. The question, in other words, is whether the rule that the failure on the part of a traveler to stop and look and listen is negligence in law (negligence per se, as it is sometimes designated) applies to a grade crossing of a city street which, in compliance with municipal regulations or by the voluntary act of the railroad company, is guarded by gates arranged to be lowered while trains are passing, or by flagmen habitually stationed there for the purpose of signaling that the way is clear.

"Upon this question the cases and the text-writers are by no means agreed. There are decisions both ways, and the text-writers have inclined to one side or the other according to their respective views of public policy. The opinion of the court cites only section 1614 of Thompson on Negligence, and the cases referred to in illustration of the text. But section 1614 of Dr. Thompson's work does not state his view of the question. It states the view to which he is evidently opposed, as will be seen by reference to the preceding section (1613), where he says: 'Many decisions . . . concede that the traveler approaching a railway crossing has the right to rely upon the fact that the gate is open, or that the flagman is absent from his post, and to assume from these indications that no train is approaching, and that he may safely proceed to cross; and so where the gates are up and a flag flying, indicating that a train will stop before reaching the crossing; and so where the traveler, having waited several minutes, starts to cross on the gates being raised. While, as we shall soon see' (referring to section 1614, cited by the court), 'some courts condone the fault of the railroad company in luring the traveler to

his death or injury by deceptive appearances, and visit all the blame on the traveler, yet even these courts concede that a traveler approaching a crossing guarded by gates is not required to exercise the same vigilance in looking and listening as when he approaches one not so guarded,' etc.

"With the sole exception of the Pennsylvania case, the decisions cited in the opinion of the court will be found on examination to furnish a very slender support to its conclusion. In *Greenwood v. Philadelphia etc. Ry. Co.*, 124 Pa. 572, 10 Am. St. Rep. 614, 17 Atl. 188, 3 L. R. A. 44, the doctrine contended for by defendant is indeed carried to its extreme limit. There a hose-cart, responding to an alarm of fire (a false alarm, as the event proved), was driven rapidly upon a gate-crossing and one of the firemen injured by a crossing train. An instruction to find for the defendant was affirmed because it appeared that the driver of the cart, relying on the open gates, did not stop to listen as he approached the crossing. Outside of Pennsylvania, I think, it would be difficult to find a case going to this extent. In every other case cited the person injured was a pedestrian, and in every case the decision turned upon the fact that the plaintiff, after passing the gates, could have seen the approaching train in ample time to have avoided the accident if he had used his eyes. This was the whole point of the decision, and in each case, except the New Jersey case, previous decisions of the same court, in which it had been held that travelers had a right in approaching a grade-crossing to rely upon open gates as an assurance of safety, were distinguished upon the ground mentioned.

"Take the Virginia case—*Rangeley's Admr. v. Southern Ry. Co.*, 95 Va. 715, 30 S. E. 386. The facts of that case are stated at page 720 of 95 Va. (and on page 387 of 30 S. E.) as follows: 'The record considered as on a demurrer to the evidence shows that the deceased, on the night of the accident, with his companion, left a restaurant, the porch of which extended to within eight or ten feet of the railroad track; that he went to a point on or near the track, and was standing there talking when struck by the defendant's train; that the night was dark, but that the locality was well lighted by electric lamps; that the track was straight in the direction from which the train came, with nothing to obstruct the view in that direction after leaving the restaurant porch; that the train was backing about as fast as a man could walk, not over five miles an hour, upgrade, using steam, and that the bell was ringing from the time it commenced to back until after the unfortunate man was run over.' The court, discussing the refusal of an instruction which 'in effect informed the jury that a person approaching a railroad crossing where gates are required to be kept and lowered on the approach of trains, has the right, when he sees that the gates are not lowered, to presume that no train is approaching, and that he is under no obligation to use his senses to ascertain whether a train is approaching,' referred to

another case reported in the same volume, for the correct rule in such cases: *Kimball v. Friend's Admr.*, 95 Va. 125, 27 S. E. 901. The facts of that case were that the plaintiff rode a bicycle on the track at about the speed of a trotting horse. The sides of a cut prevented him from seeing the approaching locomotive until he was too close to avoid the collision, and he was killed. He did not stop to listen, and he did not approach the crossing at such a moderate rate of speed as would enable him to control his movements. There was no direct evidence, of course, that he did or did not listen. Upon a very full discussion of the evidence and the rulings giving and refusing instructions, the court holds that a traveler is not required to exercise the same vigilance in approaching gate-crossings as he must exercise at crossings not so guarded, and that in such cases the question of contributory negligence is peculiarly one for the consideration of the jury. The judgment for the plaintiff (defendant in error) was affirmed.

"Next in order is the New Jersey case, *Pennsylvania Ry. Co. v. Pfuelb*, 60 N. J. L. 278, 37 Atl. 1100. That was another case of a pedestrian walking upon a gate-crossing and being killed by a train which he could have seen approaching for a long distance before he stepped on the track, and a circumstance to which much weight was attached was the fact that when he was approaching the track he saw the gate standing open while another train was passing, which was notice that the open gates were not an invitation to cross.

"*Dawe v. Flint etc. Ry. Co.*, 102 Mich. 307, 60 N. W. 838, was another case of a pedestrian injured by a train which she could have seen approaching, after passing the gates, long before it struck her. The case is distinguished from *Richmond v. Chicago etc. Ry. Co.*, 87 Mich. 374, 49 N. W. 621, and *Evans v. Lake Shore etc. R. R. Co.*, 88 Mich. 442, 50 N. W. 386, 14 L. R. A. 223. The rule established by those cases, and not questioned by the Dawe case, is that 'a party approaching a railroad track has a right to rely upon the absence of such warnings of danger as is shown to be the custom of the railroad company to give': See point 2, syllabus, p. 442, 88 Mich. 'When gates are provided by railroad companies at street-crossings, the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and are not negligent in acting upon the presumption that they are not exposed to a danger which could only arise from a disregard of such duties': And see *Van Auken v. Chicago etc. Ry. Co.*, 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33.

"A Maine case is next cited by the court—*Romeo v. Boston etc. R. R. Co.*, 87 Me. 540, 33 Atl. 24. This was another case of injury to a pedestrian who for a distance of eighty feet from the track had a plain view of the approaching train if she had raised her eyes to look. The case was distinguished, for this reason, from *State v. Boston etc. R. R. Co.*, 80 Me. 430, 15 Atl. 36, and *Hooper v. Boston etc. R. R. Co.*,

81 Me. 260, 17 Atl. 64. In the first of these cases the gates had been erected voluntarily by the railroad company, and they did not operate them at night, but nevertheless it was held to be a question for the jury, whether the deceased was guilty of contributory negligence in driving on the track without stopping. The second case is to the same effect.

“Coming to Massachusetts, an extensive quotation is made from the opinion in *Ellis v. Boston etc. R. R. Co.*, 169 Mass. 600, 48 N. E. 339. I think it can hardly be said that the opinion in that case contains a critical review of the matter. The plaintiff walked through the gates and stepped on the track in front of a train that he could have seen if he had looked. It is expressly stated that the raising of the gates was a circumstance which justified him in starting across the track, but his failure to use his eyes when he was in perfect control of his own movements and in a place of safety was held to be negligence. It is an error, I think, to regard this case, or any other of the cases in which a man or woman on foot was injured by a train they could have seen approaching if they had looked along the track, as authority in this case. With the single exception of the New Jersey case, they were all decided by courts that hold to the doctrine that open gates are an assurance of safety which justify the traveler to enter the crossing without stopping to listen, and all that is said in any of the decisions in regard to the obligation of the traveler to make use of his senses has reference to the ability of a pedestrian to avoid the danger after passing the gates by simply stopping when the train has come into his view. In this case the plaintiff could have done nothing to save himself after the train came in view. The views of the supreme court of Massachusetts regarding a case such as this are stated in *Clark v. Boston etc. R. R. Co.*, 164 Mass. 434, 41 N. E. 666. There the plaintiff, hauling a load of hay with a team of two horses, drove at a trot down a grade to a gate-crossing without attempting to stop, and was injured. Exceptions to a verdict in his favor were overruled by the supreme court upon the ground that ‘there is no absolute rule of law that a traveler approaching the crossing at the grade of a highway by a railroad must under all circumstances stop to look and listen for a train before entering on the railroad’: First point of syllabus. See, also, *Conaty v. New York etc. Ry. Co.*, 164 Mass. 572, 42 N. E. 103, and section 1613 of Thompson on Negligence, and the cases cited under that section, particularly the opinion of Judge Elliott in the case of *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 10 Am. St. Rep. 136, 20 N. E. 843; and the opinion of Judge Williams in *Cleveland etc. Ry. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321. Both of these cases were very elaborately argued and considered, and the conclusions of the courts were widely at variance with the doctrine to which we are committing this court in the first case we have had to consider involving the question of negligence in approaching a gate-crossing. It is, in my opinion,

very important on the first presentation of this question that this court should adopt that rule which is dictated not only by considerations of public convenience, but of humanity. If we lay down the rule that open gates at street-crossings are an assurance of safety to all persons and an invitation to pass without stopping to listen when the view is obstructed, I feel assured that the railroad companies will see that their gates are kept in order and tended by careful and competent keepers. There will be no accidents of this kind, and both life and property will be rendered more secure without any impediment to the great and increasing railroad traffic. Their trains will be able to move with the same or greater celerity than now, and without danger of encountering obstacles at the points where gates are established. But the traffic conducted by rail is not the only thing to be considered. The multifarious traffic of large cities upon their public streets is to be considered and promoted as far as it can be done without injury to more important interests, and since the careful operation of crossing-gates would be no interruption to the passage of trains, while it would leave the use of the streets free at all times when the gates were open, the rule which I advocate would conserve all interests at no cost except for the erection and repair of the gates, and the wages of keepers—a cost which in most cases would be trifling in comparison with the privilege of crossing the city street at grade.

“There is perhaps less difference between me and the court upon the question of law involved in this case than there is with respect to the facts. It is at all events recognized in the opinion of the court that there is a distinction to be observed between cases of accidents at gate-crossings and those at crossings not so guarded. This distinction was repudiated in a majority opinion of the district court of appeal, and as the judge who presided at the trial was one of the two justices who concurred in that opinion, I am satisfied, not only from that circumstance, but from the argument of counsel for respondent here, that the case was taken from the jury upon the assumption that it was governed entirely by the strict rule applied to accidents at unguarded crossings in such cases as *Green v. Southern California Ry. Co.*, 138 Cal. 1, 70 Pac. 926, and *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, and not upon the theory of this decision that the plaintiff could have avoided the accident after the train came within range of his vision.”

The Decision in the Principal Case finds support in the recent case of *Northern Cent. Ry. Co. v. State*, 100 Md. 404, 108 Am. St. Rep. 439. Compare, however, *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 10 Am. St. Rep. 136.

HIGGINS v. CARLOTTA GOLD MINING COMPANY.

[148 Cal. 700, 84 Pac. 758.]

MECHANICS' LIENS are Governed by the Law existing at the time the work is done and the liens are filed. (p. 346.)

MECHANICS' LIENS on Leased Mining Claim.—Where a lease of mining property provides that the lessees shall work and develop the mine and pay the lessor a percentage of the net profits, the lessees are, under section 1183 of the Code of Civil Procedure, regarded as the agents of the lessor, and both his and their interests are subject to liens for work done in developing the mine and extracting ore. (p. 345.)

J. E. Foulds, for the appellant.

J. B. Curtin, J. C. Webster, J. F. Rooney and G. G. Grant, for the respondents.

701 SHAW, J. In this case a number of persons who had performed labor upon a mine filed separate claims of lien on the two mining claims constituting the mine for the sums due them, respectively, for such labor, and afterward began the actions involved in this appeal to foreclose their said liens. Several separate actions were begun, but before the trial all were consolidated and tried as one case. The parties defendant were the Carlotta Gold Mining Company, which was the owner of the mining claims, and David Naegle, David Miller and J. B. Coleman, who were lessees thereof, operating the mine under a lease of the mining claims executed to them by the said owner. The two mining claims were worked together as a single mine, and no objection is made on the ground of misjoinder. The labor for which the liens were claimed was all performed for the lessees, and under contracts made by the lessees alone with the respective claimants. A personal judgment was given in favor of each claimant against the lessees for the amount of his particular claim, and against all the defendants, including the appellant, for the foreclosure of the liens and the sale of the mining claims to pay the same. A motion for new trial, made by the Carlotta Gold Mining Company, was denied. The company alone appeals from the judgment and from the order denying its motion for a new trial.

It is conceded that the work for which the several liens were allowed was done upon the mine, and was of the value

for which judgment was given, and that the interest of the lessees in the mining claims is subject to the liens. The sole question presented is the liability of the interest of the lessor, the Carlotta Gold Mining Company, in the property to the liens, and to sale for the payment thereof. The lease, under which the lessees were operating, gave them the exclusive possession of the mining claims during the term, and provided that they should forthwith begin and "continually prosecute" the work of "exploring, developing, and mining ⁷⁰² upon said premises," and should mill and reduce the ores extracted, and that they would "pay to the lessor monthly, on the tenth day of each month . . . two-thirds of the net profits of the proceeds derived by him (them), from the working of said mine during the calendar month immediately preceding," less the sum of two thousand one hundred and thirty-one dollars in unpaid bills of a former lessee, and the cost of "such machinery and improvements as he (they, the present lessees) shall have put upon the premises," which amounts were to be first paid from such gross receipts. The agreed statement of facts, set forth in the statement used on motion for a new trial, shows that the work for which the liens were claimed was done in part in extracting ore from the portion of the ledges already exposed by shafts sunk in the mine before the execution of the lease, and in part "in drifting and stoping for the purpose of opening up new ore bodies and discovering better ore." From the findings it appears that certain of the liens were for work done exclusively for the purpose of extracting ore, and not in the process of development, but many of them were for work which, for aught that appears in the record, may have been done either in extracting ore, or in development and improvement, or in both. According to our view of the law, and of the correct interpretation of the lease under which the work was done, the interest of the Carlotta Gold Mining Company is liable for all the liens, whether for work done exclusively in the extraction of ore, and for that purpose only, or for work done for development to discover new or better ore, or to facilitate the extraction of ore, discovered or undiscovered, or for work which served to accomplish all these purposes.

Section 1183 of the Code of Civil Procedure contains two distinct and separate provisions allowing distinct classes of

liens. One provision, stated in the first clause, allows a lien for work done or materials supplied in the construction of buildings or excavations on land, which are made in the way of an improvement, to enhance its value or make it more useful, or available for a new use. The other provision is in the second clause, and relates to, and gives a lien for work done in or upon mines, which may result either in the construction of an improvement thereto, or in the partial or total destruction thereof, by the extraction of the ore which gives it value. Then follows a provision which, as it stood ⁷⁰³ when these liens were filed, was as follows: "And every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter." By an amendment made afterward there was inserted immediately after the words "any mining," the phrase, "either in the development thereof or in working therein by the subtractive process": Stats. 1903, p. 84, c. 76. We do not perceive how this changes the effect of the clause as it stood before, but the question is not involved, for this case must be decided upon the law existing at the time the work was done and the liens filed. This clause, as a whole, refers to both classes of liens. The phrase "any mining" refers solely to the working of a mine, and its effect is that the person in charge of any "mining" is made the agent of the owner, although the work he is prosecuting does not in the least improve the property or add anything thereto, but destroys or lessens its inherent value, by removing the ore therefrom: *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762. In order to make him the agent of the owner in such a case, however, such person must be in charge, with the consent of the owner, and must be prosecuting or controlling the mining operations, either wholly or in part, for the benefit of the owner: *Jurgenson v. Diller*, 114 Cal. 491, 55 Am. St. Rep. 83, 46 Pac. 610; *Reese v. Bald Mountain etc. Co.*, 133 Cal. 285, 65 Pac. 578. Such benefit may be direct, as where the ore extracted, or some share of it, remains the property of the owner, or it may be indirect, as where the ore, when extracted, is the property of the person in charge, but is to be sold by him, and a part or share of the proceeds is to be paid to the owner, or for his use or

benefit. The legal effect would be the same in either case. The purpose of the statute, obviously, is to allow a lien for mining work done upon a mine against the estate or interest therein of the person who is to be benefited thereby, whether done directly for him and at his request, or indirectly for his benefit, at the request of some other person operating in pursuance of some express or implied contract with him. Such a case we have here. The lease is a contract; by its covenants the lessees undertook to ⁷⁰⁴ do the mining work, and both the lessees and the lessor were to share in the proceeds and benefits of the work. It might almost be said that such person would in such a case be authorized to bind the estate of the owner for a lien for such work without the aid of the special statutory provision making him constructively the agent of the owner for that purpose, but with the aid of the provision there can be no doubt of the proposition. There is nothing in either *Jurgenson v. Diller*, 114 Cal. 491, 55 Am. St. Rep. 83, 46 Pac. 610, or *Reese v. Bald Mountain etc. Co.*, 133 Cal. 285, 65 Pac. 578, that is contrary to this conclusion. In the first case the person who caused the ore to be extracted had no authority from the owner to do so, and was doing it for his own exclusive benefit. Although he was occupying the premises with the consent of the owner, he was, as to the mining work, a mere trespasser. In the later case the decision was put upon the ground that there was no finding that the person who caused the work to be done was the "agent of the owner," nor anything from which such fact would be necessarily implied, nor anything to show that the owner was to receive, or had received, any benefit from or on account of the work done or the ore extracted. All of these facts appear in the case at bar. Section 1192 of the Code of Civil Procedure has no application to mining work which consists of removing ore solely by the "subtractive process," as it is termed in *Jurgenson v. Diller*, 114 Cal. 491, 55 Am. St. Rep. 83, 46 Pac. 610. That section by its express terms applies only to "every building or other improvement mentioned in section 1183 of this code, constructed upon any lands," and hence does not include or apply to "mining" work, which does not constitute for any purpose an improvement to the mine or to the land: *Reese v. Bald Mountain etc. Co.*, 133 Cal. 285, 65 Pac. 578; *Williams v. Santa Clara M. A.*, 66 Cal. 200,

5 Pac. 85; *Jurgenson v. Diller*, 114 Cal. 491, 55 Am. St. Rep. 83, 46 Pac. 610. With respect to the liens wholly or in part for work done for the "purpose of opening up new ore bodies and discovering better ore," if such work consisted in making an "improvement" to the mine, apart from, or in addition to, its effect in obtaining ore from the rock excavated, it would come within the provisions of section 1192 of the Code of Civil Procedure. As the lease expressly provides that such work should be done by the lessees, when they deemed ⁷⁰⁵ it expedient, the lessor must be presumed to have had notice or knowledge of it from the beginning. Such work would also be for the lessor's benefit, either by reason of the increased receipts of net profits during the lease, or from the increased facility for the extraction of ore from the mine after the lease expired. It is conceded that the appellant posted no notice disclaiming any liability for such work or improvement, and consequently its estate in the property stands charged with a lien for the value thereof: *Hines v. Miller*, 122 Cal. 517, 55 Pac. 401.

Our conclusion in regard to the validity of the liens as against the appellant's estate in the property renders it unnecessary to consider the objection that as to some of the liens the evidence does not sustain the findings to the effect that the labor for which the liens were allowed was done for the development and improvement of the mining claims and for the repair of the machinery situated thereon. The judgment, with respect to all the liens, for work not of the character indicated in these findings, is fully supported by the other findings made by the court. The allegation in the answer that plaintiffs knew, at the time they began work, that the defendants Naegle, Miller and Coleman were working the mine as lessees, is immaterial, and no finding thereon was necessary.

The judgment and order are affirmed.

Beatty, C. J., McFarland, J., Angellotti, J., Henshaw, J., and Lorigan, J., concurred.

On Mechanic's Liens against leased mining properties, see the recent case of *Berentz v. Belmont Oil Min. Co.*, 148 Cal. 577, ante, p. 308, and cases cited in the cross-reference note thereto.

WINSLOW v. VALLEJO.

[148 Cal. 723, 84 Pac. 191.]

EASEMENT—Right of Grantee to Change.—When the grant of an easement is general as to the extent of the burden to be imposed, an exercise of the right, with the acquiescence of both parties, determines the extent of its enjoyment, which cannot thereafter be changed at the pleasure of the grantee. (p. 352.)

EASEMENT—Interpretation of Grant.—In determining the extent and limits of an easement, the entire instrument granting it is to be considered, in view of the circumstances surrounding its execution and the situation of the parties. (p. 352.)

EASEMENT TO LAY WATER-PIPES—Right to Change.—Where a property owner grants to a city a general easement to lay water-pipes and mains across his land, and the city thereafter lays a single pipe, it is not entitled, after the lapse of several years, to lay an additional and larger pipe to meet the requirements of an increasing population, and may be enjoined from so doing, irrespective of other damages than the obstruction of the free use of the land and the possible ripening of the wrongful action into an easement. (p. 353.)

George A. Lamont and James S. Lamont, for the appellant.

H. D. Gill, for the respondent.

723 SLOSS, J. The defendant, the city of Vallejo, appeals from a judgment enjoining it from entering upon certain land belonging to the plaintiff and laying thereon a fourteen-inch pipe, or from entering for any purpose except that of inspecting, repairing or renewing the water-main already laid across said land.

724 The findings, which are not attacked, show the following facts: The city of Vallejo has for some years owned and operated a water system for the purpose of supplying the city and its inhabitants with water. The water is impounded in a reservoir situated in Solano county and is thence conveyed through a ten-inch iron main pipe-line to the city of Vallejo, a distance of about fourteen miles. The pipe-line was laid about nine years before the commencement of this action, and in its course passes through the lands of various property owners, including the plaintiff. By reason of the growth of the city, the ten-inch main has become inadequate for the needs of the inhabitants, and the city has undertaken to lay an additional pipe, fourteen inches in diameter, which it is about to run across the plaintiff's lands, within three feet of the ten-inch pipe-line.

While an express finding as to damage is not, in our view, important, it may be proper to say that the trial court finds that the laying of the new main will damage plaintiff's orchard and a crop growing on the land. The ten-inch main was laid under a grant of a right of way, dated June 15, 1893, from the then owners of the land to the defendant, and inasmuch as no compensation for any further or other right was paid by the city, the question is whether the conveyance or grant of 1893, taken in connection with the facts above stated, gave to the defendant the right to run a fourteen-inch main through the lands of the plaintiff, over a route outside of and in addition to that occupied by the ten-inch line. The instrument in question, after reciting a consideration of one dollar and the furnishing of water by the city to the owners of the land, to the extent of not more than one thousand gallons per month, grants and conveys to the city a right of way over the land described as follows: "Being the right of way on, in, through and over the land of the parties of the first part hereinafter described for any water-pipes or mains which may be laid by the city of Vallejo, the party of the second part, and the right to maintain such water-pipes and mains, provided that all water-pipes and mains shall be laid so that not less than one and one-half feet of ground shall cover such water-pipes and mains, and that in no case shall the said water-pipes or mains interfere with the proper cultivation of the lands of the parties of the first part, and ⁷²⁵ also the use of so much land as is necessary in the laying down and maintaining of said water-pipes and mains, and also the right to enter into and upon said lands for the purpose of laying down and maintaining said water-pipes or mains, and also at all times in the future for the purpose of repairing and inspecting and maintaining said water-pipes or mains, and causing no more damage in such entry or entries than cannot be avoided. Should said party of the second part cause any damage by such entry or entries, it is hereby agreed that reasonable compensation shall be paid by said city of Vallejo to the parties of the first part. Said water-pipes and mains to be laid and maintained on present surveyed line as near as may be."

Section 806 of the Civil Code provides that "the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired."

In the present case the easement or servitude was acquired by grant, and we must therefore determine its extent by looking to the terms of the grant. But the conveyance is general in its terms and affords no basis for determining the number of pipes, their size, or their exact location. What is granted is the right of way for "any water-pipes or mains which may be laid by the city," such pipes to be covered by not less than one and one-half feet of ground, and to be "laid and maintained on present surveyed line as near as may be." The rule is well settled that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed. In *Onthank v. Lake Shore etc. R. R. Co.*, 71 N. Y. 194, 27 Am. Rep. 35, the plaintiff, in 1863, had granted to the predecessor of the defendant the right to enter upon his lands "for the purpose of laying down and keeping in repair an iron pipe" to carry water from a certain reservoir across said lands. The grantee laid a two-inch pipe across plaintiff's land. In 1871, the defendant enlarged its reservoir and put down a four-inch in place of the two-inch pipe. It was held that the easement of the defendant became fixed as to extent and location by the laying of the original pipe, with ⁷²⁶ the consent of both parties, and that it could not thereafter be exercised in any other place, nor could the size of the pipe be increased. The court said, per Earl, J.: "After the grantee had once laid its pipe and thus selected the place where it would exercise its easement thus granted in general terms, what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place. . . . But why is not the right also fixed for the same reasons as to the size of the pipe and the quantity of water to be diverted? I can perceive no reason for confining the operation of this rule to the mere place where the right is to be exercised. There is the same reason for applying it to the entire right granted." In *Jennison v. Walker*, 11 Gray (Mass.), 423, the court said: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be exercised cannot be definitely

ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee." This case involved the location and course of an aqueduct. The same principle has been applied to the construction of a dam (*Orphan Home v. Buffalo Hydraulic Assn.*, 64 N. Y. 561); and to the location of a right of way: *Wynkoop v. Burger*, 12 Johns. 222; *Bannon v. Angier*, 2 Allen (Mass.), 128; *O'Brien v. Goodrich*, 177 Mass. 32, 58 N. E. 151; *Garraty v. Duffy*, 7 R. I. 476.

It is of course true that for the purpose of ascertaining the extent and limits of the right granted the entire instrument is to be considered, in view of the circumstances surrounding its execution and the situation of the parties: *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800, 23 N. E. 442, 7 L. R. A. 226. And if the language of the grant in question, viewed in the light of all the conditions existing when it was executed, clearly gave to the defendant a right in excess of the one actually used, such right would still exist, notwithstanding the exercise for a time of a lesser privilege: *Quigley v. Baker*, 169 Mass. 303, 47 N. E. 1007. But we see nothing ⁷²⁷ in the language of this grant, or in the conditions existing when it was executed, to indicate that it was intended to give the defendant the right to increase from time to time the number of pipes laid. The appellants' plea for such construction is based largely on the fact that the conveyance throughout uses the words "pipes" and "mains" in the plural number, and that, therefore, the parties could not have intended to limit the city to a single pipe. But while the city might, at the outset, have laid more than one pipe, the most that can be said regarding this language is that the grant is indefinite as to the number of pipes. The city, having elected to lay one, is bound by this election. It might with equal force be urged that inasmuch as there was no limitation on the size of the pipe to be laid, the defendant might at any time replace the ten-inch pipe with one of twice or three times the diameter. Such view is entirely inadmissible under the authorities cited above. It is true, as urged by appellant, that the parties to the grant knew that the right of way

granted was for the purposes of a municipal water supply, and they may have contemplated that with the growth of the city, additional means of conducting water to it might be necessary. It by no means follows, however, that the grantors, in conveying a right of way for water-pipes over their land, intended to burden that land with an easement, the extent of which could never be definitely ascertainable, and which might be enlarged again and again, as often as the growth of the city of Vallejo might make it necessary to extend the operations of the water plant.

We think, therefore, that the construction given to the conveyance by the lower court was correct, and that the laying of the ten-inch pipe with the acquiescence of both parties, measured and limited the location and the extent of the easement. "It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent, after it has once been finally established, whether by the express terms of a grant, or by acts of the parties tantamount in their effect": *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381; *Allen v. San Jose Land etc. Co.*, 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93. If the defendant had no right to lay the new pipe, injunction was the proper remedy. "It is the settled law of this state that, irrespective of other damage, ⁷²⁸ an injunction will be granted to prohibit the continuance of action that obstructs one in the free use and enjoyment of his land, where such action, if continued, will ripen into an easement": *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381, and cases cited.

The judgment is affirmed.

Angellotti, J., and Shaw, J., concurred.

Under a Grant of a Right to Enter upon the grantor's land and lay a water-pipe, without specifying the place or the size of the pipe, it has been held that the grantee, after having once laid the pipe, cannot increase the size of it or lay it in any other place: Onthank v. Lake Shore etc. R. R. Co., 71 N. Y. 194, 27 Am. Rep. 35. And if a private way has once been selected, it cannot be changed by either party without the consent of the other: *Dudgeon v. Brownson*, 159 Ind. 562, 95 Am. St. Rep. 315, and note.

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TINN v. UNITED STATES DISTRICT ATTORNEY.

[148 Cal. 773, 84 Pac. 152.]

CERTIORARI—Scope of Writ.—The Writ of Certiorari can issue only when the court under review has exceeded its jurisdiction. (p. 354.)

NATURALIZATION—Conclusiveness of Judgment.—An order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction. (p. 355.)

NATURALIZATION—Attack upon Judgment.—A judgment admitting an alien to citizenship cannot be set aside except by one of the three modes prescribed by law, which are: (1) By appeal, (2) by a suit in equity, (3) by a motion within six months after the judgment is taken. Therefore, an order vacating the judgment on motion of the United States district attorney, without any complaint or other pleading, for fraud in its procurement, more than three years after the naturalization, is void and will be annulled on certiorari. (p. 355.)

JURISDICTION—Necessity of Complaint.—A civil action can be instituted only by the filing of a complaint; without such a foundation for its action, the judgment of a court of record is void, even though it be a court which has jurisdiction over the subject matter referred to in the judgment. (p. 356.)

Lewis & Royce, for the petitioner.

Robert T. Devlin, United States district attorney, and Frank A. Duryea, assistant United States district attorney, for the respondent.

774 SHAW, J. This is a proceeding by Walter Tinn to obtain a writ of certiorari to annul an order of the superior court of the city and county of San Francisco, canceling a previous order of that court admitting him as a citizen of the United States. The order of admission was made November 19, 1902. The order of cancellation was made upon motion of the United States district attorney, purporting to be made as in the course of the original proceeding, on November 23, 1905. The only question which we can consider in a proceeding in certiorari is that of jurisdiction. The writ can only issue when the court under review has in some manner exceeded its jurisdiction: Code Civ. Proc., sec. 1068. If the superior court had jurisdiction to make the order canceling the previous order admitting the petitioner to citizenship, then its judgment in the matter cannot be reviewed in certiorari, although it may have been rendered upon insufficient evidence or in some irregular method of procedure not going to the jurisdiction.

The contention of the petitioner is that an order admitting an alien to citizenship, made by a court of competent jurisdiction, is a judgment, possessing all the characteristics of an ordinary judgment of a court having jurisdiction of the subject matter and the person; that after the lapse of six months from the time such order is made it is too late to institute proceedings by motion to vacate the same; that when such proceedings are instituted after such lapse of time the ⁷⁷⁵ court is without jurisdiction to act therein; and that the only proceeding which can be thereafter taken to vacate such order is an action in equity to set aside, on the ground that it is procured by fraud or mistake. We think this contention is correct. It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction: *United States v. Norsch* (C. C.), 42 Fed. 417; *Commonwealth v. Paper*, 1 Brewst. 263; *In re McCoppin*, 5 Saw. 630, Fed. Cas. No. 8713; *Spratt v. Spratt*, 4 Pet. (U. S.) 393, 7 L. ed. 111; *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420, 3 L. ed. 391; *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. This being so, such judgment must possess the same qualities as any other judgment of a court having jurisdiction, and consequently it cannot be set aside, except in some recognized lawful mode. But three modes are recognized by law. These are: 1. A motion made under section 473 of the Code of Civil Procedure, within six months after the judgment is taken; 2. By an action in equity; and 3. By an appeal to some court having appellate jurisdiction over the subject. The latter is, of course, not involved here. The vacating order in question was made in a proceeding begun three years after the making of the original order, and therefore it cannot be sustained as a proceeding by motion under the code. After the lapse of six months from the time the petitioner was admitted to citizenship, there was no authority for the institution of a proceeding by motion to vacate the judgment admitting him.

It cannot be successfully contended that the proceeding was, either in form or substance, a suit in equity. No complaint or other pleading invoking the jurisdiction of the court to act against the defendant in the matter was ever filed. A civil action can only be instituted by the filing of a complaint: Code Civ. Proc., sec. 405. Without such foundation for its

action the judgment of a court of record is void, even though it be a court which has jurisdiction over the subject matter referred to in the judgment. If the record of the judgment alone were produced, the presumptions in favor of the validity of such records would perhaps require another court, in a collateral proceeding, to assume that it was based on a proper complaint. But here the entire record is before us, and it is shown that the action of the superior court was invoked by **776** motion only, without any complaint or other written pleading. The rule is that a judgment so obtained is of no validity or force. Mr. Freeman says that in order to give a court jurisdiction to act "there must be a cause to be heard, and when the tribunal is a court of record, such cause must be submitted to it by a complaint in writing": 1 Freeman on Judgments, sec. 118. Mr. Works, in his treatise on Jurisdiction, states the rule thus: "Jurisdiction of the subject matter is obtained by the filing of such pleading or petition as will bring the action within the authority of the court": Works on Jurisdiction, p. 30, sec. 11. This rule is supported, and judgments so obtained declared to be void, by the following authorities: *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132; *Jordan v. Brown*, 71 Iowa, 421, 32 N. W. 450; *Garretson v. Hays*, 70 Iowa, 19, 29 N. W. 786; *Dunlap v. Southerlin*, 63 Tex. 38; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Munday v. Vail*, 34 N. J. L. 418; *Beckett v. Cuenin*, 15 Colo. 281, 22 Am. St. Rep. 399, 25 Pac. 167; *Young v. Rosenbaum*, 39 Cal. 646.

Not only was there no complaint filed, and no action begun to cancel the original order for fraud in its procurement, but the record shows affirmatively that the proceeding was not so considered in the superior court. The record showing what there took place is as follows: "In the matter of the applications of certain persons to be admitted to become citizens of the United States of America. In this matter, upon reading and filing the annexed consents and admissions, and now on motion of R. T. Devlin, Esq., the United States attorney for the northern district of California, and good cause appearing therefor, it is ordered that the certificates of citizenship heretofore issued to the hereinafter named persons, on the dates set opposite their names, as follows, to wit: Walter Tinn, England, November 19, 1902 [here follow eight other names and dates], be, and the same are, hereby canceled and the order of

this court admitting said hereinbefore named persons as citizens of the United States of America be vacated and set aside." The consent of Walter Tinn referred to in the foregoing record was the only writing produced relating to his case. It was manifestly not presented as a complaint or petition to the court, but was merely filed in evidence in support of the oral motion made by the United States attorney. It was a paper purporting to be signed and acknowledged by ⁷⁷⁷ Walter Tinn, in which he "admits" that the order admitting him as a citizen and certificate thereof "were obtained by false testimony and fraud," and "consents that the order so admitting him as a citizen of the United States of America as aforesaid be vacated and set aside." Whatever force this document might have as evidence in an action or proceeding regularly begun, to prove an allegation of fraud, it clearly was not intended, nor can it be considered, as a substitute for a complaint against the petitioner. Even if it could be considered as an appearance to the motion and a consent that such motion be granted, it could not give the court power to act after the time had elapsed within which proceedings by motion could be instituted. It can only be considered as effective for the purpose for which the record shows it to have been intended—that is, as evidence in support of the motion then made to the court. As such it could have no effect whatever to give the court jurisdiction over the cause. In whatever light the record is viewed, it is clear that the court never obtained jurisdiction to make the orders under review, and it follows that they should be annulled.

It is therefore ordered that the several orders of the superior court dated November 23, 1905, purporting to set aside the order of November 19, 1902, admitting Walter Tinn to citizenship as a citizen of the United States, and to cancel the certificate of citizenship then issued to him, be, and the same are, hereby annulled.

Beatty, C. J., Angellotti, J., McFarland, J., Henshaw, J., and Lorigan, J., concurred.

A Judgment of a Court of Competent Jurisdiction naturalizing a minor, though erroneous, is not void, and cannot be attacked collaterally, but can be annulled or set aside by appeal or writ of error only: State v. Brandhorst, 156 Mo. 457, 79 Am. St. Rep. 538. See, too, State v. McDonald, 108 Wis. 8, 81 Am. St. Rep. 878.

A Judgment Admitting to Citizenship a Japanese, who is not eligible to citizenship under the naturalization laws, may be attacked at any time and in any proceeding: *In re Yamashita*, 30 Wash. 234, 94 Am. St. Rep. 860.

The Scope of Certiorari is discussed in the notes to *Elliott v. Superior Court*, 103 Am. St. Rep. 110-117; *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29-46.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WATERS v. WATERS.

[222 Ill. 26, 78 N. E. 1.]

WILLS—Undue Influence—Unequal Distribution.—Inequality in the distribution by will of the property of a testator among his children cannot itself have the effect of invalidating the will on the ground of undue influence. (p. 361.)

WILLS—Unequal Distribution.—If a testator assigns a substantial and sufficient reason for any inequality in the distribution of his property among children by will, such reason must be accepted as true when there is no evidence in the record tending to disprove it. (p. 362.)

WILLS—Undue Influence—Burden of Proof.—The certificate of the oaths of subscribing witnesses to a will is prima facie proof of its validity, which is contested on the ground of undue influence and want of mental capacity, and the contestants have the burden of overcoming the prima facie case thus made. (p. 362.)

WILLS—Want of Mental Capacity—Evidence.—To sustain an allegation of want of mental capacity in a testatrix to make a will, something more must be shown than mere physical suffering, disease, and old age, on her part. (p. 362.)

WILLS.—Testamentary Capacity Exists, if the testator, at the time of making his will, had such mind and memory as enabled him to understand the business in which he was then engaged, and the effect of the disposition made by him of his property. (p. 363.)

WILLS—Undue Influence.—The presumption is in favor of the validity of a will when a person provided for therein, to the exclusion of another, has maintained more intimate and affectionate relations with the testatrix than has the excluded person. (p. 364.)

WILLS—Undue Influence—Evidence.—The fact that the testatrix ceased to talk to a neighbor about her will when beneficiaries favored therein came into the room does not show that the mind of the testatrix was influenced by fear of such beneficiaries, or that they imposed upon her in any way. (p. 365.)

WILLS—Evidence—Declarations of Testator.—Statements made by a testator, either before or after the execution of a contested will, which are in conflict with the provisions thereof, do not invalidate or modify such will in any manner. (p. 365.)

WILLS—Undue Influence.—Declarations of Testator made prior to the execution of his will and opposed to its provisions are not admissible to prove undue influence. (p. 366.)

WILLS—Undue Influence.—Influence over a testatrix gained by affection and friendship to her is not undue influence. (p. 366.)

WILLS—Knowledge of Contents—Presumption.—If the evidence shows that when a testatrix executed her will she knew what she was doing, and was in good mental condition, it will be presumed that she knew the contents of her will. (p. 369.)

WILLS—Contests—Allegations and Proof.—If a bill in chancery is filed to set aside the probate of a will, the complainant will be allowed to impeach the prima facie case made in favor of the validity of the will, only upon the particular grounds that are alleged in the bill. (p. 369.)

H. C. Hyde, W. N. Cronkrite and R. K. Welsh, for the appellants.

R. R. Tiffany, for the appellees.

29 Per CURIAM. 1. The will in this case is attacked upon the two alleged grounds that the testatrix, at the time of making the will, was not of sound mind and memory, and was subject to undue influence exercised over her by her daughters, Emma L. Waters and Lydia J. Stockberger.

After a careful examination of this record and of all the testimony in it, we are obliged to conclude that a finding that **30** testatrix, at the time of executing the instrument in question, did not possess the requisite mental capacity to make a valid will, is against the manifest preponderance of all the evidence in this cause, and that on the other branch of the case, the evidence fails to show any wrongful act on the part of the appellants, Emma L. Waters and Lydia J. Stockberger, which was calculated to unduly influence the testatrix to make the disposition of her property, which she did make.

In finding their verdict in this case the jury must have been influenced by the consideration that the testatrix left all her property to three of her children, and cut off the other two, the appellees herein, with five dollars apiece. Under the law, however, if she was of sound mind and memory and acted as a free agent, she had a right to dispose of her property as she saw fit.

In *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656, we said (page 322): "It accords with common observation that in contests concerning wills, where the testator has made, or has seemingly made, an unequal or inequitable disposition of his property among those occupying the same relation to him by consanguinity or otherwise, there is a disposition in most minds to seek for a cause for holding the will invalid. The inclination in this direction that is found to exist in the minds of most, if not all, jurors cannot always be controlled by instructing them there is no law requiring a testator, nor is he bound, to devise his property equitably or in equal proportions among his heirs. Of course, the law is he may make such disposition of his property as he sees fit, and he may bestow his bounty where he wishes, either upon his heirs or others. While this is undoubtedly the law, the common mind is disinclined to recognize it, and jurors will too frequently seize upon any pretext for finding a verdict in accordance with what they regard as natural justice." This language was quoted with approval in the recent case of *Nieman v. Schnitker*, 181 Ill. 400, and is precisely applicable to the condition of affairs in the case at bar. The fact that there is inequality ³¹ in the distribution of the property of a testator or testatrix cannot of itself have the effect of invalidating the will: *Graham v. Deuterman*, 206 Ill. 378, 67 N. E. 237. Moreover, where the testator or testatrix assigns a substantial and sufficient reason for such inequality, that reason must be accepted as true when there is no evidence in the record tending to disprove it: *Graham v. Deuterman*, 206 Ill. 378, 69 N. E. 237. In the case at bar declarations of the deceased, Mrs. Waters, were proven to the effect that she had already sufficiently helped her son, Oliver, and her daughter, Clara; nor was there any evidence tending to disprove this reason for giving them nothing more than five dollars apiece by her will.

The appellants introduced in evidence upon the trial below the certificate of the oaths of the subscribing witnesses to the will. That certificate was prima facie proof of the validity of the will in this proceeding attacking the probate thereof. Consequently, the burden of proof was upon the appellees, complainants below, as the contestants of the will, to substantiate both charges—that is to say, the charge that the testatrix was not of sound mind and memory when she

executed the will, and that she was under the undue influence of her two daughters above named at that time: *Swearingen v. Inman*, 198 Ill. 255, 65 N. E. 80; *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273. It was incumbent upon the contestants to overcome the prima facie case, thus made through the introduction of the certificate, by a preponderance of the evidence. This they failed to do.

In addition to the certificate in question the proponents, appellants here, produced fourteen witnesses, including two physicians, who treated the testatrix in the last years of her life, a banker who did business with her, a shopkeeper or clerk with whom she traded, people who boarded at her home, neighbors, and others closely associated with her, all of whom testified that at or about the time when her will was made her mind and memory were sound. Some of ³² them swore that she was an unusually bright and smart woman. It is true that, during the last year or two of her life, she was not only old, but she was feeble and sick, suffering with some kind of neuralgia in her shoulders. In order to sustain the allegation of want of mental testamentary capacity something more must be shown than mere physical suffering, disease and old age: *Woodman v. Illinois Trust etc. Bank*, 211 Ill. 578, 71 N. E. 1099; *Wallace v. Whitman*, 201 Ill. 59, 66 N. E. 311; *Schmidt v. Schmidt*, 201 Ill. 191; *Freeman v. Easley*, 117 Ill. 317, 7 N. E. 656. Proof that the testatrix here was suffering otherwise than from disease and old age is wanting.

To offset the proof introduced by the proponents of the will to the effect that the testatrix was of sound mind and memory, the contestants introduced a large number of witnesses; but an examination of the evidence of these witnesses tends in no degree to sustain the charge of a want of sound mind and memory. None of such witnesses swear that the mind of the testatrix was unsound.

Lizzie Kurtz, the first witness of the contestants, said: "I saw her in 1901. I don't know what her mental condition was at that time with regard to soundness of mind. . . . I think she was about as well as anybody would be of her age." Mary Kurtz, the second witness of the contestants, says: "I wasn't with her enough to form any opinion as to the soundness or unsoundness of her mind and memory." Nora Geiger, the third witness of the contest-

ant, says: "In my opinion she was sound, but I think the woman was suffering from pain, so that at times she hardly realized where she was or what she was doing. . . . I do not think she would be capable of transacting business at any time. Transacting business is work in one way. It is occupying one's time. I said I thought she was incapable of transacting business, and I do not think she did transact any business of her own. I think she was physically unable to work; that is what I mean; that she was physically unable to work." One witness for the contestants ³³ says: "I don't think she was capable of doing business successfully." Another witness says: "From what I saw of Mrs. Waters I was able to form an opinion as to whether she was able to transact the ordinary business of life; I thought she was too weak in body; her mind was as rational as we could expect in a person of her age, who had been sick. . . . She would frequently commence saying something, and then change it a little and turn off into something else, and sometimes refer to it again as if she had not been talking about it; but nothing that I would call insane or out of her mind, only a little absent-mindedness." Many of the witnesses of the contestants expressed no opinion at all upon the question of her soundness of mind. No one of the witnesses of the contestants, so far as we have been able to ascertain from the record, swears that the testatrix was incapable of understanding the business in which she was engaged at the time when she executed her will. Some of them gave it as their opinion that she was not competent to transact the ordinary business of life; but an examination of their testimony will show that they based such opinion wholly upon her physical condition as to age and sickness. Competency, however, to transact the ordinary business of life is not the test by which testamentary capacity is determined. Anyone having the mental ability to transact intelligently the ordinary business affairs of life is capable of making a valid will, but the converse of that proposition is not always true. This court has decided that testamentary capacity exists, if the testator, at the time of making his will, had such mind and memory as enabled him to understand the business, in which he was then engaged, and the effect of the disposition made by him of his property: *Waugh v. Moan*, 200 Ill. 298, 65 N. E. 713; *Camp-*

bell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167; England v. Fawbush, 204 Ill. 384, 68 N. E. 526, and cases cited. The evidence of the witnesses of the contestants is merely to the effect that Mrs. Waters was too feeble from sickness to devote her attention to her business ³⁴ affairs, and in no sense goes to the extent of establishing the proposition that she was not of sufficiently sound mind and memory to understand what she was doing when she made her will, and to understand the effect of the disposition which she was thereby making of her property.

1. Nor are we able to see that the evidence tends to support the other charge in the bill that she was under the undue influence of her daughters, Emma and Lydia. Her unmarried daughters, Emma and Carrie, lived with her and took care of her. All the evidence tends to show that she regarded all her children with kindness and affection, and only cut off two of them because she thought they had received enough of her bounty already. Mrs. Stockberger, though not living with her mother, lived only a few miles away, and was attentive and kind in her treatment in her frequent visits to her mother. "The presumption also is in favor of the validity of the will, when the person, who is provided for therein, is one with whom the testator had maintained intimate and affectionate relations during his life": Harp v. Parr, 168 Ill. 459, 48 N. E. 113. Here the relations with the three children, to whom the most of her property was given by the will, were most intimate and affectionate. It was natural, therefore, that she should provide for them in preference to the other children, whose relations had not been so intimate and affectionate, and one of whom had lived for years at a long distance from her.

There is not a particle of evidence in this record, so far as we have been able to discover, to show that Emma Waters and Lydia Stockberger attempted to exercise, or did exercise, any undue influence over their mother. No declarations on the part of these two children in the presence of their mother are proven, and the only acts sought to be proven are that sometimes when Mrs. Waters was talking with one of her neighbors about her disposition of her property, and one of her daughters, Emma, or Lydia, would come into the room, she would cease her conversation. This act alone, ³⁵ however, as it is unaccompanied by any other facts or circumstances looking in that direction, was insufficient

to show that the mind of the mother was influenced by fear of her daughters, or that she was imposed upon in any way by them.

3. We are of the opinion that the trial court erred in admitting evidence over the objections of the proponents of the will, and in the giving and refusal of instructions.

Two women, who testified in favor of the contestants, said that on one or two occasions Mrs. Waters, while engaged in conversation with them, made remarks to the effect "that she wanted to deal equally with all of her family at one time," and substantially that she was in favor of making another disposition of her property than that which she actually made in her will. Counsel for the proponents of the will objected to the admission of this testimony, and moved that it be stricken out. Their objection was overruled, and their motion was denied. We are of the opinion that this was error. The general rule is that statements made by the testator, either before or after the execution of a contested will, which are in conflict with the provisions thereof, do not invalidate or modify such will in any manner, and the parties making wills cannot invalidate them by their own parol declarations, made previously or subsequently: *Dickie v. Carter*, 42 Ill. 376; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Hill v. Bahrns*, 158 Ill. 314; *England v. Fawbush*, 204 Ill. 384, 68 N. E. 526. The declarations of the testatrix, Mrs. Waters, thus sought to be proved, were declarations in conflict with the provisions of her will, which made an unequal distribution of her property, and, therefore, they were not competent testimony, and should have been excluded.

It is true that where a will is charged to have been executed through undue influence, the declarations of the testator made before its execution are admissible by way of rebuttal to show his intention as to the disposition of his ³⁶ property, upon the ground that a will made in conformity with such declarations is more likely to have been executed without undue influence than if its terms are contrary to such declarations. But the declarations thus admissible are those which are in harmony with the provisions of the will actually made, and not those which are opposed to such provisions. As was said in the per curiam opinion in *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321:

"The general rule, recognized by this court is, that prior due influence. That rule, however, is applicable only in due influence. That rule, however, is applicable only in cases where the declarations and statements are offered for the purpose of varying or controlling the operation of the contested will, and not to those in which the will is in harmony with the declared intentions of the testator." The declarations and statements here offered had a tendency to vary or control the operation of the will of Mrs. Waters, and were not in harmony with her intentions as declared in her will.

4. The proponents of the will upon the trial below asked the court to instruct the jury that "any degree of influence over another, acquired by kindness and attention, can never constitute undue influence within the meaning of the law, and although the jury may believe from the evidence, that the deceased, in making her will, was influenced by any of the said defendants, still, if the jury further believe from the evidence that the influence which was so exerted was only such as was gained over the deceased by kindness and friendly attention to her, then such influence cannot be regarded in law as undue influence," etc. The refusal of this instruction was error, and the idea set forth in it is not embodied in any of the other instructions given for either party. This court has held in a number of cases that influence secured through affection is not wrongful: *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321; *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622. In *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622, we said ³⁷ (page 399): "No rule of law requires the parent to distribute his property among his children equally, or upon any ratable basis of relative merit. He may prefer one and cut off another, with or without a reason, or he may cut off all his children and give his property to a stranger, and the only inquiry admissible is, Was he, when doing so, of sound mind and free of the undue influence of others? Undue influence means wrongful influence. But influence secured through affection is not wrongful, and, therefore, although a deed be made to a child at his solicitation, and because of partiality induced by affection for him, it will not be undue influence. . . . The influence, to render the conveyance in-

operative, must be of such a nature as to deprive the grantor of his free agency." The principle thus announced applies to wills as well as deeds: *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698.

5. We think that the trial court erred in giving the ninth instruction, which was given for the contestants of the will. By that instruction the jury were told "that, if they believed from the evidence in the case that Mary Waters did not read over the contents of the alleged will prior to the time of the execution thereof, and that the same was not read over to her by another person or persons prior to the execution thereof, or that she was not at any time informed of any provision therein contained, or of the entire contents of said will, or that by reason of the fraud or undue influence of others she did not know the contents of any provision therein, or of the entire will, or if you further believe from the evidence that her mental condition was such that she could not intelligently understand the will at the time she executed it, you should find that the alleged will in question is not the will of Mary Waters, deceased, and you should find the issues for the complainants." So far as this instruction was predicated on the idea that the testatrix, Mrs. Waters, did not know the contents of the will which she executed, and had not been informed of its provisions, it ³⁸ is not based upon any evidence in the record. The will was signed by the testatrix at about 12 o'clock on August 7, 1901. Somewhere about 10 o'clock on that morning Emma Waters and Mrs. Stockberger were present with their mother at her home, when Mrs. McGilligan called. Emma asked Mrs. McGilligan, who lived in the neighborhood, if her husband, W. K. McGilligan, a justice of the peace and notary, was at home, and, upon her answering in the affirmative, she was asked to send him over because Mrs. Waters wanted to see him. McGilligan came over to the house, and the will was ready for execution at about 12 o'clock. The fair inference from all the evidence is that it was drawn there in the house by McGilligan between 10 and 12 o'clock on that morning, but as McGilligan died before the hearing of this cause, it is impossible to know just what was the fact about the matter. The mere fact that Emma told the wife of the notary to send her husband over does not indicate that she had anything to do with dictating the terms of the will. On the contrary, the evidence shows that when the

will was signed, nobody was present in the room with Mrs. Waters except McGilligan, who drew the will, and the two witnesses who subscribed it, Byrnes and Neil. Patrick Byrnes, father of Grant Byrnes, named as executor, is the only witness who says anything about the reading of the will to the testatrix, and he says: "I don't know of my own knowledge whether or not the will was read over in that room [the room in which the testatrix was]; I was in another room." This is no evidence to the effect that the will was not read to the testatrix. Patrick Byrnes says that he first went into the room, where Mrs. Waters was lying, and spoke to her about her health, and she said she was very poorly, and he further says: "I came out of the room pretty soon after that. The will was signed in her room. I was in another room when the will was signed, and the squire, the two men who signed the will, and Mrs. Waters are all whom I know were there when the will was signed. When ³⁹ I went into the house, Mr. McGilligan was in the next room, in the parlor where he had his papers. I do not remember whether the will was read at any time in Mrs. Waters' presence."

John Neil, one of the subscribing witnesses, says: "I was at Mrs. Waters' residence the day the will was drawn; we walked into the room where she lay; she lay west of the door in the bed with her head to the south; I walked to the foot of the bed and faced her; Mr. McGilligan and Mr. Byrnes went into the room with me and were there with me. Mr. McGilligan said it was necessary for her to declare to these gentlemen that this was her last will and testament. Mrs. Mary Waters sat up in bed and said, 'Gentlemen, this is my last and only will.' Mr. William McGilligan then took the will, and walked to her bed, and put the pen in her hand, and took her hand in his, and made the marks she made on the paper. I don't know what the marks were nor that the signature he made was with her hand in his. He then took the paper, laid it on the stand at the side of the bed, east of where she was lying. Mr. Byrnes and I signed the will. She asked me how my family was, and told Mr. Byrnes she was sorry she was keeping him from his work. That was all she said while we were in the room, and we walked out. Physically she seemed weak, but was able to raise herself up without assistance, and sit up in bed."

In view of this evidence the presumption is that she knew the contents of her will. "The law, in the absence of all evidence, will presume that a person who executes a will or other instrument does so with knowledge of its contents; but this is a presumption which will readily yield to evidence tending to show that such was not the fact": *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740. Here, the testatrix not only executed the will, but showed that she understood the act she was engaged in by stating to those present that the instrument before her was her last and only will, and also indicated that she was in good ⁴⁰ mental condition by asking one of the subscribing witnesses as to the health of his family, and expressing regret that she was keeping the other from his work by requiring him to act as a witness to her will. Certainly, here, under the proof thus stated, the presumption is that she knew the contents of the will, and there is no evidence tending to overcome that presumption or to show that she did not have knowledge of the contents of the will. Instruction numbered 9, given for the contestants, was calculated to create in the minds of the jury the impression that the testatrix was ignorant of the contents of the will which she signed, and as there was no evidence upon which to base any such instruction, it should not have been given.

6. In addition to what has been said upon this branch of the case, it is to be observed that there was no allegation in the bill which authorized the introduction of any proof to the effect that the testatrix did not know the contents of the will, and did not read it over, or that the same was not read over to her by any other person prior to its execution. The only charges in the bill are those of unsound mind and memory, and undue influence. It is nowhere charged or alleged therein that Mrs. Waters did not know the contents of the will when she signed it, or that she did not read it, or that no other person read it to her. The appellees cannot in such a case as this, any more than in any other equity case, be allowed to state one case in their bill and prove another case, or have the jury instructed that they can find on another case. Where a bill in chancery is filed for the purpose of setting aside the probate of a will, the complainant in such case will be allowed to impeach the

prima facie case, made in favor of the validity of the will, only upon the particular grounds that are alleged in the bill: *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Carmichael v. Reed*, 45 Ill. 108; *Flinn v. Owen*, 58 Ill. 111. In *Swearingen v. Inman*, 198 Ill. 255, 65 N. E. 80, upon this very subject it was said: "It is insisted that there was ground for invalidating the will in the ⁴¹ fact that the testatrix did not know its contents when she signed it. Complainants could not have prevailed on that ground if it had been proved, because it was not alleged in the bill. They would not be allowed to have the will set aside upon grounds not alleged, or to state one case in their bill and prove another. . . . The claim that the testatrix did not know how she disposed of her property is neither the same as, nor consistent with, the averment that she was induced to make a particular disposition of her estate by the undue influence of her husband." The language thus used is precisely applicable to the situation in the case at bar. Consequently, the instruction was erroneous for this additional reason, besides the fact that it was not based upon any evidence in the case.

We have hereinabove disposed of all the errors assigned, and are of the opinion that the decree of the lower court, based upon the verdict of the jury to the effect that the instrument in question was not the will of Mary Waters, is erroneous. Accordingly, the decree is reversed, and the cause is remanded to that court for such further proceedings as to justice and equity may appertain.

Testamentary Capacity Exists where the testator understands the nature of the business in which he is engaged when he executes his will, knows the persons who are the natural objects of his bounty, and realizes what property he has and what disposition he wishes to make of it: *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828. The fact that he is advanced in years, or is physically weak, or is suffering acute pain, does not incapacitate him: *In re Cline's Will*, 24 Or. 175, 41 Am. St. Rep. 851; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85.

Undue Influence as affecting the validity of a will is the subject of a monographic note to *In re Hess' Will*, 31 Am. St. Rep. 670-691. Such influence, in order to vitiate a will, must amount to such a degree of restraint or coercion as destroys the free agency of the testator at the time the testamentary act is performed; and when the proponents of a will make a prima facie showing of its validity, the burden is upon the contestants to establish by a preponderance of evidence the charge of undue influence: See *Compher v. Browning*,

219 Ill. 429, 109 Am. St. Rep. 346; *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 391; note to *Richmond's Appeal*, 21 Am. St. Rep. 94-104. As to discrimination against one child in favor of another as evidence of undue influence, see *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 391.

Declarations of a Testator to Sustain or overthrow his will are discussed in the monographic note to *In re Colbert's Estate*, 107 Am. St. Rep. 459-473.

The Evidence of Subscribing Witnesses to a will, in respect to its competency and effect, to support or overthrow that will, is discussed in the monographic note to *Stevens v. Leonard*, 77 Am. St. Rep. 459-480.

PEOPLE v. OLSEN.

[222 Ill. 117, 78 N. E. 23.]

CONSTITUTIONAL LAW—Statutes Invalid in Part.—Although a part of a statute is unconstitutional, that does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other. (p. 373.)

CONSTITUTIONAL LAW—Statutes Invalid in Part.—Constitutional and unconstitutional provisions of a statute may even be contained in the same section, and yet be perfectly distinct and separable, so that the one may stand though the other must fall. The question is not whether they are contained in the same section, but whether they are essentially and separably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. (p. 373.)

UNCONSTITUTIONAL LAW, EFFECT OF.—Sections of Statutes which are void because of being in conflict with some limitation of the constitution are absolute nullities, and must be treated in the construction of the statute as though they had never been passed or approved by the governor. (p. 378.)

CONSTITUTIONAL LAW—Statutes Invalid in Part.—Although one section of a statute is not enacted in the mode prescribed by the constitution, this does not render void other sections of the statute not at variance with the constitution, and which are a complete act in themselves, and not dependent upon the unconstitutional section. (p. 380.)

Waterman, Thurman & Ross, A. N. Waterman, C. H. Poppenhusen, J. L. McNab and S. S. Gregory, for the petitioners.

H. A. Lewis, W. F. Struckmann and F. L. Shepard, for the respondents.

¹²³ WILKIN, J. The second section of the act in question not having been passed by either branch of the legislature or signed by the speaker of the House and president of the Senate and approved by the governor is consequently null and void. But it is insisted on behalf of the relator that notwithstanding ¹²⁴ the invalidity of that section, the act is valid and complete as to the salaries of the judges of the superior and circuit courts, under the well-recognized rule of construction that where the several provisions of an act are separate and distinct from each other, one may be declared unconstitutional and void and the others sustained, whereas it is earnestly contended by counsel for respondent that section 2 being void, the whole act must fall.

Judge Cooley, in his work on Constitutional Limitations (seventh edition, page 246), treating of this subject, says: "It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional because it is not within the scope of the legislative authority. It may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable, object, by means repugnant to the constitution of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature and being in the form of law, may contain other useful and salutary provisions not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act but not connected with or dependent upon others which are unconstitutional. ¹²⁵ Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remain-

der void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and separably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them."

The rule of construction here announced, as far as we have been able to ascertain, has been universally adopted by the courts both of this country and Great Britain. In ¹²⁰ fact, we do not understand counsel for the respondents to question it, but their contention is that the statute in question does not fall within the rule for two reasons: 1. Failing to meet the constitutional requirements in its enactment it never became a law, but is an absolute nullity, and therefore no part of it can be held valid; 2. The provisions of the statute, taken together, are so mutually connected and dependent on each other as to warrant the belief that the legislature and the governor intended them as a whole, and it cannot be

presumed that the legislature would have enacted, or the governor approved, the provision designed to increase the judges' salaries without increasing the state's attorney's salary, and providing for turning into the county treasury additional revenues. In the consideration of these propositions it will be necessary to first determine whether, on the face of the statute, the several sections are so dependent upon each other and intended to operate together for the same object, or are otherwise so connected in meaning, that they must stand or fall together, or whether they are so blended with each other that it cannot be presumed the legislature would have passed the first and third sections, and the governor approved them, without the second. If it shall be found that they are so dependent upon each other or commingled together, then the unconstitutional section falling will carry with it all other provisions of the act, and this without reference to the question as to the irregularity of the passage of the law.

Both the title and body of the act expressed the legislative intent to increase the compensation of two classes of officers; the circuit and superior judges and the state's attorney of Cook county. These officers bear no such legal relation to each other as to justify the inference that the salary of one would not have been increased without the other. The legislature might with perfect consistency have increased one and left the other unchanged, or increased one and decreased the other. It is wholly immaterial that they are mentioned ¹²⁷ together in section 25 of article 6 of the constitution of 1870. That section does not in any way affect the power of the county commissioners to fix the compensation to be paid out of the county treasury at different sums for the judges and the state's attorney. Nor is it at all important in the determination of this question that the act of 1871 fixes the salaries of both at the same amount in the same section. If the present act had simply increased the compensation of both by a single section, as did the former one, there would be no ground for controversy here. But the statute of 1901 attempted to provide for the salaries of the judges by one section and of the state's attorney by another and distinct section, which fact, if it indicates anything, shows that the legislature, in passing the last act, regarded the salaries of the two classes of officers as distinct subjects of legislation.

But however that may be, certainly no argument is needed to show that the compensation to be paid a judge furnishes no criterion whatever for fixing that of a prosecuting or state's attorney. The duties of the two officers are entirely distinct and separate—as much so as those of a judge and clerk, sheriff, or other ministerial officer of the court.

But it is earnestly insisted by counsel on behalf of the respondents that, the requirements of the constitution as to the passage of statutes not having been followed, and that fact appearing from the answer, the entire law is unconstitutional and void, and they insist that the foregoing rule, under which one provision of a statute may be held contrary to the constitutional limitation and other parts sustained, has no application to such a law, and cite several decisions of this court which they understand to sustain their position. It is undoubtedly true that the language used in *Prescott v. Trustees etc.*, 19 Ill. 324, sustains the contention, as do, perhaps, expressions used in other cases; but when the questions which were before the court for decision in those cases are carefully considered it will be found that they are not at all in point. In the *Prescott* case (19 Ill. 324), the ¹²⁸ question was as to the validity of a section of the statute, the facts being that that section never passed the Senate, and it was, of course, held that it was invalid. The question here raised—that is, whether one section being void the whole statute must fall—was not in the case, and therefore the statement in the opinion that the whole act must fall was strictly obiter dictum, and cannot be said to be an authority on the question now before us. *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 348, simply holds that the irregularity—that is, that the act then before the court had never been put upon its passage in the House of Representatives, either as a whole or in part—rendered the act void in toto. And the same is true of the act under consideration in *Ryan v. Lynch*, 68 Ill. 160. This act was shown not to have been read in the Senate on three different days nor passed by a vote of the yeas and nays, and the irregularity of course affected the whole statute, and not a particular part of it. In *Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N. E. 180, the question was whether a joint resolution of the House and Senate authorizing the purchase of books, having no title or enacting clause and not being signed by the speaker of the House, was a valid enactment, and it was held that it

was not. Nor does *People v. Knopf*, 198 Ill. 340, 64 N. E. 842, 1127, sustain the contention of counsel. There it was simply held that certain portions of the act were unconstitutional and void, and that they were so connected with and related to the other portions that none could stand. It is true, we there cited the *Prescott* case (19 Ill. 324), and other cases referred to by counsel, but only as authority that the court would look behind a printed statute to the journals of the legislature in passing upon the constitutionality of a law, and the language quoted from the *Prescott* case (19 Ill. 324), as to the effect of a void section on the whole law, was not for the purpose of indicating our approval of the obiter dictum in that opinion.

The question in this form has never been presented for our decision, but the principle was involved and passed upon in *Binz v. Weber*, 81 Ill. 288. There the title of an act authorizing ¹²⁰ the issue of town bonds, when it passed the Senate, included the names of the city of Belleville and the towns of Mascoutah and Nashville, but in the House the town of Nashville was dropped out of the title. The validity of a tax levied to pay interest on bonds issued by the town of Mascoutah under the provisions of that law was involved, and it was urged against the tax that because the law has a title more restrictive than had the bill when it passed the Senate, and because this more restrictive title does not appear to have been adopted by the ayes and noes and by a majority of the members of each House, the law was not constitutionally adopted. Referring to the constitutional provision as to the title of acts and the manner in which they shall be voted upon, it was said (page 290): "Under this constitutional requirement, then, we must look to the title of this bill as it passed each House, and not to the title of the act after its adoption, to learn what portion of its provisions are constitutional. By thus applying these provisions to the passage of laws we have no doubt we shall effectuate the intention of the framers of that instrument. . . . Tested, then, by these requirements, was this a constitutional law? This law undoubtedly does authorize the city of Belleville and town of Mascoutah to issue bonds, and that purpose was clearly expressed in the title as it passed both Houses. It is true, the journals may show—and it is stipulated they do—that the title, when the bill passed the Senate, was more comprehensive, and embraced the town of Nashville, in Washington

county; but in the House the name of the latter town was omitted. But we fail to see how that could affect the law so far as it related to the city of Belleville and town of Mascoutah. They were both embraced in the body of the bill and in the title as it passed both Houses, and that answers the constitutional requirements, and we must hold that both of these places may legally act under the law, whether or not Nashville can. . . . The doctrine is well established that although some provisions of an act are repugnant to the constitution, ¹³⁰ the others are valid if they are capable of being carried into operation; and there can be no doubt that all relating to Nashville may be stricken out and still enough remain to permit Belleville and Mascoutah to issue and deliver valid and binding bonds."

The case of *Stein v. Leeper*, 78 Ala. 517, involved questions similar to those decided in *Binz v. Weber*, 81 Ill. 288, and in the opinion of the supreme court of Alabama the latter case is cited with approval, and the court concludes its opinion as follows: "The enacting part of the act in question was approved by the governor literally as passed by the General Assembly. The omission of the localities occurred in the title as enrolled. There was then a concurrence as to the body of the enactment and also as to the localities remaining in the enrolled title. Such omission does not vary the substance and legal effect in respect to the remaining localities, and the legal identity of the bill is maintained though within a restricted title. Our conclusion is, that the statute, so far as it relates to the locality in controversy, is valid and operative. To hold otherwise would be to enforce the mandatory requirements of the constitution so exactly as to operate disastrously to legislation in many instances and cloud with uncertainty the validity of legislative enactments." Very many forcible illustrations of the truth of this last sentence are shown in the brief and argument of counsel for petitioner, in which the strict enforcement of the constitutional requirements as to the passage of statutes would result most disastrously to the public.

The position of counsel is, that the rule permitting a portion of a statute to be upheld although other portions are condemned as unconstitutional and void, applies only to acts of the legislature which have been passed as a whole in strict conformity with the methods prescribed by the constitution.

While the distinction can be readily seen, it is not easy to find a satisfactory reason upon which to base it. A section of a statute which is void because of its being in conflict with ¹³¹ some limitation of the constitution is an absolute nullity, and must be treated in the construction of the statute as though it had never been passed or approved by the governor. If the question were wholly one of first impression, we should feel compelled to hold that the distinction insisted upon should not be maintained. Turning to the decisions of other courts, we find that the question has been fully considered and passed upon to that effect. In the case of *Berry v. Baltimore etc. Ry. Co.*, 41 Md. 446, 20 Am. Rep. 69, the court of appeals of Maryland, after holding that the court may go behind the printed statutes to the journals of the respective Houses of the General Assembly to ascertain whether the law has been constitutionally passed or not, and after holding that the third section of the act as it was sealed and approved by the governor was materially different from the same section as it passed the House, and therefore null and void, entered upon the further question as to how the invalidity of that section operated upon the remainder of the act, and said: "Upon examination it is found that the third section is entirely separate and disconnected from the other sections of the act, and that the operation and effect of those sections in no manner depend upon the coexistence of the third section. As applicable to such case, Judge Cooley, in his work on Constitutional Limitations (page 177) says: 'So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished but insufficient for others. In any such case the portion which conflicts with the constitution or in regard to which the necessary conditions have not been observed must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law and in what manner and to what extent the unconstitutional portion affects the remainder.' " And the court proceeded to hold the remainder of the statute valid.

In *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647, the case is sufficiently stated in the syllabus, as follows: "On March 1, 1870, the ¹³² General Assembly of the state passed 'An act to revise, simplify and abridge the rules of practice, pleadings and forms of courts in this state.' The nineteenth section

of the enrolled act, to which the great seal of the state was affixed and which was signed in the Senate chamber by the president of the Senate and speaker of the House of Representatives, and received the approval of the governor, provided that the courts for the county of Barnwell should be held at Barnwell; but it appeared by the journals of the two Houses of the General Assembly that the same section of the bill as it finally passed both Houses provided that the courts for that county should be held at Blackville. By the law as it stood at the passage of the act the place last named was the county seat of Barnwell county: Held, that the nineteenth section of the act was void, and consequently that Blackville remained the county seat of Barnwell county." The supreme court of South Carolina, in its opinion, dealing with the question here involved, says: "In a technical sense the term 'bill' is applicable properly to the enactment as a whole. Although the technical sense of words should prevail where not inconsistent with the clear intent of the instrument, yet when such intent requires that words should be used in a larger sense it is competent so to regard them. If we should hold that the constitution regards the enactment as wholly in an exclusive sense, we would be led to the inevitable conclusion that to become a law all the substantial parts of the measure must have together passed through all the requisite stages. The consequence of this would be, that alteration in a substantial part during such progress would be fatal to the whole. By a substantial part is meant any section, clause or word that conveys distinct expression of the legislative will which cannot be supplied by construction from the other parts of the act, leaving out of view that part in which the defect lies. Whether it is to be regarded as substantial does not depend upon its importance or unimportance to the rest of the act, but upon its being, in itself, an expression of the legislative will, capable ¹³³ of being the subject of the separate act. It would lead us to the conclusion in the present case that if the law in question, although in substance a code of legal procedure, differed, as it passed the House, from the enrolled act in respect of any matter, though a mere word, that covered a distinct expression of the legislative will not capable of being made out by construction applied to the rest of the act, the whole must be regarded as unconstitutional. That the constitution intended no such absurdity is manifest.

When a deed or contract cannot be carried into full execution by reason of error, the law invariably eliminates the error either by construction or reformation, when that can be done without the substantial destruction of that in which it inheres. This principle is constantly applied to statutes where some independent matter, capable of severance from the body of the statute, is inoperative under the constitution. The rules of construction are based, in part, upon this principle so vital to them, that they would not only lose their scientific character, but fail to express that common sense fundamental to all legal system if deprived of it," and the part of the statute under consideration which had not been passed in conformity with the constitution was held illegal and void, but the remainder valid. To the same effect will be found *Abernathy v. State*, 78 Ala. 411; *Stow v. Common Council*, 79 Mich. 595, 44 N. W. 1047; *State v. Van Duyn*, 24 Neb. 586, 39 N. W. 612; *In re Groff*, 21 Neb. 647, 59 Am. Rep. 859, 33 N. W. 426.

Our conclusion is, that the mere fact that section 2 of the act in question was not passed by the legislature in the constitutional mode cannot have the effect of destroying the validity of the remaining sections.

The second point urged on behalf of respondents has in part been already disposed of—that is, that the sections as they appear in the statute are so interwoven with or related to each other that one cannot be held invalid and the others sustained. But counsel insist that the proceedings in the House of Representatives, as shown by the answer, clearly ¹³⁴ indicate that it would not have passed sections 1 and 3 without section 2, their contention being that the amendment of that section by adding the words, "and shall be in full for all services of the state's attorney of Cook county, and all fees as provided by statute and earned by the state's attorney of Cook county shall be paid into the county treasury of Cook county," indicated the purpose that the increased compensation should be paid out of the funds arising from that source. However plausible the argument may appear on first impression, we do not think it can be maintained. The object in passing section 1 was manifestly to provide what the legislature considered a fair and reasonable salary for the services of the judges of the circuit and superior courts and for the state's attorney, and there is nothing whatever in the language of the statute to indicate an intention to limit the pay-

ment of such salaries to any particular fund belonging to the county. If the intention had been to limit the payment of the same to the fees turned in by the state's attorney, it would have been easy to have so provided. We may speculate as to the motive of the General Assembly in that regard, but in the absence of anything appearing in the act itself to justify the conclusion, we are not at liberty to say the first section would not have been passed without the second, including the provision for turning over the fees of a state's attorney's office. In the language of the rule laid down by Judge Cooley, *supra*, the fact that one part of a statute is unconstitutional "does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other." In other words, under such circumstances the presumption is that the legal parts would have been enacted. It seems clear to us that the fact that the increased compensation of the judges was placed in a separate and distinct section from that which purported ¹³⁵ to increase the compensation of the state's attorney sufficiently indicates that the legislature would have passed the one without the other. Certainly we are not justifiable, upon the facts appearing in this record, in presuming it would not.

Our conclusion is, that sections 1 and 3 of the act of May 10, 1901, in force July 1, 1901, are valid enactments, and the respondent Peter B. Olsen, as county clerk of Cook county, should have drawn his warrant on the treasurer of Cook county according to the demand of the relator, as stated in his petition. A peremptory writ of mandamus will accordingly be awarded against him, as prayed.

The Fact That One Provision of a Statute is Void does not affect other portions of the statute, providing they are distinct, separable and complete in themselves: *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225; *Soper v. Lawrence*, 98 Me. 268, 99 Am. St. Rep. 397; *Northwestern Mut. Life Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572. See, however, *Hanson v. Krehbiel*, 68 Kan. 670, 104 Am. St. Rep. 422.

COMMERCE VAULT COMPANY v. BARRETT.

[222 Ill. 169, 78 N. E. 47.]

EXECUTION SALE of Leasehold Interest.—Upon foreclosure sale of a leasehold interest, the only interest remaining in the lessee is the right to redeem within twelve months, and to retain possession for fifteen months, and such interest is not subject to levy and sale under execution. (p. 384.)

JUDGMENT LIENS—Execution Sale of Leasehold.—After a leasehold estate has been sold on foreclosure, no lien can attach to such estate by reason of the subsequent rendition of a judgment against the lessee. (p. 384.)

EXECUTION SALE of Leasehold Estate—Right to Redeem.—The right of a subsequent judgment creditor to redeem from a foreclosure sale of a leasehold estate does not exist by virtue of any lien, but only by reason of statutory provisions. (p. 384.)

JUDGMENT LIENS—Foreclosure Sale of Leasehold.—Judgments rendered against a lessee after foreclosure sale of his leasehold interest are not liens upon the surplus remaining in the hands of the sheriff after one of such judgments has been satisfied by making redemption and reselling the property. (p. 388.)

GARNISHMENT of Surplus of Execution Sale.—If a leasehold interest is sold on foreclosure and redemption made by a creditor under a judgment recovered subsequently to the foreclosure sale, the surplus remaining in the hands of the sheriff, after satisfying such judgment, is held by him for the use of the debtor, and subject to garnishment, even though such officer has in his hands executions issued on other judgments rendered after the foreclosure sale. (p. 388.)

Garnishment by the Commerce Vault Company for the use of one McWilliams against T. F. Barrett, sheriff. The garnishee was discharged and judgment rendered against McWilliams for costs. He appealed.

The facts were as follows: "On August 22, 1902, the leasehold interest of the Commerce Vault Company in certain real estate in Cook county was sold under a foreclosure decree. No redemption was made by the Commerce Vault Company from that sale. Thereafter, at the October term, 1903, of the superior court of Cook county, judgment was rendered against said company, in favor of the Knights Templars and Masons Life Indemnity Company, for \$29,392. Execution (hereinafter referred to as execution No. 1) was issued upon this judgment and delivered to the sheriff of Cook county, together with the amount necessary to redeem from the foreclosure sale. On October 23, 1903, the sheriff levied on the leasehold interest above mentioned, and on November 24, 1903, sold the same under execution No. 1 for \$65,000. After making the

said levy, but before sale thereunder, the sheriff received two other executions (hereinafter referred to as executions Nos. 2 and 3) against the Commerce Vault Company and in favor of the Knights Templars and Masons Life Indemnity Company, one of which was issued upon a judgment rendered at the October term, 1903, of the circuit court of Cook county, and the other at the October term, 1903, of the superior court of Cook county, the aggregate amount of these two judgments being \$186,618.07.

"McWilliams obtained judgment against the Commerce Vault Company for \$3,325 at the October term, 1903, of the circuit court of Cook county. Execution was issued on this judgment and delivered to the sheriff of Cook county, who returned it 'no property found.'

"Prior to the sale by the sheriff last above mentioned, and on November 20, 1903, the circuit court of Cook county, in a proceeding by McWilliams against the Commerce Vault Company, entered an order restraining Barrett, sheriff of Cook county, during the pendency of a certain motion in said cause, from paying over to any person or persons whomsoever any and all proceeds in excess of \$16,990.27 arising from the sale to be made by him under execution No. 1, and from applying any of the proceeds of said sale in excess of \$16,990.27 on execution No. 1, and from applying any of the proceeds of said sale in excess of \$16,990.27 on executions Nos. 2 and 3. The garnishment writ herein was served upon appellee on December 15, 1903, and the restraining order was dissolved on the following day.

"The garnishee set up by his answer to the interrogatories filed in this suit that on November 24, 1903, being the day of the sale under execution No. 1, he paid to the redeeming creditor, the Knights Templars and Masons Life Indemnity Company, \$16,730.55, and retained his fees, amounting to \$741.04, leaving a balance of \$47,528.41 in his hands on that date belonging to the Commerce Vault Company. He claimed by said answer that this balance was subject to the lien of execution No. 1, under which the redemption and sale had been made, and was also subject to the liens of executions Nos. 2 and 3, which were in his hands on that date. The answer disclosed that after satisfying execution No. 1 there will remain a surplus of \$17,964.96 from the proceeds of the sale made under that execution. The contention of appellant is that this surplus is subject to garnishment, while appellee's

position is that executions Nos. 2 and 3 were liens upon this surplus at the time the garnishment writ was served, and that, inasmuch as it will require all of said surplus to satisfy these two executions, no part thereof is subject to garnishment."

Taylor & Martin, for the appellant.

S. Edgerton, for the appellee.

¹⁷⁴ SCOTT, C. J. On August 22, 1902, when the foreclosure sale was made of the leasehold interest of the Commerce Vault Company, the only interest which remained in the company was the right to redeem from the sale at any time within twelve months and to continue in possession for a period of fifteen ¹⁷⁵ months. This right was not such an interest as to be subject to levy and sale under execution: *Merry v. Bostwick*, 13 Ill. 398, 54 Am. Dec. 434; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746; *Cook v. City of Chicago*, 57 Ill. 268; *Kell v. Worden*, 110 Ill. 310; *Hill v. Blackwelder*, 113 Ill. 283. Consequently, no lien could attach to the leasehold interest by reason of the rendition of any judgment against the Commerce Vault Company subsequent to the foreclosure sale: *Green v. Marks*, 25 Ill. 221. The right of a creditor to redeem from a foreclosure sale at any time between twelve and fifteen months after the date of sale and to have the property resold to satisfy his debt does not exist by virtue of any lien on the property, but solely by reason of sections 20 and 23 of chapter 77 of Hurd's Revised Statutes of 1903: *Herdman v. Cooper*, 188 Ill. 583, 28 N. E. 1094.

All of the judgments involved in this suit were rendered after the foreclosure sale, and for that reason none of them became liens upon the leasehold interest theretofore owned by the Commerce Vault Company. The Knights Templars and Masons Life Indemnity Company, however, redeemed from the foreclosure sale and caused the premises to be resold under execution No. 1 in its favor, as it had a right to do under the provisions of the statute above referred to. This sale produced a surplus of \$17,964.96 over and above the amount necessary to reimburse the redeeming creditor for the money advanced by it and to satisfy that execution against the Commerce Vault Company.

At the time of the sale under execution and when the proceeds arising therefrom were received by the sheriff, he had in his hands two other executions which had been is-

sued upon judgments rendered against the Commerce Vault Company during the month of October, 1903. As above indicated, neither of these judgments was a lien upon the leasehold interest heretofore mentioned. It was claimed by the garnishee in the trial court, and is contended here in support of the judgments of the circuit and appellate courts, that executions Nos. 2 and 3, although not liens upon the ¹⁷⁶ leasehold interest, became liens upon the surplus arising from the sale under execution No. 1 at the instant such surplus came into the hands of the sheriff. Whether these executions became liens upon such surplus depends upon whether such surplus may be levied upon by the sheriff under those executions or applied thereon by him. This involves a consideration of the relation existing between the sheriff, as the holder of such surplus, and the Commerce Vault Company.

It has been heretofore decided by this court that a surplus remaining in the hands of a sheriff from the sale of property taken and sold under execution is not in the custody of the law, but that the sheriff holds such surplus for the use of the judgment debtor as money had and received (*Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Lightner v. Steinagel*, 33 Ill. 510); or, as stated in *Weaver v. Davis*, 47 Ill. 235, the sheriff holds such surplus merely as a trustee for the debtor, which the latter may recover in an action against the sheriff for money had and received.

Such being the relation between the sheriff, as the holder of the surplus, and the debtor, it is manifest that the latter has no property in the specific money received by the sheriff, but has merely a chose in action which may be enforced against the sheriff in an action of assumpsit. The sheriff may substitute any other money, provided it be a legal tender, in the place of the money received by him at the sale, and a payment with such substituted money would be a complete discharge of his liability to the person entitled to the surplus.

That a chose in action, other than those evidences of debt which circulate as money, is not subject to levy and sale under execution has been expressly decided by this court in *Crawford v. Schmitz*, 139 Ill. 564, 29 N. E. 40.

In the case of *Turner v. Fendall*, 1 Cranch, 116, 2 L. ed. 153, the supreme court of the United States, in discussing the question whether money collected for one person by a sheriff

under an execution could, before it had been paid over to that person, ¹⁷⁷ be levied upon by the same sheriff under an execution in favor of another person and against the goods and chattels of the person for whom the money was collected, said: "The general rule of law is, that all chattels, the property of the debtor, may be taken in execution, and whenever an officer has it in his power to satisfy an execution in his hands it is his duty to do so, and if he omits to perform his duty he must be accountable to those who may be injured by the omission. But has money not yet paid to the creditor become his property? That is, although his title to the sum levied may be complete, has he the actual legal ownership of the specific pieces of coin which the officer may have received? On principle, the court conceives that he has not this ownership. The judgment to be satisfied is for a certain sum—not for the specific pieces which constitute that sum; and the claim of the creditor on the sheriff seems to be of the same nature with his claim under the judgment, and one which may be satisfied in the same manner. No right would exist to pursue the specific pieces received by the officer, although they should even have an earmark; and an action of debt—not of detinue—may be brought against him if he fails to pay over the sum received or converts it to his own use. It seems to the court that a right to specific pieces of money can only be acquired by obtaining the legal or actual possession of them, and until this is done there can be no such absolute ownership as that an execution may be levied on them. A right to a sum of money in the hands of a sheriff can no more be seized than a right to a sum of money in the hands of any other person, and however wise or just it may be to give such a remedy, the law does not appear yet to have given it."

In *Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631, where the same question was before the court as in *Turner v. Fendall*, 1 Cranch, 116, 2 L. ed. 153, it was said: "The fallacy of the ground assumed, that the money collected on an execution becomes the money of the creditor, ¹⁷⁸ will manifestly appear by inquiring whether an action of trover could be maintained against the sheriff when he neglects to pay over the money? Whether, if the money was stolen or lost, it would be the loss of the officer or creditor? Whether, if received in bills which at the time, or at any time thereafter, should be subject to a discount or bear a premium, the creditor would sustain the

loss or have the benefit of the premium? No one, I believe, would hesitate to answer all these questions in the negative. . . . Neither do we see any of the absurdities attending this view of the case which have been urged in the argument. It has been said that it is idle to require him to pay over the money to the creditor when it would be his duty immediately to levy on the same as soon as it came into the possession of the creditor. But it may be remarked that there is no greater absurdity in this than there is in requiring him in all cases to forbear levying on property until it becomes the property of the person for whose debt he is about to levy. Whether he or any other person is indebted and about to make a payment, and whether this payment is to be made in money or specific articles, he, as sheriff, cannot stop the payment and seize upon the money or specific articles until they have become the money or property of the person for whose debt he takes it."

The case of *Leach v. Pine*, 41 Ill. 65, 89 Am. Dec. 375, relied upon by appellee, is entirely dissimilar to the one at bar. The property involved in that case was personal property and the executions were liens upon the property which was seized by the sheriff. In such case it is manifest that the surplus arising from a sale under one execution could be applied by the sheriff upon other executions which were in his hands and were liens upon the property at the time such sale was made.

In *First Nat. Bank of Chicago v. Hanchett*, 126 Ill. 499, 16 N. E. 907, the sheriff had in his hands a writ of attachment, which he levied upon certain property in the possession of the warehouse company which was the defendant in attachment, and upon which the defendant had a lien for storage charges and ¹⁷⁹ money advanced. Thereupon the various owners of this property paid to the sheriff the amount of the storage charges and he released the levy. The attorney for the plaintiff directed him to pursue this course and to hold the money so received in lieu of the property released. The sheriff, however, paid the money, upon the order of the defendant, to a creditor other than the plaintiff. This court held that the sheriff should have returned the money into court to answer to the judgment in attachment, as the court might direct. That conclusion was undoubtedly correct for this reason, there pointed out: The money was paid into the sheriff's hands by the defendant's creditors, and the order

given by the defendant to the creditor to whom the money was paid "was a distinct admission by the warehouse company that the money in the sheriff's hands was their money, and upon this, if nothing else, the sheriff should have attached or have held the money in his hands as the money of the warehouse company and have brought the same into court to abide," etc. In the case now before us the identical money in the sheriff's hands did not become the money of the execution debtor, but the sheriff, in his individual capacity, was merely indebted to the Commerce Vault Company precisely as though he owed it for borrowed money.

Appellee refers us to adjudications in sister states supporting this view, but we regard the conclusion reached by the supreme court of the United States and by the court of last resort of the state of Vermont as founded upon the stronger reasoning.

We therefore hold that executions Nos. 2 and 3 were not liens upon the surplus in the hands of the sheriff at the time the garnishment writ was served upon him in this case. That was the only defense set up by the answer, which admitted that the garnishee had \$17,964.96 in his hands belonging to the Commerce Vault Company when this writ was served upon him. The circuit court, therefore, erred in overruling the exceptions to the answer, in discharging the ¹⁸⁰ garnishee and in entering judgment against appellant for costs.

The judgment of the circuit court and the judgment of the appellate court will be reversed, and the cause will be remanded to the circuit court for further proceedings in conformity with the views herein expressed.

A Judgment Debtor's Right to Redemption is held not subject to be levied on and sold under another execution against him within the year allowed for redemption: *Watson v. Reissig*, 24 Ill. 281, 76 Am. St. Rep. 746. See, too, *Haven v. Low*, 2 N. H. 13, 9 Am. Dec. 25.

Garnishment of the Surplus Proceeds of Execution Sales is considered in *Allen v. Gerard*, 21 R. I. 467, 79 Am. St. Rep. 816; *Oppenheimer v. Marr*, 31 Neb. 811, 28 Am. St. Rep. 539. Property in the possession of an officer who has levied upon it may be constructively attached and a valid lien acquired thereon by suitable proceedings, in which he may be garnished: *Pitkin v. Burnham*, 62 Neb. 385, 89 Am. St. Rep. 763. As to garnishment against a fraudulent attachment, see *Stern v. Butler*, 123 Ala. 606, 82 Am. St. Rep. 146.

STARNE v. PEOPLE.

[222 Ill. 189, 78 N. E. 61.]

CONSTITUTIONAL LAW—Miners' Washroom Act.—A statute requiring mine owners to provide a washroom at the top of each mine for the use of employes places upon mine owners or operators a burden not borne by other employers of labor, and is therefore special legislation, discriminatory and void.—(pp. 390, 391.)

CONSTITUTIONAL LAW—Police Power—Miners' Washroom Act.—A statute requiring mine owners to provide a washroom at the top of each mine for the use of their employes is special legislation, and cannot be sustained as a proper exercise of the police power to enact sanitary laws. The legislature cannot ameliorate the coal miners' condition under the guise of an exercise of the police power, and leave others unaided who suffer from like causes. (p. 391.)

CONSTITUTIONAL LAW—Legislation Concerning Mines.—Constitutional provisions requiring the enactment of laws for the protection of miners are designed only to require the passage of laws for the protection of miners against personal injury while in the mine. (p. 393.)

Lawrence & Folsom, for the plaintiff in error.

J. H. Hamlin, attorney general, G. B. Gillespie, W. E. Shutt, Jr., state's attorney, T. Williamson, and Shutt & Graham, for the people.

¹⁹² SCOTT, C. J. This was a criminal proceeding commenced before a justice of the peace of Sangamon county. The complaint charged the plaintiff in error, the owner and operator of a coal mine in this state, with failing and refusing to provide and maintain a washroom, as he was required to do by section ¹⁹³ 37 of chapter 93 of Hurd's Revised Statutes of 1903, which was approved May 14, 1903, and provides: "That every owner or operator of a coal mine in this state shall provide and maintain a washroom at a convenient place at the top of each mine for the use of the miners and other employes of such mine; and such washroom shall be so arranged that such miners and other employes may hang therein their clothes for the purpose of drying the same."

A judgment of conviction was rendered by the justice and an appeal was taken to the circuit court. A motion was there entered to quash the complaint and dismiss the suit, one of the grounds of the motion being that the act in question was in contravention of the constitution of the state of Illinois. This motion was denied, and, upon trial, plaintiff in

error was again convicted, and has sued out of this court a writ of error to review the judgment of conviction.

It is insisted that the statute is unconstitutional. It is apparent, upon inspection thereof, that it places upon mine owners or operators a burden not borne by other employers of labor and is special legislation, and for that reason invalid, unless for some reason it does not fall within the operation of the general rule forbidding legislation of that character: *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62, 22 L. R. A. 340; *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, 32 L. R. A. 445; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108, 32 L. R. A. 659; *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116, 60 N. E. 90, 54 L. R. A. 838.

It is said, however, that the miner works at a depth which removes him from all climatic changes and conditions on the surface, and in a temperature which, throughout a portion of the year, is much higher than that outside the mine; that when his work is over for the day his skin is covered with grease, smoke, dust, grime and perspiration; that without an opportunity to bathe and change his attire, he cannot clothe himself comfortably for his journey through cold weather to his home; that these adverse conditions inevitably ¹⁹⁴ lead to colds, consumption, pneumonia and general unhealthfulness; and that the statute in question should be sustained as a valid exercise of police power, and, it is urged, as that power may be exercised to promote the comfort, health, welfare and safety of the public, that this statute is referable to that power as a health regulation, for the reason that it will afford the miner an opportunity to avoid danger to his health, otherwise consequent upon his occupation.

It is true, as suggested by counsel and as stated by this court in *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663, 47 L. R. A. 802, that the legislature has the power to form classes for the purpose of police regulation if it does not arbitrarily discriminate between persons in the same situation.

The only purpose of this act is to promote the health of miners and other persons employed in coal mines. Many men in this state are employed in the foundries and steel mills who work in a higher temperature than do the miners,

surrounded by conditions deleterious to health and inimical to longevity. The convenience provided for by this act is not less desirable to them than to the coal miner.

While the power of the legislature to form classes in reference to which the police power may be exercised is unquestioned, there can be no discrimination among individuals in forming such classes unless there is some difference in their condition which causes them to naturally fall into different groups: *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663, 47 L. R. A. 802; *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, 32 L. R. A. 445; *Horwich v. Walker-Gordon Laboratory Co.*, 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938.

It is apparent that a statute of this character, providing that a washhouse should be provided for miners working at a greater depth than two hundred feet below the surface and making no similar provision for miners working at a lesser depth, would be unconstitutional, because it would make an arbitrary distinction between individuals surrounded by the same conditions.

We think the act in question, when considered as an exercise of police power, is properly the subject of the same ¹⁹⁵ objection. The fact that it proposes to benefit workmen employed in coal mining does not make it valid, in view of the fact that laborers in other employment are surrounded by like conditions and are equally in need of the benefit of this statute. As quoted from Cooley's Constitutional Limitations in *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, and in *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492: "Distinctions in these respects should be based upon some reason which renders them important, like the want of capacity in infants and insane persons; but if the legislature should undertake to provide that persons following some specific lawful trade or employment should not have capacity to make contracts or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bound of legislative power, even if it did not come in conflict with express constitutional provisions."

It is manifest that for the purposes of this statute no such distinction exists between coal miners and workmen in many other occupations in this state. The evil at which this statute

is aimed is one that is not visited alone upon persons employed in coal mines. The legislature cannot ameliorate the coal miners' condition under the guise of an exercise of the police power and leave others unaided who suffer from like causes. Conceding the importance which defendant in error attaches to this act as a sanitary measure, it is apparent that it is not sufficiently comprehensive to remedy the evil at which it is aimed, because it will bring relief only to a part of the people who suffer therefrom.

Defendant in error predicates its contention that this statute is constitutional principally upon the ground that it is within section 29 of article 4 of the constitution of 1870, as appears from the following language quoted from its brief: "It might be conceded for the purpose of this argument that if the act applied to any other class than miners it would be open to the objection of class legislation, but the framers ¹⁹⁶ of the constitution made an exception in favor of this particular class, which we contend is broad enough to furnish a foundation for the act in question."

That section reads as follows: "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."

We think it also reasonable to conclude that the legislative purpose was to exercise a power contemplated by this section of the constitution, as it does not appear from the act or its title that the law-making power regarded it as a sanitary measure passed by virtue of the police power of the state.

It is contended that the purpose in adopting this constitutional provision was to provide for the health as well as the safety of persons employed in coal mines.

We are referred by the defendant in error to the debates of the constitutional convention, that we may be made acquainted with the views of that convention and determine the meaning of this section in the light of the purpose for which it was passed as disclosed by those debates.

"References to the proceedings of a constitutional convention are sometimes resorted to by the courts in order to find reasons for a particular action of the convention. They are

not resorted to for the purpose of construing away any express language of the constitution, or even for the purpose of construing what may be doubtful. 'When the inquiry is directed,' says Judge Cooley, 'to ascertaining the mischief designed to be remedied or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the ¹⁹⁷ purpose of the provision, the aid will be valuable and satisfactory': Cooley's Constitutional Limitations, 63, and cases cited"; *Wulff v. Aldrich*, 124 Ill. 591, 16 N. E. 886; *Burke v. Snively*, 208 Ill. 328, 70 N. E. 327.

In the case at bar we do not think the discussion of this provision prior to its adoption of any assistance. To adopt the view of defendant in error would require us to interpolate the words, "and health," after the word "safety," and then the provision would be of doubtful meaning. If it was the purpose of the builders of the constitution to direct the General Assembly to pass laws other than such as should "secure safety in all coal mines," they failed to use language to manifest their intention, and an ascertainment of their purpose can avail nothing under such circumstances.

We are of opinion that the legislation in question is not authorized by this constitutional provision for two reasons: 1. The purpose of this provision of the constitution is to require the enactment of laws providing for the safety of the miner while in the mine, and this act makes no provision that will benefit the miner or protect or aid him until a time after he has left the mine; 2. The provision of the constitution was designed only to require the enactment of laws which should promote ventilation and guard the personal safety of the miner—that is, protect him from personal injury.

This latter view was taken by this court in *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, where it is said: "We are not unmindful that our constitution, in section 29, article 4, enjoins legislation in the interest of miners; but this is solely as respects their personal safety—the enactment of police regulations to promote that end."

The miner works in a place where he is exposed to dangers which do not assail those who labor above ground. Damp, darkness, noxious gases, lack or difficulty of ventilation and other causes contribute to render his situation while at work unpleasant, undesirable and perilous. The constitutional con-

vention and the people of the state recognized ¹⁹⁸ this condition, and, by the constitution, wisely commanded the legislature to enact such laws as should secure his personal safety while in the mine. When, however, he has ceased his labor, left the mine and reached the surface of the earth, he has for the time being passed beyond the operation of the constitutional provision and of any valid statute authorized thereby. His situation is not then different from that of many other workmen leaving their employment at the end of the day, and his rights under the constitution are not then greater than those of such other workmen.

An analogous question arose in Colorado, where it is provided by section 2 of article 16 of the constitution of the state that "the General Assembly shall provide by law for the proper ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein." It will be observed that this is broader than our own constitution, in that it in terms includes appliances "to protect the health." In *Re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L. R. A. 52, the supreme court of that state, considering this provision, said: "These regulations manifestly embrace only such reasonably necessary mechanical appliances as will secure the end in view, and do not include other kinds of health regulations."

We conclude that the enactment here in question is not within the meaning of the section of our constitution hereinabove set forth, and that it is obnoxious to that provision of the fundamental law of the state which forbids special legislation in certain enumerated cases.

The judgment of the circuit court will be reversed.

HAND, J., dissenting. I do not agree to the conclusion reached in the foregoing opinion, but entertain the view that the statute referred to therein is a valid exercise of the police power of the state.

Constitutional Law—Unreasonable Classification.—The legislature is competent to enact statutes applicable to only one class of persons, if the classification is based upon intrinsic differences requiring different legislation. But a classification, to be a basis for valid legislation, must be reasonable and founded upon real differences; there can be no arbitrary discrimination against any one class engaged in a lawful business: See *Ex parte Sohneke*, 148 Cal. 262, ante, p. 236, and cases cited in the cross-reference note thereto.

GOUWENS v. GOUWENS.

[222 Ill. 223, 78 N. E. 597.]

MORTGAGE FORECLOSURE—Parties—Wife of Mortgagor—Effect of Decree.—If a mortgagor's wife is made a party to a proceeding to foreclose his mortgage, and subsequently acquires such interest as her husband had in the land, she is bound by the foreclosure decree. (p. 396.)

MORTGAGE FORECLOSURE—Res Judicata.—Parties defendant to a foreclosure suit who claim liens may set up their claims by answer and make proof of the facts upon which they claim their liens, but unless there is a surplus after satisfying the mortgage debt, there is nothing to litigate between the defendants, and hence no adjudication which can become res judicata as between the mortgagor and such defendants as to the validity of their liens. (pp. 398, 399.)

RES JUDICATA.—The Only Parties Precluded by a Decree are Adversary Parties, and the matter determined must be in issue between them. (p. 399.)

RES JUDICATA—Mortgage Foreclosure.—Parties on the same side of a foreclosure proceeding cannot be concluded by the decree thereon, as against each other if no issue between them was presented and adjudicated. (p. 399.)

J. C. Trainor, for the appellant.

I. T. Greenacre, for the appellees.

²²⁶ CARTWRIGHT, J. In the year 1898 two judgments were recovered against John J. Gouwens, who was then the owner of certain lots in the city of Chicago, upon which the judgments became liens. One judgment was in favor of Rollin A. Gouwens and the other in favor of Anton Steinbach. In 1901 appellant, who is the wife of John J. Gouwens, acquired title to the lots, and executions were afterward issued on the judgments and levied on the lots and they were sold by the sheriff. Appellant then filed her bill in this case against part of the appellees, the judgment creditors, the sheriff and the purchaser at the sheriff's sale, asking the court to cancel the levies, sale, and certificate of sale as a cloud upon her title. The ground upon which she asked relief was that the judgments were not liens at the time of her purchase of the lots, for the reason that the executions which were issued within one year from their rendition were not issued for the purpose of collecting the judgments, but the sheriff was directed to hold them until the return day and not levy them. The bill alleged that the executions not having been issued for the purpose of executing them and collecting the judgments,

the liens created by the judgments expired at the end of the year. During the pendency of this suit a sheriff's deed was executed in pursuance ²²⁷ of the sale, and a supplemental bill was then filed making the rest of the appellees, the grantees therein, defendants, and asking the court to enjoin them from conveying the real estate or interfering with appellant's possession of it, and praying for general relief. Some of the defendants answered the bill, but two of the defendants brought in by the supplemental bill filed pleas setting up facts designed to show that the validity of the judgment liens had been adjudicated in two foreclosure suits. Three other defendants filed a joint and several plea, asking the benefit of the matter set up in the other pleas without setting out the facts. The pleas were set down for argument and the circuit court held them good, and thereupon dismissed the bill for want of equity at complainant's cost.

The pleas having been set down for argument, the truth of their allegations was admitted (*Snow v. Counselman*, 136 Ill. 191), and the question to be decided was whether such facts constituted an adjudication of the validity of the judgment liens, so that the question whether they were valid liens on the real estate involved in this suit could not again be litigated between the parties. That is the only question considered here. The complainant was one of the defendants in each of the foreclosure suits, but her husband was then the owner of the property. She afterward succeeded to the estate or title held by him and was privy to the decrees entered in those suits: *O'Connell v. Chicago Terminal Transfer Co.*, 184 Ill. 308, 56 N. E. 355. If the validity of the liens as to this property was conclusively settled and adjudicated between her husband and the judgment creditors, she also would be bound by the adjudication.

The facts alleged in the first plea were, in substance, as follows: Prior to the rendition of either of the judgments, John J. Gouwens and his wife, the complainant, executed a trust deed conveying a part of the lots to secure a principal note for five hundred dollars, and interest notes. Rokus P. Van Drunen, one of the defendants in this case, having become the owner of ²²⁸ the notes secured, filed his bill in 1899 to foreclose the trust deed, and complainant and her husband, and the judgment creditors, Rollin A. Gouwens and Anton Steinbach, were defendants. The allegation of

the bill as to Rollin A. Gouwens and Anton Steinbach was, that they had or claimed to have some interest in the real estate, or some part thereof, as purchaser, mortgagee, judgment creditor or otherwise, which interest, if any there was, had been acquired since and was subject to the lien of the trust deed. Complainant and her husband filed an answer admitting the execution of the notes and trust deed but denying every other allegation of the bill. The judgment creditors filed separate answers, setting up the recovery of their judgments and asking that any surplus arising from the sale of the premises should be applied toward the payment of the same. The cause was referred to a master in chancery, who took the evidence and filed his report finding in favor of the complainant, and that the judgment creditors had concurrent liens on the real estate subject to the lien of the trust deed, and that they were entitled to be paid pro rata the amount found due them out of the proceeds of any sale next after paying complainant and the costs. The court entered a decree February 5, 1900, finding the amount due upon trust deed and the amounts due on the judgments, and finding that they were concurrent liens on the premises subject to the lien of the trust deed. The court thereupon decreed that the premises should be sold by the master in chancery; that after the payment of costs he should pay the complainant the amount found due her, with interest; that if there should be any deficiency he should report the amount, and if there should be any surplus he should hold it subject to the order of the court.

The second plea was a plea puis darrein continuance, filed April 28, 1904, setting forth a decree entered April 25, 1904, in a foreclosure suit brought by William G. Krutz, Jr., to foreclose a trust deed executed by said John J. Gouwens and wife upon other lands not involved in this suit in any ²²⁹ way. John J. Gouwens and complainant and the judgment creditors were defendants in that suit, and in the decree the court found the amount due the complainant, Krutz, on his trust deed, and found that the judgment creditors recovered their judgments and that executions were issued thereon. The decree directed the master in chancery, in default of payment of the amount due on the trust deed, to sell the premises, and if there should be a deficiency he should report the same, and if there should be a surplus he was ordered to bring it into court to abide the further order

of the court. The finding in that case was merely that the judgment creditors had judgments which were liens on the property subject to the trust deed, none of which is included in this suit.

The single fact alleged in the bill in this case as ground for relief was, that the executions were delivered to the sheriff with directions not to levy them but to merely hold them until the return day, and the claim was that such action had the same effect as though the executions were not issued. The defense set up by the pleas was, that the fact that the judgments were valid and subsisting liens on the real estate at the time of complainant's purchase had been conclusively determined and adjudicated in the two foreclosure suits. The facts alleged were, that the complainant and her husband and the judgment creditors were codefendants in those suits, and that the court in each of those suits found that the liens were valid.

The complainants in those suits sought foreclosure of their mortgages, and the judgment creditors were proper parties defendant for the purpose of foreclosing their right of redemption. The bill of Van Drunen alleged that they had or claimed some right, title or interest in the premises which was subject to the lien of the trust deed. By their answers they did not dispute that averment, and there was no issue formed between them and the complainant. As between the complainant and defendants it was not necessary to determine the question whether the judgments were valid ²³⁰ and subsisting liens upon the property or not, and any finding as to the existence or the priority of liens or titles as between the defendants was wholly unnecessary to the relief asked for or granted. The decree in the Krutz case was precisely of the same kind as in the other and in each it was ordered that the master in chancery should sell the property and report to the court if there was a deficiency or surplus, and in case of a surplus should hold it subject to the order of the court. If there should be a deficiency there might be a decree for such deficiency against the party personally liable for the debt secured, in favor of the complainant in the suit. If the property should sell for the amount of the debt and costs, there would be no further subject for litigation, but if there should be a surplus for distribution the court would then be called upon to determine to whom it should be paid.

It has very frequently been held that it is not necessary for a defendant having a lien to file a cross-bill, but his rights may be determined under his answer. If the answers of the various parties claim liens, the court has power, without the filing of a cross-bill, to determine the existence and priority of the various liens and to distribute any surplus in discharge of such liens, according to their priority: *Gardner v. Cohn*, 191 Ill. 553. It is undoubtedly proper for persons claiming liens who are made defendants to a foreclosure suit to set up their claims by their answers and to make proofs of the facts upon which they claim the liens, but unless there is a surplus after satisfying the mortgage debt there is nothing to litigate as between the codefendants who claim nothing except a right to participate in such surplus. The only parties concluded by a decree are adversary parties, and the matter determined must be in issue between them. Parties on the same side of a foreclosure suit are not concluded, as against each other, if no issue between them was presented and adjudicated. Where nothing has been litigated as between codefendants in a chancery suit, the decree is not evidence in ²³¹ in favor of either party against the other: *Conwell v. Thompson*, 50 Ill. 329. If there had been a surplus there would have been adverse interests between the judgment creditors claiming liens and the mortgagor, and the decision of that question by the court would have been an adjudication of such adverse interests. Manifestly, when the judgment creditors answered in the foreclosure suit that they had liens, neither the complainant nor her husband could have filed a cross-bill or entered into litigation with their codefendants as to the existence of the liens. The complainants would have no interest in that controversy, and the court would not listen to it when it could not be known that there would be any surplus to which the alleged liens would be transferred after the sale. In the *Van Drunen* foreclosure the property sold for exactly the amount of the trust deed and costs, and in the *Krutz* foreclosure there had been no sale to ascertain whether there would be any surplus to be the subject of litigation between the complainant and judgment creditors. So far as the *Van Drunen* foreclosure is concerned, it is not disputed that when the bill and answers were filed the judgments were liens; but whether they were or not, we do not understand that there could be a final adjudication on

the merits as between the defendants in either case until there should be a surplus disposed of by the order of the court.

It follows that the pleas do not set forth facts constituting a final adjudication that the judgments were valid and subsisting liens upon the lands in question, and that the court erred in holding them to be good and dismissing the bill.

The complainant asked leave to amend her bill so as to show that she had redeemed from the sale under the Van Drunen foreclosure, but the court refused her motion. Upon the reinstatement of the case in the circuit court she will be permitted to amend her bill as she may desire.

The decree is reversed and the cause remanded.

A Judgment on the merits constitutes a bar in a subsequent action founded upon the same claim or demand, concluding the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. But where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those issues upon the determination of which the judgment was rendered, and does not extend to matters which might have been, but were not, litigated and determined in the former action: See Brock v. Boyd, 211 Ill. 290, 103 Am. St. Rep. 200, and cases cited in the cross-reference note thereto; Rew v. Independent School Dist., 125 Iowa, 28, 106 Am. St. Rep. 282; Pereles v. Gross, 126 Wis. 122, 110 Am. St. Rep. 901.

DILLMAN v. McDANEL.

[222 Ill. 276, 78 N. E. 591.]

WILLS—Testamentary Capacity—Evidence of Insanity.—If the sanity or insanity of a testator is the subject of judicial investigation, and there is no other evidence tending to show his mental unsoundness, it is competent to show the insanity of his collateral blood relations, not further removed than uncles and aunts, without making proof that the insanity from which they suffered was hereditary in character. (p. 408.)

WILLS—Testamentary Capacity.—The disposal for an inadequate consideration, and without apparent reason of valuable property by a testator, after his severe illness and partial paralysis, to persons to whom he was under no special obligation, when prior to such illness he had been very close and penurious, indicates a marked change in mentality, and tends to show unsoundness of mind. (p. 408.)

WILLS—Testamentary Capacity—Evidence—Other Wills and Declarations.—If a will is attacked upon the ground of mental incapacity on the part of the testator, proof of other wills and declarations of the testator conforming substantially to the disposition of property as made by the will in question must be confined to wills and declarations made at a time when the testator is conceded to be of sound mind. (pp. 409, 410.)

WILLS.—Lack of Testamentary Capacity disqualifies a testator from making a valid will even though the incapacity does not amount to absolute imbecility. (p. 410.)

WILLS—Testamentary Capacity.—Neither Illness, Old Age nor Physical or mental weakness renders a testator incapable of making a valid will unless the mental weakness deprives him of testamentary capacity. (p. 411.)

WILLS—Testamentary Capacity.—Capacity to comprehend a few simple details, if the estate is small, may qualify a person to intelligently dispose of his property by will, while, if the estate is large, requiring the remembrance of many facts and the comprehension of many details and the disposition to be made is complicated, the same mental capacity may be wholly insufficient to the intelligent understanding of the business requisite to the making of a valid will. (p. 411.)

WILLS—Testamentary Capacity.—Unless the person whose testamentary capacity is questioned had, at the time of making his will, such mind and memory as enabled him to understand the business in which he was then engaged and the effect of the disposition made by him of his property, he did not possess the sound mind and memory required to enable him to make a valid will. (p. 411.)

WILLS—Testamentary Capacity.—The intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, his family, the claims of particular individuals, and the known financial conditions of his relatives, may be considered by the jury in determining the question of his mental capacity. (p. 412.)

WILLS—Power to Dispose of Property.—A person has the power to make such final disposition of his estate by his last will as he may choose, and if he has the requisite mental capacity, he has the power to disinherit his heirs, and leave his property to charitable and educational objects, and if he does so, the validity of his will is not thereby affected. (p. 412.)

WILLS—Testamentary Capacity.—In determining whether a man was of sound mind and memory at the time of executing his will, his manner, talk, and actions, at a time when it is alleged he was not sane, should be compared with his manner, talk and actions at a time when his sanity was not questioned. (p. 412.)

WILLS—Testamentary Capacity—Instructions.—If a will is contested on the ground of want of mental capacity in the testator, an instruction that "where witnesses are otherwise equally credible and their testimony otherwise is entitled to equal weight, greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge," is harmless if all the witnesses gave affirmative evidence on the subject of mental capacity without any dispute as to transactions or events. (p. 413.)

B. D. Monroe, J. H. Smith and G. B. Gillespie, for the appellants.

Rose & McCollum, J. W. Thomason and Dawley, Hubbard & Wheeler, for the appellees.

278 Per CURIAM. Appellees, cousins and heirs at law of William H. Hudelson, deceased, filed their bill in the circuit court of Clay county to contest his last will and testament, and the codicil thereto, and to set aside the probate thereof, on the ground that the execution of the will was obtained by undue influence, and that the testator was mentally incompetent to make a will at the time of the execution of the will and at the time of the execution of the codicil. Appellants, being the executor of the will and legatees and devisees named in the will, and certain other persons who did not appeal, were made defendants. At the conclusion of all the evidence the court excluded from the jury all evidence on the question of undue influence, and the cause was submitted to the jury upon the issue of mental incapacity. A verdict was returned against the proponents. After overruling a motion for a new trial the court entered a decree in accordance with the verdict, and the proponents appeal to this court.

William H. Hudelson died March 9, 1905. The instrument in question, purporting to be his last will and testament, with a codicil, was admitted to probate by the county court of Clay county on April 3, 1905. The bill herein was filed on June 15, 1905.

The deceased, at the time of his death, was seventy-nine years of age. He had resided in Clay county since 1852, and during the latter years of his life at Louisville, the county seat of that county. He was first married in 1852, and of that marriage his only child was born. That child died, however, before reaching adolescence, and the first wife died in **279** 1854. He married again in 1858, and lived with the second wife, Penina, until May, 1903, when she died.

His heirs at law are all cousins, one of whom resides in Clay county and the others are nonresidents of the state. While there is no evidence of any estrangement, his relations, during the latter years of his life, with those who are now his heirs at law were quite distant.

During the earlier years of his life in Clay county he was engaged in the mercantile business and in farming. Later

he was a money lender, and engaged in discounting notes and buying and selling real estate, and in the banking business, and was a stockholder and director in the Farmers' and Merchants' Bank of Louisville at the time of his death, and latterly transacted his banking business with that bank.

Prior to December 24, 1902, he was a strong and healthy man. On that day he was taken ill and was sick for several months. During that time he suffered greatly from a carbuncle on the back of his neck and sustained what is denominated in the record a stroke of paralysis. As a result he lost the use of his left arm, and to some extent, of other portions of his left side, and the contention of appellees is that ever after that illness he lacked mental capacity to make a valid disposition of his property by will. At the time of that illness he was worth between \$175,000 and \$200,000, but prior to his death he reduced his property, by gifts and conveyances made upon slight and inadequate consideration, to about \$100,000, which consisted both of real and personal estate. Prior to this illness he had been very close in his dealings and was penurious in his habits. Such gifts as he made prior to that time were confined to recipients in some way connected with the Baptist church, of which he had been a member since 1868.

There is, and has been for many years, a Baptist college located at Ewing, Franklin county, Illinois, known as Ewing College, to which he had been a frequent contributor. At Sailor Springs, in Clay county, there was an academy ²⁸⁰ under the control of the same denomination. He purchased this institution, gave it the name of Hudelson Academy, and afterward, prior to his illness, conveyed the property to and placed the academy under the management of Ewing College. In 1892 he established at Ewing a Baptist orphanage, and built cottages there to be used as dormitories for young ladies. But the orphanage and the dormitories bear his second wife's name.

During the time intervening the illness above mentioned and his death, in addition to money and property which he gave to Ewing College and Hudelson Academy during that period, he gave to Dr. Scaife, under whose treatment he was for several months preceding his death, the sum of \$15,000; to J. C. Meyers and wife, with whom he resided for a time after the death of his wife, he gave \$10,000 and two farms, aggregating one hundred and eighty-four acres,

valued at \$4,600; to Ed Hawkins, who officed with W. H. Dillman, who was the attorney of the deceased, he surrendered notes that he held against him to the amount of \$2,200; to one Elson he surrendered a note of \$150; to a woman by the name of Hobbs he surrendered a note which he held against her for \$900; to Dr. Dillman, a brother of W. H. Dillman, he surrendered a note which he held against him for \$900; to Joseph Murphy he surrendered notes which he held against him to the amount of \$300; to Sumner Hayes he surrendered notes which he held against him to the amount of \$3,000; to Dr. Lauchner he surrendered a note which he held against him for \$100. It does not appear but that all these notes were collectible. He conveyed without consideration a small tract of land, about ten acres, the value of which is not fixed by the record, to one George McClure.

In May, 1904, he made a trip to Arkansas to examine some real estate which he owned there. He was absent one week, and J. C. Zink, of Clay county, accompanied him to assist in the inspection of the land. On their return Mr. Hudelson proposed to give Zink a tract of land on Hoosier ²⁸¹ Prairie, in Clay county. Hudelson was then going to Sailor Springs, which was known locally as a health resort, and Zink told him to go there and rest a while, and when he came back, if he wanted to do anything like that, Zink would see about it. Hudelson never renewed this offer, but he afterward said to Zink that he, Zink, would be well taken care of and never allowed to suffer. Nothing was ever done in pursuance of this promise.

For several years prior to his death W. H. Dillman had been his attorney. He made his business headquarters at Dillman's office, in Louisville, and both before and after the illness above mentioned, Dillman, who at the time of the trial of this case was thirty-seven years of age, assisted him in the transaction of his business, which was principally that connected with loaning and collecting money. During the period of his life now under investigation he surrendered to Dillman a note for \$600. He also held a note against Dillman for \$2,800. After that note had been partly paid he traded it to Dillman for stock in a gold mine situated in Wichita mountains. This stock Dillman, as executor, listed in his inventory as "doubtful." After his trip to Arkansas he traded the Arkansas land, which was eight hundred and

eighty acres in extent, to Mr. Dillman. A deed was executed and Dillman gave his obligations for the land. Hudelson, for some reason which the record does not disclose, became dissatisfied with the arrangement before the transaction was finally closed, and with Dillman's consent the deeds and obligations were destroyed. Afterward he wrote to Dillman, asking him to prepare another deed for the Arkansas land and to bring it over to Sailor Springs, where Hudelson then was, for execution. Dillman complied with the request, thinking, as he says, that Hudelson had concluded to carry out the trade the same as before, and when he saw Hudelson at Sailor Springs the latter asked whether he brought the deed. Dillman replied in the affirmative, and asked whether Hudelson desired to trade as he said he would. Hudelson said no, and told Dillman ²⁸² that he had concluded to deed him the Arkansas land, and the conveyance was executed and delivered on that day.

We think it apparent from the testimony of Mr. Dillman, who was called by appellees, that there was in fact no valuable consideration for this deed. While he says that Mr. Hudelson expressed gratitude for his kindness to him, and that he, Dillman, did not regard it as a straight gift, yet he also says that at that time he, Dillman, "had no particular bill against him; he seemed to think a good deal of me." This land cost Mr. Hudelson about \$9,000, and the consideration expressed in the deed to Dillman is \$12,000. It appears that Dillman had been compensated for his services to Mr. Hudelson otherwise than by the gifts and conveyances above mentioned.

During the period succeeding his illness it appears that Mr. Hudelson himself transacted considerable business. The record shows that during that period he drew and signed twelve checks on the Farmers and Merchants' Bank, and that nineteen other checks drawn on that bank were written by other persons at his request and signed by him, and that all were paid on presentation. This does not include a \$5,000 check hereinafter mentioned. During that time he executed deeds, bonds for deeds, took notes, released mortgages, and with the assistance of Mr. Dillman managed financial affairs which amounted in the aggregate to many thousand dollars. Many of those with whom he dealt during that time were witnesses. Some of them were of the opinion that he was entirely competent to transact ordinary

business. Others gave it as their opinion, based upon what they saw and observed of him, that he lacked testamentary capacity. Among the latter were some of those in the active management of the bank in question. Part of the property given to Dr. Scaiefe was \$5,000 in cash, which was transferred to him by a check on that bank. When that was presented the bank at first refused to pay it, making an indorsement thereon, signed by several of the directors, to the ²⁸³ effect that the payment was refused, not on account of lack of funds, but because of Mr. Hudelson's mental condition. Later, after communicating with Mr. Hudelson, the bank paid this check.

Medical experts testified both for proponents and contestants, and, as usual, testimony of those called for the will indicates that Mr. Hudelson had the requisite mental capacity, while the testimony of those called against the will tends to show that he lacked that capacity. A multitude of circumstances are recited by the various witnesses, many of which tend to establish a lack of testamentary capacity on the part of the deceased and many others of which are entirely consistent with sanity.

The instrument in controversy was executed on February 4, 1904. By it Mr. Hudelson sought to bequeath and devise his property as follows: To Mrs. J. C. Meyers, the wife of J. C. Meyers above mentioned, the sum of \$2,000. In trust for the benefit of Hudelson Academy, the sum of \$6,000; in trust for the benefit of Hudelson Home, the orphanage above mentioned, the sum of \$10,000; in trust for the purpose of carrying on the work of evangelism according to the Baptist doctrine, the sum of \$10,000; in trust for the permanent endowment of the Dr. John Washburn chair of ancient languages in Ewing College, the sum of \$5,000; and the residue of his estate in trust for the benefit of Ewing College. Each of these devises or bequests which are in trust, except that for the permanent endowment of the chair of ancient languages, is upon the happening of a certain contingency to pass to and become the property of the American Baptist Missionary Union of Boston, Massachusetts. James M. Sappenfield was nominated for executor of this will. Upon the death of Mr. Sappenfield Mr. Hudelson executed a codicil on the twenty-ninth day of May, 1904, nominating Mr. Dillman as executor of the will.

Two other wills executed by Mr. Hudelson were offered in evidence. One was dated January 9, 1894, and the other ²⁸⁴ July 15, 1903. By each of these wills practically his entire estate was given to Ewing College and charities connected with the Baptist church. By the will executed in 1903 the entire estate was devised to W. H. Dillman in trust, to be held and managed by him for a period of twenty years, excepting a bequest of \$800 to Mrs. J. C. Meyers, the wife of J. C. Meyers above mentioned, which was to be paid as soon as the executor could conveniently do so.

Evidence was introduced showing that Mr. Hudelson had frequently expressed a purpose of bequeathing his property to Ewing College and to other charities of the character of those mentioned in each of the three wills. Other evidence was introduced showing that he had made various other statements showing that his purpose was to make certain bequests to various persons, none of which appear in the instrument attacked in this case.

At the close of all the evidence proponents moved the court to instruct the jury to return a verdict in their favor. This motion was denied, and the action of the court in this regard is assigned as error; and it is further urged that if this assignment be not meritorious, the verdict was contrary to the clear preponderance of the evidence, and that the decree should be reversed for that reason.

A large number of witnesses testified in this cause. The original abstract contains four hundred and seventy-four pages. An additional abstract has been filed containing seventy pages. We have read the testimony of the various witnesses as set out in these abstracts. On account of the volume of the evidence it is impossible to discuss and analyze it in this opinion. There was a marked variance between the conclusions of those who spoke for the proponents and those who were called by the contestants. In our judgment the evidence tends to support the averments of the bill in reference to mental incapacity, and the verdict is not manifestly against the weight of the evidence. We have been moved to this conclusion largely by the fact that the gifts and conveyances made by the deceased after the illness ²⁸⁵ which began in 1902, other than those to Ewing College and Hudelson Academy, indicate a marked change in his mentality, and tend strongly to show that he was not, during that period, of sound mind and memory.

Efforts were made to show some reason for some of these gifts. None of these reasons are such as, in our judgment, would move a man of the character and habits of William H. Hudelson so long as his mind was sound.

Wesley R. Baldrige, a witness for contestants, was permitted, over objection, to testify that Jane Devin, a paternal aunt of the deceased, was "crazy" for a period of eighteen months and then recovered, and it is urged that this evidence was incompetent, for the reason that it was not supplemented by any evidence showing that the insanity from which the aunt suffered was of a kind that was hereditary, and that in any event the disease could not have been transmitted from her to the deceased. The precedents are not a unit on this question, but we think the greater weight of authority is, that where the sanity or insanity of an individual is the subject of judicial investigation, and there is other evidence tending to show mental unsoundness, it is competent to show the insanity of his collateral blood relations, not further removed than uncles and aunts, without making proof that the insanity from which they suffered was hereditary in character: 16 Am. & Eng. Ency. of Law, 2d ed., 613; Rogers on Expert Testimony, sec. 60; 1 Wharton & Stillé on Medical Jurisprudence, sec. 580; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Prentis v. Bates*, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; *State v. Simms*, 68 Mo. 305; *Baxter v. Abbott*, 7 Gray, 71; *Hagan v. State*, 5 Baxt. 615.

There was also evidence, which was received without objection, that Sarah E. Hudelson, a cousin of the deceased, had been insane for a great many years and was so at the time of the trial.

The court refused the first instruction requested by appellants, which was in the words following: ²⁸⁶ "The law is, that to be of sound and disposing mind and memory, so as to be capable of making a valid will, it is sufficient that the testator has an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed among them. It is not necessary that he should comprehend the provisions of his will in their legal form; it is sufficient if he understands the actual disposition which he is making of his property at the time."

We think the last sentence in this instruction apt to mislead the jury. By instruction No. 19, however, given at the request of appellants, the jury were instructed that if the deceased at the time of executing the will "knew what he was doing, and executed it as his will, understanding its nature and effects, and had sufficient mind and memory," etc., then the jury should find the paper in dispute to be his will. We think this instruction stated the proposition embodied in the last sentence of the first instruction, and stated it in unobjectionable form. Several other instructions given laid down the correct rule for determining the testamentary capacity of the deceased. There was, therefore, no error in the refusal of appellants' first instruction.

Appellants' tenth instruction, as requested, reads as follows: "The court instructs the jury that if you believe, from the evidence, that the said William H. Hudelson did, prior to the making of the will in question, make other wills, *the provisions of which are in substantial conformity to the will in question*, then it is your duty to take into consideration the fact of the execution of such former wills, if any are proven, together with all the other facts and circumstances proved on the trial."

The court modified it by striking out the words italicized and gave it as modified. Appellants' sixteenth instruction was one of the same character, advising the jury that if the ²⁸⁷ deceased, before executing the paper in question, "had expressed any fixed purposes and intentions regarding the disposition of his property, *approximating very nearly to the provisions of the will which is contested*, then the jury should consider such expressed purposes and intentions, if such appear from the evidence; and if the jury find that such expressed purposes and declarations of the testator are in accordance with the provisions of the will in question, then such declarations should be weighed by the jury in determining the question of sanity," etc. The court modified this instruction by striking out the italicized words and gave the instruction as modified. Complaint is made of both of these modifications.

These instructions should both have been refused, for the reason that they did not confine the jury to the consideration of prior wills executed and purposes and intentions expressed at a time when the deceased was conceded to be

competent to make a will. The substance of the language stricken out of the tenth instruction, however, is found in the seventh given by the court at the request of the contestants, where the jury are told that the fact, if it be a fact, that the deceased "had formerly made other wills substantially like the one in controversy may be considered by you upon the question of mental capacity," but that such fact would not be conclusive, etc. The language stricken out of the sixteenth did not change its meaning, as the jury were advised by that instruction, as given, that it was proper to consider the expressed purposes and declarations of the testator which were "in accordance with the provisions of the will in question."

Complaint is made of the action of the court in giving certain instructions requested by appellees. The first of these is appellees' No. 3, which advises the jury that any impairment of the mental faculties, or dementia, "which destroy testamentary capacity as defined in these instructions, disqualifies a person from making a will, even though it has ²⁸⁸ not reached the stage of absolute imbecility." It is said that this instruction is misleading as to the legal test of competency to make a will, and that by this instruction mere old age or any impairment of the mental faculties is sufficient to render one incompetent. We think this a misapprehension. The instruction merely advised the jury that the lack of testamentary capacity disqualifies, even though the incapacity does not amount to absolute imbecility. By propositions of law given for the appellants the jury were fully advised that neither illness, age, physical weakness nor mental weakness rendered the deceased incapable of making a will unless the mental weakness left the testator without the testamentary capacity defined by the instructions.

Appellees' instruction No. 4 reads as follows: "The court instructs the jury that the capacity to comprehend a few simple details, if the estate be small, might qualify a person, in that case, to intelligently dispose of his property by will, while if the estate be large, requiring the remembrance of many facts and the comprehension of many details, and the disposition to be made is complicated, the same mental capacity may be wholly insufficient to the intelligent understanding of the business requisite to the making of a valid will."

It is said that this violates the law laid down in the case of *Yoe v. McCord*, 74 Ill. 33, where it was said that one grossly ignorant or of very limited mental capacity, if otherwise of sane mind, may make any instrument, however complex it may be, and be bound thereby, and where this court approved the rule as held in *Delafield v. Parish*, 25 N. Y. 9, "that the question is, had the testator, as *compos mentis*, capacity to make a will—not, had the capacity to make the will produced." This view had not been followed by the later authorities where the question of sanity is involved.

In *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 157, it is said (page 480): "The capacity to comprehend a few simple details may in one case suffice to enable the party to intelligently dispose ²⁸⁹ of his property by contract or will, while in another case, if the estate be large, requiring the remembrance of many facts and the comprehension of many details, and the disposition to be made is complicated, the same mental capacity may be wholly insufficient to that intelligent understanding of the business requisite to the making of a valid will." To the same effect are *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080, and *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837.

Unless the person whose testamentary capacity is questioned had, at the time of making his will, such mind and memory as enabled him to understand the business in which he was then engaged and the effect of the disposition made by him of his property he did not possess the sound mind and memory required by the statute. The business in which he was then engaged was that of disposing of his property by the instrument in writing which is attacked, and it is manifest that he could not understand that business unless he had sufficient mental capacity to understand the effect of that particular instrument upon his property.

Instructions numbered 5 and 18 for appellees advised the jury that they might take into consideration, in determining the question of mental capacity, any inequality of distribution or unreasonableness of the provisions of the will, and the reasonableness of the will with reference to the amount of the testator's property and the situation and condition, financially, of his relatives. Evidence was introduced which showed that the deceased had knowledge of the situation and condition, financially, of some of his relatives.

Instructions were given at the request of appellants which embodied the same propositions as contained in the two here criticised, except that in those given at the request of appellants the jury were not directed to consider the reasonableness of the will with reference to the situation and condition, financially, of his relatives. We have held that in cases of this character, "intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking ²⁹⁰ into view the state of the testator's property, family and the claims of particular individuals, is competent and proper for the consideration of the jury": *McCommon v. McCommon*, 151 Ill. 428, 38 N. E. 145; *French v. French*, 215 Ill. 470, 74 N. E. 403. The financial condition of the testator's relatives falls within the language quoted.

At the request of the appellants the jury were instructed that the next of kin had no legal or natural right to the estate of the deceased; that the law of the land gives to each person the power to make such final disposition of his estate by his last will and testament as he may choose, and that the owner of property having the requisite mental capacity has the power to disinherit his heirs and leave his property to charitable and educational objects, and that if he does so, the validity of his will is not thereby affected. The instructions, as a series, correctly stated the law bearing upon the subjects touched by appellees' instructions numbered 5 and 18, now under consideration.

The objections made to instructions 2, 15 and 17 given at the request of the appellees are disposed of adversely to the contention of appellants by what has already been said.

Appellees' instruction No. 14 reads as follows: "The court instructs you that in determining whether or not a man is of sound mind and memory he should be compared with himself, and not with others. His manner, talk and actions at a time when it is alleged he was not of sound mind and memory should be compared with his manner, talk and action at a time when his sanity was not questioned."

It is said that this instruction is misleading from the fact that before Mr. Hudelson was sick, in the winter of 1902-03, he was a strong and vigorous man, above the average in point of intelligence; that thereafter he was physically ill, and that the jury were given to understand by this instruction that if they found physical and mental changes they

should consider the allegations of insanity, or want of mental ²⁹¹ capacity, established. It seems impossible that the jury could have given any such meaning to this instruction. We think the objection is without merit.

Instruction No. 19 given for appellees reads: "The court instructs the jury that when witnesses are otherwise equally creditable and their testimony otherwise is entitled to equal weight, greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact rather than to those who swear negatively or to a want of knowledge."

The giving of this instruction, in our judgment, was harmless. The witnesses who testified that in their opinion the deceased was sane; the witnesses who testified that in their opinion he lacked testamentary capacity; the witnesses who testified to facts and circumstances from which an inference of sanity might be drawn; the witnesses who testified to facts and circumstances from which an inference of mental unsoundness might be drawn; the expert witnesses who testified, in response to a hypothetical question, that he was sane, and the expert witnesses who testified, in response to a hypothetical question, that he was of unsound mind, were all witnesses who gave affirmative or positive evidence: *Frizell v. Cole*, 42 Ill. 362.

If, as contended by appellants, this instruction directed the jury to give undue weight to the testimony of those who swore affirmatively, appellees did not thereby obtain any greater advantage than did appellants, because all the witnesses of both parties who testified to material matters were witnesses who swore affirmatively. This is not a case where there is a dispute as to whether or not a certain thing transpired. Counsel have not pointed out, nor have we observed in reading the testimony, a single instance where witnesses have sworn that a certain event occurred, and other witnesses present at the time testified that the event did not occur or that they did not notice that it occurred.

²⁹² One respect in which appellants deem the instruction harmful is this: Witnesses for the appellees testified that at the times when they observed the deceased the left corner of his eye was drawn down and his mouth was drawn down on the left side of his face; that his eyes had lost their natural expression and had a glazed and staring appearance, and that his conversation indicated failing mental powers. Wit-

nesses who testified for appellants, on the other hand, testified that they observed the deceased; that the left corner of his eye was not drawn down; that his mouth was not drawn down on the left side of his face; that his eyes did not have a glazed and staring appearance, and that in their conversation with him there was nothing to indicate failing mental powers. Appellants contend that, within the meaning of this instruction, their witnesses just referred to would be regarded by the jury as those who gave negative testimony, and those who testified for appellees in reference to these matters would be regarded by the jury as those who gave affirmative testimony.

The testimony of appellees' witnesses and the testimony of appellants' witnesses did not relate to the same times and conversations. There was, therefore, no conflict between them, and those who testified for appellants could not be regarded as witnesses swearing negatively, when considered in connection with those who testified for appellees in regard to the matters just mentioned. It is apparent from this record that the deceased was stronger, both physically and mentally, at some times than he was at others, and the difference in the testimony which has just been noted is perhaps explainable by this fact. If witnesses for appellants and witnesses for appellees, and the deceased, had all been present on the same occasion, and witnesses for appellees had testified that the peculiarities and failings of the deceased which we have last above mentioned, existed, and were observed by them on that occasion, and witnesses for appellants had testified that on that occasion those peculiarities and failings²⁹³ did not exist or that they did not observe them, then argument of counsel for appellants bearing on this instruction would be entitled to weight. This is a case where there is practically no dispute in reference to events and transactions. The conflict is in regard to the inference that is to be drawn from those events and transactions.

Upon consideration of all the instructions given we conclude that appellants have no just cause of complaint on account of the action of the court in stating the law to the jury.

No assignments of error other than those which we have discussed in this opinion have been called to our attention by the brief and argument of appellants.

The decree of the circuit court will be affirmed.

Evidence of Mental Unsoundness on the part of a brother or sister of a person accused of crime has been thought admissible on the issue of his insanity: *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

The Admissibility of the Declarations of a testator to sustain or overthrow his will is the subject of a monographic note to *In re Colbert's Estate*, 107 Am. St. Rep. 459-473.

WOODS v. PEOPLE.

[222 Ill. 293, 78 N. E. 607.]

LARCENY OF GAS.—Gas used for illuminating and heating purposes may be the subject of larceny independently of any statute specially making the taking of such gas a crime. (p. 416.)

LARCENY OF GAS.—Illuminating gas may be the subject of larceny, and the asportation is sufficient when the accused, receiving gas from a gas company, diverts some of it to his burners without passing the meter to be measured, the means employed being to use a pipe running directly from the entrance to the exit pipe. While the pipe remains thus connected, there is one continuous taking. (p. 417.)

LARCENY OF GAS—Grand Larceny.—The wrongful taking and theft of gas constitutes grand larceny when the amount consumed from day to day at any one continuous period of taking exceeds the value fixed by statute as constituting such crime. (p. 419.)

LARCENY OF GAS.—Selling Price of gas to consumers in the district in which the gas in question is stolen, and not the cost value of the material from which the gas was made, is to be considered in determining the value of the gas abstracted. (p. 419.)

Indictment and conviction for the larceny of gas. Plaintiff in error was the lessee of a building lighted and heated by gas furnished through meters located in such building under and by virtue of a contract between him and a gas company. At regular intervals during the continuance of such contract plaintiff in error removed the meter, and by rubber hose connections caused the gas to pass from the service pipes directly to the gas burners in such building, where it was ignited and used by such plaintiff in error without being registered.

J. E. W. Wayman and E. N. Zoline, for the plaintiff in error.

W. H. Stead, attorney general, J. J. Healy, state's attorney, and F. Crowe, for the people.

298 HAND, J. The first contention made by plaintiff in error is, that the offense made out against him by the evidence falls within the special statutory crime created by section 117 of the Criminal Code (1 Starr & Curtis' Statutes, 2d ed., c. 38, p. 1288, par. 234), and not under section 167 of the Criminal Code, which defines the crime of larceny, and that he should have been prosecuted for a violation of said section 117, and not for the crime of larceny. We do not agree with such contention. The law is well settled that gas used for illuminating and heating purposes may be the subject of larceny: *Commonwealth v. Shaw*, 4 Allen, 308, 81 Am. Dec. 706; *State v. Wellman*, 34 Minn. 221, 25 N. W. 395; *Regina v. White*, 6 Cox C. C. 213. In the *Shaw* case (4 Allen, 308, 81 Am. Dec. 706), it was said (page 309): "There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like **299** other personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place. In the present case it appears that it was the property of the Boston Gas Light Company; that it was in their possession by being confined in conduits and tubes which belonged to them, and that the defendant severed a portion of that which was in a pipe of the company by taking it into her house and there consuming it. All this, being proved to have been done by her secretly and with an intent to deprive the company of their property and to appropriate it to her own use, clearly constituted the crime of larceny."

Section 117 of the statute above referred to does not undertake to punish a person who unlawfully abstracts gas from the pipes of a gas company, but that section of the statute was passed with a view to protect gas, water or electric meters from being tampered with or false connections being made with gas or water pipes or electrical conductors, so that gas, water or electricity might be consumed or utilized without passing through or being registered by a meter. The crime of larceny and the crime created by that section of the statute are therefore entirely separate and distinct offenses, and the doctrine announced in *Stoker v. People*, 114 Ill. 320, 2 N. E. 55, and kindred cases, relied upon by plaintiff in error, has no application to the case at bar. The plaintiff in error might have been guilty of a violation of said section 117 without obtaining any gas from said light and coke company. The

two offenses are not the same, and the evidence which would support a conviction for a violation of said section 117 of the statute would not necessarily even tend to show the plaintiff in error guilty of larceny. The trial court did not, therefore, err in holding that the plaintiff in error was not entitled to his discharge on the ground that he was being prosecuted for the wrong offense.

It is next contended that, conceding the plaintiff in error was guilty of larceny, the evidence does not show him to be guilty of grand larceny, as it is said there is no evidence in ³⁰⁰ the record that the value of the gas converted by him to his own use at any one time exceeded in value the sum of fifteen dollars. The correctness of this contention depends upon whether the evidence shows the plaintiff in error to have been guilty of a continuing offense. If the gas abstracted on each day is a single and complete offense, then the contention of the plaintiff in error would be correct, as the evidence failed to show that more than fifteen dollars' worth of gas was consumed at 3947 Michigan avenue during any one day while the plaintiff in error was in possession of said premises. On the contrary, however, if it be the law that all the gas which was consumed by the plaintiff in error during any one period while the service pipes of said light and coke company were connected with the burners in said building by said rubber hose or the concealed pipes should be treated as one continuous taking, then clearly the evidence shows the plaintiff in error to have been guilty of grand larceny. In Bishop on Criminal Law (volume 2, seventh edition, page 799), it is said: "Illuminating gas may be the subject of larceny; and the asportation is sufficient where the prisoner, receiving gas of a gas company, diverts some of it to his burners without its passing the meter to be measured, the means employed being to use a pipe running directly from the entrance to the exit pipe. While the pipe remains thus connected there is held to be one continuous taking."

The above statement of the law is based mainly upon *Regina v. Firth*, L. R. 1 C. C. 172, which was an indictment for larceny for abstracting gas from a gas main by means of a pipe which drew off the gas from the main without allowing it to pass through the meter. The prisoner had for several years supplied a portion of his manufactory with gas which was thus abstracted, and it appeared the gas obtained

was burned during the day at a large number of burners and was turned off at night. It was ruled there was but one taking, and therefore but one offense. In support of that conclusion the learned judge who delivered the opinion referred ³⁰¹ to *Regina v. Bleasdale*, 2 Car. & K. 765, as a clear authority on the point, in which case the prisoner was indicted for stealing coal from the mines of a number of different land owners. The taking of the coal had continued for a number of years and all the coal was taken through one shaft, and it was objected that there were a number of different takings and that the charge should be restricted to one special act. Erle, J., held that the taking was one continuous act. Also, *Regina v. Shepherd*, 1 C. C. Res. 117, was referred to, where the question was whether damage done by the prisoner to a number of trees should be considered as one single act. The question was left to the jury, who found the act was continuous. The prisoner was convicted and the conviction was affirmed. The writer of the opinion further illustrated his view that the taking was a continuous one, by the following illustrations: He said: "Take the case of a granary at a railway station, and a man bringing two wagons close to the granary and taking sacks from time to time, and extending this taking over four or five days. Here there would be different takings at different times, but it would be impossible to treat the taking otherwise than as one continuous act. Another case might be suggested of a man at work in a house, stealing, on different days, out of different rooms, and taking one article out of one room and another out of another at intervals of a quarter of an hour or an hour, or longer, all during the same job of work. I should rather suppose that this would be one continuous act and might be included in one indictment."

The trial court in this case instructed the jury "that if they believe, from the evidence, beyond a reasonable doubt, that the defendants, or either of them, are guilty of stealing gas as charged, and that they, or either of them, had been stealing gas for any number of days continuously prior to the fourteenth day of December, 1904, in fixing the value of the property stolen you may add together the various values of the amounts of gas stolen from day to day during the time ³⁰² preceding the discovery of the false connections, if any, on the fourteenth day of December, that such takings from day to day were continued. That is, you may judge, from all

the surrounding facts and circumstances as shown by the evidence how long the said gas, if any, had been unlawfully taken through said false connections prior to the fourteenth day of December continuously, and you may add together the total sum of the various amounts taken on the different days continuously before the said fourteenth day of December."

This instruction left the question of whether the taking was continuous, and from day to day, to the jury, and authorized them, in fixing the value of the stolen property, in case they found the taking was continuous and from day to day, to add together the various amounts taken on the different days continuously before the fourteenth day of December, under which instruction the jury found the plaintiff in error had continuously taken gas to an amount in value in excess of fifteen dollars. We are of the opinion the findings of the jury were amply supported by the evidence, and that they were not misdirected as to the law by the court.

It is finally contended that the court erred in directing the jury that in fixing the value of the gas stolen, if any, they should be guided by the selling price of the gas in question to consumers in the district in which the gas was abstracted, and not by the cost value of the material from which the gas was made. We are of the opinion the court did not err in so instructing the jury. The ordinary test of the value of property is the price it will command in the market if offered for sale, which in this case was the selling price of gas to consumers in the vicinity where the plaintiff in error wrongfully converted the gas of the light and coke company to his own use.

Finding no reversible error in this record, the judgment of the criminal court of Cook county will be affirmed.

The Crime of Larceny is the subject of a monographic note to *People v. Miller*, 88 Am. St. Rep. 559-608. That illuminating gas may be the subject of larceny, see *Commonwealth v. Shaw*, 4 Allen, 308, 81 Am. Dec. 706; note to *State v. Homes*, 57 Am. Dec. 276.

STAR BREWERY COMPANY v. HAUCK.

[222 Ill. 348, 78 N. E. 827.]

NEGLIGENCE—Contributory—Proximate Cause.—Even though a person's own negligence exposes him to danger, if the proximate cause of his injury was the result of the negligence of the person injuring him in failing to use ordinary care to avoid the accident after becoming aware of the danger, the latter is liable. (pp. 421, 422.)

NEGLIGENCE—Contributory—Age of Person Injured.—In determining whether a boy ten years old was guilty of contributory negligence in failing to see, hear and get out of the way of a wagon, which ran over and killed him, the jury may consider his age, intelligence, experience and ability to comprehend danger and take care of himself, and such failure alone is not contributory negligence as matter of law. (p. 422.)

NEGLIGENCE—Ordinance as Evidence.—An ordinance regulating the speed for driving animals upon the streets and prohibiting heedless and reckless driving is properly admitted in evidence in an action to recover for the death of a boy run over and killed by a wagon where the complaint charges careless and negligent driving as the cause of the accident, and there is evidence to sustain the allegation. (p. 423.)

NEGLIGENCE—Playing in Street—Violation of Ordinance—Proximate Cause.—If a boy is killed in the street by being run over by a wagon, and the defense is set up that he was playing a game in the street in violation of a city ordinance prohibiting persons from engaging in games or sports in the street having a tendency to frighten horses or interfere with teams or vehicles, it must be shown, to sustain such defense, that the violation of the ordinance was the proximate and efficient cause of the injury. (p. 423.)

EXPERT EVIDENCE is Admissible only to prove matters not within the common knowledge of ordinary persons. (p. 424.)

MASTER AND SERVANT—Negligence.—A master is liable to third persons for the negligent conduct of his servant, while acting within the line of his duty and in obedience to his master's authority, independently of whether there is any liability of the servant to his master. (p. 424.)

TRIAL—Instructions—Prejudicial Error.—If a party to a suit has the full benefit of the proposition of law contained in an instruction asked by him, he cannot be prejudiced by a slight modification in the wording of the instruction. (p. 425.)

L. D. Turner, for the appellant.

Wise & McNulty and W. P. Launtz, for the appellee.

349 FARMER, J. This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court for two thousand five hundred dollars against appellant for negligently causing the death of appellee's intestate, a boy ten years and ten months old.

The deceased boy, while engaged in playing a game of "tag" in one of the public streets of East St. Louis with other boys, was driven upon and run over by a team hitched to one of appellant's loaded brewery wagons and thereby killed. The team was in charge of and driven by appellant's servant. The evidence as to the circumstances of the boy's being run over was conflicting. Appellee's evidence tended to show that the boy was standing in the street a few feet from the sidewalk, with his face turned in the opposite direction from which the wagon was approaching, but that he was in plain view of the driver for a distance of eighty-five feet if the driver had been observing where he was driving. Appellant's evidence tended to show that the boy suddenly and unexpectedly ran in front of and against the horses, and was thereby knocked down and run over.

³⁵⁰ At the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, appellant moved the court to direct a verdict in its favor, and the rulings of the court in denying these motions are assigned as error. To justify a reversal on those grounds would require us to hold that there is no evidence in the record fairly tending to support the plaintiff's cause of action. This cannot be said of the evidence in this record. The trial court properly submitted to the jury to determine the question of the weight and credibility of the testimony, and their verdict having been approved by the judgment of the circuit court, and that judgment having been affirmed by the appellate court, we cannot weigh the testimony, but can only examine and determine whether there was any evidence fairly tending to prove the plaintiff's case.

It is contended by appellant that the deceased boy could have easily seen and heard the approaching wagon if he had been exercising reasonable and ordinary care, and that his negligent conduct caused or contributed to his death, and brings the case within the rule where negligence is held to become a question of law. It was held in *Chicago etc. Ry. Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385, that even though a person's own negligence exposed him to risk, if the proximate cause of his injury was the result of the defendant's failing to use ordinary care to avoid injuring him after becoming aware of his danger, the defendant would be liable. It was also held in that case that it was not necessary to a recovery that the defendant should have actually known of the danger

to which the injured party was exposed, but that he would be liable if he has "sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief": See, also, *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692. In determining the question whether deceased was guilty of contributory negligence, it was proper for the jury to take into consideration ³⁵¹ his age, intelligence, experience and ability to understand and comprehend danger and to care for himself: *Illinois Iron etc. Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008.

We think the court properly denied appellant's motion to direct a verdict in its favor.

Three counts of the declaration set up the following ordinance of the city of East St. Louis: "496. No person shall ride or drive any horse, mule or other animal in or through any street or avenue or alley of the city of East St. Louis with greater speed than at the rate of six miles an hour, nor shall, in turning the corner of any street, avenue or alley in the city, ride or drive any such animal with greater speed than at the rate of four miles an hour, nor shall willfully or heedlessly ride or drive any such animal so that the same, or any vehicle attached thereto, shall come into collision with any other animal or vehicle, or strike against any person, under a penalty, in each and every case, of not less than five dollars nor more than one hundred dollars."

One of the counts charges that the team was driven at a high rate of speed in excess of that allowed by the ordinance; another one, that appellant, by its servant, willfully and heedlessly drove said wagon and team of horses in a willful and heedless manner; and another, that defendant, by its servant, carelessly and negligently drove said team and wagon in a careless and negligent manner. The court permitted appellee to introduce the ordinance in evidence over the objections of appellant, and afterward refused to exclude it from the consideration of the jury upon appellant's motion, and it is here urged that there was no testimony that appellant's servant violated the ordinance, and that the court erred in allowing it to go to the jury. A number of witnesses testified on this subject for plaintiff below, some of whom said the team was being driven in a lope, some said a gallop, others a fast trot, and others a pretty fast trot. There was also evidence tending to show that when some distance from where deceased was

run over, and while in plain view ³⁵² of the place and all the surroundings, the driver applied a whip or the lines to his team, causing them to travel at an increased rate of speed. The driver himself testified he was going at about six miles an hour, which was the maximum speed allowed by the ordinance. But this ordinance did not apply solely to the speed at which a team might be driven; it also provided that no person should "willfully or heedlessly ride or drive any such animal so that the same, or any vehicle attached thereto, shall come into collision with any other animal or vehicle, or strike against any person." One of the counts based upon this ordinance charged that the team was driven by defendant's servant in a willful and heedless manner, so that it struck the deceased, throwing him to the ground and running over him, and thereby causing his death. There was evidence tending to sustain this count; and even if there had been no evidence tending to prove that the team was driven at a rate of speed in excess of that allowed by the ordinance, the court properly admitted the ordinance in evidence and properly refused to exclude it.

It is next urged that deceased was playing in the street in violation of an ordinance forbidding persons to engage in games, sports or amusements in the streets or upon the sidewalks which would have a tendency to frighten horses or interfere with teams, vehicles or persons passing along the streets or sidewalks. We do not think sport of the character deceased and his little playmates were engaged in, as shown by the evidence, was within the prohibition of this ordinance. It is also to be borne in mind that appellee's evidence tended to show that at the time deceased was struck and run over he was not running or walking, but standing still. Even if deceased had been engaged in the violation of an ordinance, to bar a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury: *Lake Shore etc. Ry. Co. v. Parker*, 131 Ill. 557, 23 N. E. 237; *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Beach on Contributory Negligence*, sec. 45.

³⁵³ The team appellant's servant was driving weighed about two thousand seven hundred or two thousand eight hundred pounds, the wagon weighed about two thousand pounds and was loaded with ten or twelve half barrels of beer, weighing two hundred pounds each. The street he was driving along was paved with brick, and appellant offered to prove

by expert testimony that the wagon and team traveling over the paved street would have made such a noise that if deceased had been standing still he would have heard it. The refusal of the court to allow this proof to be made is complained of by appellant as erroneous. The offered evidence was not within the realm of expert testimony. That a wagon and team passing along a street under the circumstances mentioned would make a noise is a matter of common knowledge. Expert evidence is only admissible to prove matters not within the common knowledge of ordinary persons.

While errors are assigned by appellant upon the refusal of the court to give a number of instructions, in its argument it discusses only the refusal to give instruction No. 7 and the modification of No. 13. Instruction No. 7 told the jury that unless the evidence showed the negligence of appellant's driver was such as would permit appellant to recover from him for injuries caused by his negligence, their verdict should be for defendant. We know of no authority to sustain this instruction. Whether the servant could be held liable to the master would depend upon whether he was acting in accordance with his master's instructions. If, in driving at a rate of speed in excess of that allowed by the ordinance or in utter disregard of the safety of persons on the street, he was obeying the master's directions, he could not be held liable to the master. If the rule of law is as stated in the proposed instruction, it would have required determining the question of whether the driver was liable to appellant, and this would involve the determination of an issue between different parties from those to the suit on trial. The law makes the master liable to third persons for the negligent conduct of the servant while acting within the line of his duty and in ³⁵⁴ obedience to the master's authority, and this is independent of whether there is any liability of the servant to the master. The instruction was properly refused.

Appellant offered the following instruction: 13. "The jury are instructed that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens, instead of a case in which the defendant is a brewery company. Brewery corporations are entitled to the same fair and unprejudiced treatment in courts of law as individuals would be under like circumstances. In considering and deciding this case the jury should look solely to the evidence for the facts and to the instructions of the court

for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant.”

The court struck out the portions of the instruction particularizing a brewery company and gave the instruction as modified, which reads as follows: “The jury are instructed that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporation is entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant.” No prejudice could have resulted to appellant from the court’s action in modifying the instruction. It had the full benefit of the proposition of law contained in the instruction as asked, and could not have been prejudiced by the modification.

The judgment of the appellate court is affirmed.

Negligence in Dealing with Children is the subject of a monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406-433. While children may be chargeable with contributory negligence, they are not held to the same degree of care and prudence as are adults: *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472. They are, while travelers upon public ways, held to that degree of care which may reasonably be expected of children of their age: *McDermott v. Boston Elevated Ry. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548. As to whether a girl of nine years who, while playing a game in the streets, is struck by a team therein, will be deemed negligent, see *Young v. Small*, 188 Mass. 4, 108 Am. St. Rep. 457.

DICK v. RICKER.

[222 Ill. 413, 78 N. E. 823.]

DEEDS—"Children"—"Heirs."—The word "children," used in a deed, may be given the meaning of the word "heirs" when the context requires it to carry out the intention of the grantor. (pp. 428, 429.)

DEEDS—"To the Use of."—If the legal and equitable estate are merged in the same person under a deed, the words "to the use of" such person are of no effect, and no trusteeship can be predicated thereon. (p. 431.)

DEEDS—**Estate-tail.**—A deed granting to a daughter "and to the children of her body begotten," certain described land, "to have and to hold the same to the use" of such daughter, "for and during the term of her natural life and after her death to the use of the children of her body begotten," creates an estate-tail, conveying to such daughter a life estate with remainder in fee to her children. (p. 431.)

Petition by Ricker, as executor of the estate of Mary G. Williams, deceased, to sell certain land.

"Whatever title Mary G. Williams had in the premises sought to be sold was derived through a deed dated September 23, 1878, of which the portion bearing on the question in controversy is as follows: 'Know all men by these presents, that I, Thomas Redmond, of the city of Quincy, . . . have granted, bargained and sold, and by these presents do bargain, grant, sell, convey and confirm, unto my daughter, Eliza J. Williams, and to the children of her body begotten, the following described lots or tracts of land: [Here describing the property.] To have and to hold the same to the use of the said Eliza Williams for and during the term of her natural life, and after her death to the use of the children of her body begotten, in fee tail forever.' At the time of the execution and delivery of this deed by Thomas Redmond, Eliza J. Williams was the lawful wife of one John H. Williams, and Mary G. Williams, her daughter, was then five months old and was then the only child alive of her body begotten. Subsequently a son, John Williams, Jr., was born to Eliza J. Williams, but died in his mother's lifetime, still an infant, without children. She died prior to the death of her daughter, Mary G. Williams, leaving no husband and leaving Mary G. Williams as her only heir at law. Mary G. Williams died without ever having any children of her body begotten. The county court found that Mary G. Williams died seised in fee

simple of a full and complete title of the real estate described in this deed and decreed that the same should be sold to pay debts. The cause was thereupon appealed to this court."

H. M. Swope and Emmons & Emmons, for the appellants.

Wilson & Wall, Vandeventer & Woods and T. J. Condon, for the appellees.

⁴¹⁵ CARTER, J. As we understand the contention of appellants, it is that the deed vested in Eliza G. Williams simply an ordinary life estate; that Mary G. Williams was vested with the title to said real estate as the first holder under the fee tail estate, and as she died without any children or heirs of her body, the title to said real estate reverted, as one of the incidents of an estate-tail upon failure of competent takers, to the grantor, his heirs or devisees. Appellants claim as heirs of Thomas Redmond.

If an estate-tail was created by this deed, the word "children," both in the granting and the habendum clauses, must be construed to mean "heirs." The authorities have always held that in order to create this estate, words of inheritance as well as words of procreation are necessary. Blackstone says: "As the word 'heirs' is necessary to create a fee, so, in further limitation of the strictness of the foedal donation, the word 'body' or some other words of procreation are necessary to make it a fee-tail and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail": Sharswood's Blackstone, b. 2, p. *115. To the same effect are 1 Washburn on Real Property, 4th ed., *75; Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589; 11 Am. & Eng. Ency. of Law, 2d ed., p. 372, and cases there cited.

If the word "children" is to be considered a word of purchase, and not of limitation, in the granting clause or premises of this deed, then, manifestly, it must be construed the same way in the habendum clause. Should these words be taken in their ordinary sense, without reference to the ⁴¹⁶ context of the deed, then clearly, if the habendum clause does not in any way limit or define the estate granted, under section 13 of our statute on conveyancing, Eliza G. Williams and Mary G. Williams would take an estate in fee in the property in question, because Mary G. Williams was the only child in esse at the time the deed was delivered, and a gran-

tee must be in existence at the time the deed is executed in order that a present title in possession may pass: *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Morris v. Caudle*, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. 1036, 44 L. R. A. 489. The son, John Williams, Jr., was not born until some time after this deed was executed. It may be said in passing, it appears from the record that his only heirs were his mother, Eliza J. Williams, and his sister, Mary G. Williams; hence the fee-simple title would ultimately have all been in these two, even if he had been in existence at the time of the execution of the deed and had taken thereunder. Should the habendum clause be construed to limit or define the estate conveyed in the granting clause in accordance with the rule laid down in *Riggin v. Love*, 72 Ill. 553, *Welch v. Welch*, 183 Ill. 237, 55 N. E. 694, and *Sassenberg v. Huseman*, 182 Ill. 341, 55 N. E. 346, then, construing the word "children" not to mean "heirs," but in the ordinary sense, without any reference to the context, and considering both the granting and habendum clauses together, it would not create an estate-tail, but Eliza J. Williams would have taken the property for and during her natural life, and Mary G. Williams would have taken the remainder of the estate: *Beacroft v. Strawn*, 67 Ill. 28. So that whether the habendum clause be considered repugnant to the granting clause, and therefore rejected, or whether it be construed as limiting and defining the granting clause, if the word "children" be construed not to mean "heirs," and therefore not conveying an estate in tail, the ruling of the county court must be upheld.

The word "children," however, when the context requires it in order to carry out the intent of the testator or grantor, has been construed to mean "heirs." In *Sweetapple* ⁴¹⁷ v. *Bindon*, 2 Vern. 536 (quoted in 1 Preston on Estates, 409), it was held that where there was a gift by will, to be laid out by the testatrix in lands and settled to the use of the daughter, Mary, and her children, and if she died without issue, then over, "the court must take the will as they found it; that Mary had an estate-tail in the lands to be purchased." Lord Hardwick is quoted as having said, in discussing this question in *Bagshaw v. Spencer*, 2 Atk. 577: "There can be no magic or particular force in certain words more than others; their operation must arise from the sense they carry." Justice Buller, in considering a similar question in *Hodgson v.*

Ambrose, 1 Doug. 356, said (page 342): "It seems to me to be a false logic to put a different sense upon any words from what, in general, they import to bear, by mere inference from the words themselves, unexplained by any others; though if other words manifest the intent, I know of no law that says the intent shall not prevail." This court, in *Strawbridge v. Strawbridge*, 220 Ill. 61, 110 Am. St. Rep. 226, 77 N. E. 78, 4 L. R. A., N. S., 948, said (page 63): "The term 'children' is primarily a word of purchase, and is not to be construed as equivalent to 'heirs' in the absence of other words or circumstances showing it to have been used in that sense; but where there are other words in the will showing that the word 'children' was used in the sense of 'heirs,' the word will be construed as a word of limitation equivalent to 'heirs'": See, also, 5 Am. & Eng. Ency. of Law, 2d ed., 1092, and cases there cited. This court has held that the words "heirs," "issue" and "children" may be construed interchangeably when found necessary to effectuate the intention of the testator, and that the words "heirs" and "children" may be used synonymously in the same instrument: *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Leiter v. Sheppard*, 85 Ill. 242.

The grantor, Thomas Redmond, clearly intended to create an estate-tail by this deed; therefore he must have used "children" in the sense of "heirs." It is admitted by all the briefs that if the habendum does not limit or define in some ⁴¹⁸ way the estate conveyed by the granting clause, then the granting clause, under the common law, would create an estate-tail general, which, under the sixth section of our statute relating to conveyances, would vest in Eliza J. Williams a life estate with the remainder in fee to Mary G. Williams.

But appellants contend that the habendum clause defines the estate conveyed, and that Eliza J. Williams took simply an ordinary life estate, independently of the entailed estate, and that Mary G. Williams was the first tenant to hold by virtue of the fee-tail estate. They state in their reply brief that they have not been able to find any case in which a deed with similar language has ever been construed before a court of last resort of any of the states. The question may never have been directly before any of the courts of this country (although the case of *Ross v. Adams*, 28 N. J. L. 160, is very similar), but some early English decisions on this question

may be found construing words substantially the same as those in this deed, and it is evident that a careful consideration of the "old black-letter law" will furnish the true guide to the original nature and incidents of those estates which have been handed down from those times, and particularly of one like fee-tail, which, having been practically abolished in our jurisprudence, is only to be found treated as a vital reality in the country and at the period in which it grew and flourished. Taking the construction of the habendum clause most favorable to appellants, then the rule in Shelley's Case may be invoked, with the long line of decisions based thereon, in order to arrive at the proper construction to be given the words in the habendum clause. In *Perrin v. Blake*, 4 Burr. 2579, which is one of the first decisions giving prominence to the rule laid down in Shelley's Case, a learned sergeant expressed the rule in Shelley's Case to be: "In any instrument, if a freehold be limited to the ancestor for life and the inheritance to his heirs, either mediately or immediately, the first taker ⁴¹⁹ takes the whole estate; if it be limited to the heirs of his body, he takes a fee-tail; if to his heirs, a fee simple." This statement of the rule is quoted with approval in *Preston on Estates* (volume 1, 265), and has been frequently sanctioned by this court: *Baker v. Scott*, 62 Ill. 86; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Frazer v. Supervisors*, 74 Ill. 282. In the report of *Perrin v. Blake*, 4 Burr. 2579, it is stated that in case of "a devise to A for life and afterward to the heirs of his body, it was admitted on all hands that A took an estate-tail." The same rule is laid down in *Hayes v. Foorde*, 2 W. Black. 698; *Colson v. Colson*, 2 Atk. 246; *Bagshaw v. Spencer*, 2 Atk. 577; *King v. Melling*, 2 Lev. *58; *Richards v. Bergavenny*, 2 Vern. 324; *Elton v. Eason*, 19 Ves. 73. In these last two cases, *Preston on Estates* (volume 1, 419) states the findings of the courts in the following words: "A devise to A for life and the heirs of her body, if any, is an intail in A"; and, "Devise to A for life, and after her death to the heir male of her body living at her death, is an estate-tail in A." These cases are decisive. If the habendum clause defines the estate granted, then Eliza J. Williams, except for our statute would be held to be the first taker in a fee-tail estate.

But appellants contend that the words in the deed, "to the use of the said Eliza J. Williams for and during the term of her natural life, and after her death to the use of

the children of her body begotten, in fee-tail forever," require a different construction than if the word "use" had not been inserted. Coke says: "If an estate be made, either before or since the statute of 27 Henry VIII, chapter 10, to a man and the heirs of his body, either to the use of another and his heirs or to the use of himself and his heirs, this limitation of use is utterly void": 1 Coke, Thomas' ed., 400. This court has held that a trusteeship cannot be predicated of one who holds for life only and for his or her sole use and benefit: *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136; *Thompson v. Adams*, 205 Ill. 552, 69 N. E. 1. The words "to the use of" are ⁴²⁰ of no effect, for the equitable estate is merged in the legal estate. The equitable estate and the legal estate are in the same person: 1 Perry on Trusts, sec. 13.

It has been held by this court that the rule in the Shelley Case did not apply to an estate-tail in this state, for the reason that our statute had provided to the contrary: *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Baker v. Scott*, 62 Ill. 86. Under section 6 of our act on conveyances, as construed by this court, Eliza J. Williams took under this deed an estate during her life, and her daughter, Mary G. Williams, took the remainder in fee simple: *Frazer v. Supervisors*, 74 Ill. 282; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925; *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591; *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Metzen v. Schopp*, 202 Ill. 275, 67 N. E. 36.

The construction contended for by appellants is absolutely inconsistent with the spirit and policy of all American law. It should not be admitted unless the language is so plain that no other construction is possible, and even then the courts should not lay down such a rule unless the great weight of authority absolutely requires it. As we have seen, even in times when the policy of the law was to entail property for generations and thus foster and sustain a privileged class, the contention of appellants would not have been upheld; much less should it in this day, when the courts have repeatedly held that estates must vest at the earliest period possible, and that public policy requires that the entailment of estates be considered absolutely inconsistent with the genius and teachings of the American people.

The conclusions we have reached on the points heretofore discussed render it unnecessary to consider other points argued in the brief.

We think the rulings of the county court were in accordance with the law. The decree of that court will accordingly be affirmed.

On Devises Creating Estates-tail, see the recent cases of *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471; *Beilstein v. Beilstein*, 194 Pa. 152, 75 Am. St. Rep. 692.

The Words "*Heirs*," "*Issues*" and "*Children*," when found in wills, may be construed interchangeably, where necessary to effectuate the intention of the intestator: *Strawbridge v. Strawbridge*, 220 Ill. 61, 110 Am. St. Rep. 226, and see the cases cited in the cross-reference note thereto.

DESLAURIES v. SOUCIE.

[222 Ill. 522, 78 N. E. 799.]

CERTIORARI is not a Writ of Right, and may be granted or denied in the discretion of the court according to the showing made in a particular case, and evidence extrinsic to the record may be received before issuing the writ, to show that no injustice has been done. (p. 433.)

CERTIORARI—Evidence.—On Motion to Quash a writ of certiorari and dismiss the petition extrinsic evidence may be taken, not for the purpose of contradicting or enlarging the record, but to show that public detriment and inconvenience may result from quashing the original proceedings. (p. 433.)

CERTIORARI—Quashing Writ.—A writ of certiorari to review the record of the organization of a drainage district must be quashed where, owing to lapse of time, incurring debts and levying taxes, great public detriment will result from quashing the original organization and where the petitioners have acquiesced in the organization and work without objection, and none of the proper parties are complaining of want of notice of such organization proceedings. (pp. 434, 435.)

Petition for a writ of certiorari against the drainage commissioners of a certain drainage district, commanding that they certify a complete transcript of the record and papers relating to the attempted organization of such district that the court may inspect and set aside such record and proceedings if found irregular. The writ was issued on a vacation order and quashed upon motion upon the hearing. The petitioners appealed.

W. R. Hunter and Granger & Granger, for the appellants.

A. E. Smith and G. B. Campbell, for the appellees.

524 CARTER, J. Appellants have not complied with rule 15 of this court by filing a copy of the opinion of the appellate court. We would be justified in dismissing the appeal on this ground alone, but prefer to consider and dispose of the case on the briefs and record presented.

The writ of certiorari is not granted as a writ of right, and may be granted or denied in the discretion of the court, according to the showing made in each particular case: *Trustees of Schools v. School Directors*, 88 Ill. 100; *Commissioners of Highways v. Barnes*, 195 Ill. 43, 62 N. E. 775; 4 Ency. of Pl. & Pr. 31. Being addressed to the sound judicial discretion of the court, evidence extrinsic to the record may be very properly received before issuing the writ, to show that no injustice has been done, for on the return of the writ the court will only look to the record: *Board of Supervisors v. Magoon*, 109 Ill. 142; *Hyslop v. Finch*, 99 Ill. 171; *Sampson v. Commissioners of Highways*, 115 Ill. App. 443; *School Directors v. School Trustees*, 91 Ill. App. 96. After the writ has been issued, on motion to quash the writ and dismiss the petition extrinsic evidence may then be heard, not for the purpose of contradicting or enlarging the record, but to show that public detriment and inconvenience might result from quashing the original proceedings: *Drainage Commrs. v. Volke*, 163 Ill. 243, 45 N. E. 415; *Sampson v. Commissioners of Highways*, 115 Ill. App. 443. Appellants insist that the record introduced **525** below of the proceedings of the commissioners only can be looked to here. But the case was not heard on this theory. There is nothing in the testimony to show that the evidence introduced by the appellees is the entire record that would have been made a part of the return to the writ. The writ was disposed of in the trial court on motion to quash. We do not think the trial court erred in so doing without first requiring the defendants to make return to the writ.

Appellants argue that there was a defective notice as to one of the meetings of the commissioners, in that there was a blank in the copy offered in evidence where the date of the meeting should have appeared. They are not in a position to urge that point at this time, as they expressly averred in their petition for the writ of certiorari that a proper notice

had been given of the meeting in question, and they cannot for the first time, on appeal, urge that point: *Chapman v. Drainage Commrs.*, 28 Ill. App. 17.

The principal contention of appellants is, that the record in this case does not affirmatively show the required notice to Graham and Parker, who were not signers of the original petition and whose land was afterward taken in at an adjourned meeting. Neither Graham nor Parker is here objecting to the validity of the organization of the district. To the contrary, Graham is one of the drainage commissioners and is here contending for the legality of the proceedings.

It is urged that on the authority of *Sanner v. Union Drainage District*, 175 Ill. 575, 51 N. E. 857, such question can be raised in this manner by any interested parties. The court evidently allowed the motion to quash on the ground that the district had been organized and in operation for some time, and that contracts had been made, expenses incurred, taxes levied and presumably collected—in short, that it had been carrying out the purposes of its organization as a going district for months, and therefore the common-law writ of certiorari could not be used to test the legality of its existence: ⁵²⁶ *Lees v. Drainage Commrs.*, 125 Ill. 47, 16 N. E. 915; *Sanner v. Union Drainage District*, 175 Ill. 575, 51 N. E. 857; *School Directors v. School Trustees*, 91 Ill. App. 96. From the time the petition for this district was filed June 20, 1903, until the petition for the writ of certiorari, April 28, 1904, steps were continuous for organizing the district and carrying on its business. Manifestly, from the evidence in this record all three appellants were cognizant of the entire proceedings. One of them voted at the election for drainage commissioners; another entered into a contract for right of way across her lands, and the third waived all claim for damages. The lack of notice to Graham certainly cannot be raised by them, as he is here contending for the legality of the proceedings. The other land owner, Parker, has not complained because of any lack of notice. If there be a defect in the notice of such nature that it might be raised by appellants, such defect could as well be presented by a writ of quo warranto, and the district could then prove actual notice, even though such notice was not shown by the record.

On the facts presented here, this case comes clearly within the doctrine in *School Directors v. School Trustees*, 91 Ill.

App. 96, where, by reason of lapse of time, acquiescence of the parties complaining, incurring debts, levying taxes, etc., it would have been an abuse of the sound legal discretion of the court and a great public detriment to have quashed the proceedings. The errors, at most, are technical and harmless, so far as appellants are concerned, and are not shown to be such as would cause substantial injustice to anyone.

The judgment of the appellate court will accordingly be affirmed.

Farmer and Vickers, JJ., having heard this case in the appellate court, took no part in its decision here.

The Writ of Certiorari Issues only where the tribunal under review has exceeded its jurisdiction: *Tinn v. United States Dist. Attorney*, 148 Cal. 773, ante, p. 000; *State v. Whiteher*, 117 Wis. 668, 98 Am. St. Rep. 968. The scope of certiorari will be found discussed in the notes to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 29-46; *Elliot v. Superior Court*, 103 Am. St. Rep. 110-117.

JOLLY v. GRAHAM.

[222 Ill. 550, 78 N. E. 919.]

DEED in Fraud of Wife—Effect of.—A deed executed by a grantor in fraud of his wife's rights in the property is, when delivered, binding upon such grantors and his heirs, and a court of equity will not interfere at their instance to set it aside. (p. 439.)

FRAUDULENT CONVEYANCES—Jurisdiction of Equity to Annul—Heirs.—A person cannot deliberately put his property out of his control for a fraudulent purpose, and then, through the intervention of a court of equity, regain it after his fraudulent purpose has been accomplished. This rule applies not only to the fraudulent grantor, but also to his heirs and assigns. (p. 439.)

DEED IN FRAUD OF WIFE.—A deed executed and delivered by a grantor in fraud of his wife's rights in the property does not create a trust as between the parties to it. (p. 439.)

FRAUDULENT CONVEYANCES—Trusts.—If a deed is executed by a husband and wife for the fraudulent purpose on his part of placing the title to the property beyond the reach of his wife, and there is no agreement to reconvey, nor promise in writing that the property shall be held for the benefit of the grantor or his heirs, the conveyance does not create a trust for his benefit. (p. 439.)

DEEDS—Delivery—Death of Grantor.—If a deed from father to son is not delivered until after the grantor's death, when it was signed by the grantor's widow and delivered to such son, no title passes under the deed. (p. 440.)

INFANCY—Estoppel by Agreement Concerning Title.—If, in a partition suit, both parties rely upon the validity of a deed executed to a son by his father, but wholly ineffective as a conveyance of the title, the grantee's minor heirs are not estopped by any agreement made by them as to the validity of such title, from claiming their undivided interests in the lands of such grantor through his grantee, and they may repudiate any conveyance of the land made by their father. (p. 440.)

J. W. Gibson, for the plaintiff in error.

Davidson & Isley, for the defendants in error.

550 WILKIN, J. At the April term, 1905, of the circuit court of Jasper county, the defendants in error, Osmer E. Graham, Thomas L. Graham and Laurel C. Graham, by Martha E. Carey, **551** their next friend, filed a bill for partition against the plaintiff in error, Anna Jolly. The bill alleged that Charles H. Graham, the father of the complainants, died intestate on June 19, 1902, seised of certain real estate situated in Jasper county; that he derived title to the same on February 1, 1893, from his father, Thomas Graham, and that on December 26, 1893, Charles H. Graham and his wife executed a deed of conveyance therefor to his mother, Rebecca Graham, who on January 5, 1894, conveyed the same to the defendant, Anna Jolly; that both of said last-mentioned conveyances were without consideration, were merely colorable and never intended to convey any interest in said premises to the grantees; that subsequent to the execution of said deeds Charles H. Graham remained in the possession of said real estate, received the rents and profits therefrom, and paid the taxes thereon, and if the said Anna Jolly derived any interest in the same by virtue of said deeds, she held it in trust for the said Charles H. Graham and his heirs at law. It is also alleged that the said Anna Jolly executed a deed conveying said premises back to the said Charles H. Graham, which deed has been lost; also that said Charles H. Graham died seised of the premises in question, and the complainants, as his children and heirs, are the owners thereof in equal shares. The prayer is that said deeds of conveyance from Charles H. Graham to Rebecca, and from the latter to the defendant, Anna Jolly, be set aside as clouds upon the title of the complainants, and for partition. The hearing was upon bill, answer, replication and proofs, and the court rendered a decree granting the prayer of the bill, from which this writ of error has been sued out.

Thomas Graham, the father of Charles H. and grandfather of the complainants below, was the owner of land in Jasper county, this state, including that here in controversy. On March 7, 1892, intending to divide his lands between his children, he made certain deeds, among others one to his son Charles H. for the north half of the northwest quarter ⁵⁵² and the north half of the south half of the northwest quarter of section 31, township 8 north, range 9 east, in said county, being the same lands described in the complainants' bill. These deeds were never delivered by Thomas Graham, but retained by him to the time of his death, which occurred on the fifteenth day of July, 1892. His wife, Rebecca Graham, did not join him in the execution of the same, but after his death signed and attempted to deliver the deeds to the respective grantees therein named, giving to Charles H. the one to him, as above stated. That deed described the homestead of the father, Thomas Graham, and after his death and the delivery of the deed to Charles H. by his mother, he, together with her, Rebecca Graham, and his sister, Anna Jolly, the plaintiff in error, and his own wife, continued to reside thereon for a period of five years, during which time the children, the complainants in this bill, were born. Differences arose in the family, resulting in quarrels and disagreements between himself and wife and between her and the mother and sister, which finally resulted in the wife's abandonment of the home. The cause of their disagreement and the responsibility therefor need not now be discussed nor considered. It is very clear that the wife lived unhappily in the home, and complained that both her husband and his sister, Anna, mistreated her in such a way as to render her life miserable. About the time the deed of February 1, 1893, was delivered to Charles H. Graham, his wife left him and returned to her parents, and he became exceedingly anxious lest she should involve him in a suit for separate maintenance or for a divorce with alimony, and the property in question be taken from him or encumbered, and he made earnest efforts to secure her return, procuring the aid of friends and neighbors to that end. He said he did not care for her nor for her return, but did not want his property to fall into her hands nor the hands of her family. He succeeded in inducing her to return to him, and thereafter, by persuasion, induced her to join him in a deed of conveyance to his mother, Rebecca.

553 The evidence shows that he then declared if he could get her to sign the deed so as to get title out of him, he did not care what took place. He used persuasive arguments to induce her to join him in that deed, telling her that his mother felt that the home place should be hers and that she was without a home, and that in his opinion it would harmonize matters between them if the deed was made. The deed was executed on December 26, 1893, and the families continued to reside in the homestead, the title remaining in the mother until January 5, 1894, when she, with the consent of Charles H., conveyed it to the plaintiff in error. Thereafter, in the year 1895, Charles H. and his wife finally separated and she obtained a divorce against him. The mother died January 22, 1900, and the premises continued to be occupied by Charles H. and his sister, the plaintiff in error, until the spring of 1902, when he went west and died June 19th of that year.

In this litigation the parties seem to concede that the legal title to the premises in controversy vested in Charles H. by virtue of the deed executed by his father, Thomas Graham, signed by his mother and delivered after the death of the grantor. On that concession it is insisted on behalf of the plaintiff in error that the decree of the circuit court is erroneous, because of the evidence failing to show that the deeds from Charles H. to Rebecca and from her to the plaintiff in error were merely colorable and not intended to convey the title to the grantees therein named; also that the evidence shows that those conveyances were made and procured to be made by Charles H. Graham, the father of the complainants below, for the fraudulent purpose of putting the property out of his hands to defeat the marital rights of his wife in case she should sue him for separate maintenance or for a divorce and alimony, which being true, a court of equity will not set aside those deeds on his application or that of the complainants, his heirs. We think the evidence clearly shows that the conveyances in question were executed without consideration. It does clearly appear that the **554** intention, both of the grantor and grantees in those deeds, was to vest title in the latter. We are also convinced that the sole object and purpose of the grantor, Charles H. Graham, in making the deed to his mother and afterward consenting that the property should be conveyed to his sister, was for the purpose of cheating and defrauding his wife.

This being true, the conveyances became binding upon the grantor, Charles H., and all parties in privity with him. Having conveyed the property for the fraudulent purpose of defeating the rights of his wife, the law will leave him where he placed himself. Both his mouth and that of his heirs are closed to question the validity of the conveyance: *Miller v. Marekle*, 21 Ill. 152; *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511; *Jones v. Jones*, 213 Ill. 228, 72 N. E. 695. The law will not permit a party to deliberately put his property out of his control for a fraudulent purpose, and then, through the intervention of a court of equity, regain the same after his fraudulent purpose has been accomplished. And this rule applies not only to him, but to his heirs and assigns. There is nothing in this record upon which to base the claim that by the deeds a trust relation was created between the parties. The purpose, as we have already said, was to place the title beyond the reach of the wife of the grantor, and no trust was or could be thereby created. There is not here even an agreement to reconvey to Charles H., nor is there any promise in writing that the property was to be held for his benefit or for the benefit of his heirs. The court erred in granting the relief prayed upon the ground that as between these parties the deeds sought to be set aside as clouds upon the complainants' title were merely colorable, and did not vest the title in the plaintiff in error.

Nor are we able to agree with the learned chancellor that the testimony in this record justifies the conclusion that the plaintiff in error, Anna Jolly, did in fact deliver a deed to Charles H., during his lifetime, reconveying the premises to him. We have given careful consideration to this contention ⁵⁵⁵ on behalf of the complainants below, and find the evidence, to say the least, so conflicting and unsatisfactory as to be wholly insufficient to authorize a decree divesting the plaintiff in error of her title. In the first place, there is an entire absence of proof of the existence of any such deed—that is, no witness testifies to having knowledge of the execution, acknowledgment or delivery of any deed of conveyance from Anna Jolly to Charles H. Graham, or to having seen such a deed or having other personal knowledge of its existence. Two witnesses testify to declarations by the plaintiff in error to the effect that she made a deed back to her brother, but the testimony of these witnesses is vague and

more or less uncertain, while she testifies positively that she never made such a statement, and as to one of the witnesses she is corroborated by her daughter, who was present at the time of the alleged statement. Several witnesses testified that Charles H. stated shortly prior to his going west that the title to the land was in his sister, Mrs. Jolly, and we think the clear preponderance of the evidence is that no attempt was made by the plaintiff in error to reconvey the land to Charles H., but that the legal title continued in her after his death and to the present time. There is abundant evidence in the record to the effect that he claimed to be the owner of the land, and that she admitted that fact, but the same evidence which proves these facts also proves that he had fraudulently placed the title in her for the purpose of defrauding his wife, as above stated.

Our conclusion is, that if the title became legally vested in Charles H. Graham, it passed by his deed to his mother and by her deed to the plaintiff in error, and that because of his fraudulent purpose in so conveying the title a court of equity cannot set aside and annul those deeds at the instance of the complainants, his heirs, and that the decree below cannot be sustained upon the ground that there was a reconveyance of the title to him by plaintiff in error, for the want of competent and sufficient evidence to sustain that contention.

⁵⁵⁶ We are of the opinion, however, that the title to the lands here in controversy never became legally vested in the father of the complainants below, Charles H. Graham. The deed from his father to him was never delivered by the father, and it is too clear for argument that under the evidence in this case his widow, Rebecca Graham, could not legally deliver it after her husband's death. It is true counsel on either side say they do not wish to question the legality of the title in Charles H., and manifestly, in the view which they take of the case, it was to their interest to make no contest on that question. The rights of both parties on the bill and answer depended upon the validity of that title; but in the view we take of the case these minor complainants ought not to be precluded by any agreement or consent as to the validity of that title, but may base their claim to an undivided interest in the lands of their grandfather through their father, Charles H. Graham, and repudiate the deed of conveyance set up in the bill.

For the reasons stated the decree of the circuit court will be reversed and the cause remanded to that court for further proceedings in conformity with the views here expressed.

Conveyances by a husband to defraud his wife are discussed in the note to *Collins v. Collins*, 83 Am. St. Rep. 411-423. The general rule is, that a fraudulent conveyance is valid as between the parties, and the law provides no remedy to either of them, if in *pari delicto*, either to disturb or enforce it: See *Kirby v. Raynes*, 138 Ala. 194, 100 Am. St. Rep. 39, and cases cited in the cross-reference note thereto; *Baldwin v. Williams*, 74 Ark. 316, 109 Am. St. Rep. 81.

COON v. WILSON.

[222 Ill. 633, 78 N. E. 900.]

HOMESTEADS—Conveyance of by Husband to Wife.—If the statute provides that no conveyance of the homestead, not subscribed by the householder and his wife, shall be valid unless possession is abandoned or given pursuant to the conveyance, possession of a homestead under a deed not signed by the wife is given pursuant to the conveyance, whenever the possession would not have been delivered except for the conveyance and no other reason appears for such delivery of possession, no matter what length of time or what circumstances intervene between the execution of the deed and the delivery of possession. (p. 443.)

HOMESTEADS—Conveyance of by Husband to Wife.—Under a statute providing that no conveyance of the homestead, not subscribed by the householder and his wife, shall be valid unless possession is abandoned or given pursuant to the conveyance, if a husband for an adequate consideration conveys a homestead occupied by himself and his wife, to her, but the deed is inoperative because not signed by her, and they thereafter continue to reside on the premises for nine years, when they take up their abode elsewhere, and thereafter she leases the property to tenants, there is a sufficient delivery of possession to her pursuant to the conveyance to vest title in her. In such case it is not necessary that possession should be given at any particular time after the execution of the deed, or that delivery of possession should be so connected with the execution and delivery of the deed as to constitute one and the same transaction. (p. 443.)

W. A. Covey, for the appellants.

Brown, Wheeler, Brown & Hay and Nortrup & Williams, for the appellee.

636 SCOTT, C. J. For a valuable and adequate consideration Coon conveyed the real estate, which was occupied by himself and wife as a homestead, to his wife by deed in 1893. By the provisions of section 4 of the exemption

act that deed, not having been subscribed and properly acknowledged by the wife, was inoperative as to the homestead estate unless possession wa abandoned "or given pursuant to the conveyance." After the conveyance was made, Coon, with his wife, continued to reside on the premises until May, 1902, when they took up their abode elsewhere, and thereafter ⁶³⁷ this property was occupied by tenants, who rented from the wife, until October 29, 1903, when she sold the real estate to Castleberry and Howell, who immediately went into possession, taking a bond for a deed signed by both Coon and his wife, but which recites that the purchase was made from the wife. It is apparent that prior to the time when Velarie Coon's vendees entered into the premises under their contract of purchase the possession of the property had been given to her by her husband, and that she had received such possession at or subsequent to the time when she and her husband ceased to occupy the realty as a place of residence. Whether that possession had been given "pursuant to the conveyance" is a question which must be here determined.

Appellee contends that the execution and delivery of the conveyance, and the delivery of possession in pursuance thereof, which are contemplated by the statute, must be one and the same transaction; that the delivery of possession must be so near in point of time to the execution and delivery of the conveyance as to show one continuous transaction, or that when delivery is long deferred, such future delivery must have been contemplated and provided for by the parties to the conveyance at the time of the execution and delivery thereof.

Appellee relies principally upon certain expressions used by this court in the cases of *Eldridge v. Pierce*, 90 Ill. 474, *Willard v. Masterson*, 160 Ill. 443, 43 N. E. 771, *Gray v. Schofield*, 175 Ill. 36, 51 N. E. 684, *Davis v. McCullough*, 192 Ill. 277, 61 N. E. 377, and *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767. It is conceded by counsel for the trustee, however, that neither of these authorities is directly in point. The question here presented did not arise in either case, and for that reason the language relied upon should not control.

In our judgment, possession is "given pursuant to the conveyance" when it is given by reason or on account of the conveyance having been made, and not by reason or on ac-

count of some other circumstance. If the possession would ⁶²⁸ not have been delivered except for the making of the conveyance, and no adequate reason appears for the possession being delivered except the making of the conveyance, then the possession is to be regarded as having been given pursuant to the conveyance, no matter what length of time or what circumstances intervene the execution of the deed and the change in the possession.

Velarie Coon entered into possession of the premises by virtue of the deed made to her by her husband, and it does not appear from the evidence in this record that the transfer of the possession from him to her was occasioned by anything which would lead to a change in the possession other than the execution of that deed. Whenever the possession was given pursuant to the conveyance the deed became operative as to the homestead estate, and having been so given at a time prior to the date when the petition in bankruptcy was filed, the title vested in Velarie Coon at such prior time, and did not pass to the trustee by virtue of the bankruptcy proceedings.

Section 4 of the exemption act does not require that the possession should be given within any particular time after the execution of the deed, or that the delivery of the possession should be so connected with the execution and delivery of the deed as to be regarded as a part of the same transaction, and there is no warrant for reading such provisions into this law.

Appellee was without title to any part of the premises described in the bill, and for this reason the decree of the circuit court will be reversed and the cause remanded to that court, with directions to dismiss the bill for want of equity.

A Conveyance of a Homestead by a Husband to His Wife need not, according to perhaps the better rule, be joined in nor executed by her: *Kindley v. Spraker*, 72 Ark. 228, 105 Am. St. Rep. 32; note to *Jerdee v. Furbush*, 95 Am. St. Rep. 923-926. Compare, however, *Robertson v. Tippie*, 209 Ill. 38, 101 Am. St. Rep. 217. The sufficiency of the joinder of husband and wife in a conveyance of her real estate is considered in the note to *Peter v. Byrne*, 97 Am. St. Rep. 384-392.

CASES
IN THE
SUPREME COURT
OF
IOWA.

BLUMER v. IOWA RAILROAD LAND COMPANY.

[129 Iowa, 32, 105 N. W. 342.]

PUBLIC LANDS—Railroad Grants—Adverse Possession.—Public land granted to and earned by a railroad company is subject to adverse possession, though not certified to such company by the land department of the government. (pp. 446, 447.)

PUBLIC LANDS—Possession in Good Faith.—The possession of an entryman on public lands, as against another claimant of the same lands, will be presumed to be in good faith, if he goes into possession under an approved application, and legal advice that he has a right to such possession, and thereafter complies with the law in relation to cultivation. This presumption is not overcome by the fact that his previous application for such lands has been canceled. (pp. 447, 448.)

PUBLIC LANDS—Adverse Possession by Entryman.—The claim of one who enters land with the purpose of acquiring title from the government by compliance with its laws is quite as hostile, as to all others, as though patent had been issued, although such claim is subservient to the government. (p. 450.)

PUBLIC LANDS—Adverse Possession.—Statute of Limitations runs in favor of an occupant of government lands under an approved application therefor, from the time he thus enters into possession, rather than from the time when he becomes entitled to a patent for the land. (p. 451.)

C. A. Clark & Son and W. G. Clark, for the appellant.

Lohr, Gardner & Lohr, for the appellee.

³³ LADD, J. The forty acres of land in controversy are located within the place limits of the grant for the benefit of the Dubuque and Sioux City Railroad Company afterward transferred to the Iowa Falls and Sioux City Railroad Company, under the act of Congress, approved May 15, 1856. The road was completed prior to 1872, and, though this tract

was included in the list certified to the state, approval was delayed by the assertion of title to it under the swamp land act until 1878. In 1883 John Carraher applied to the local land office at Des Moines to enter it under the timber culture act, but his application was rejected, owing to conflict with the grant to the railroad company, and the decision was affirmed by the commissioner of the general land office in December of the same year. He then appealed to the Secretary of the Interior, by whom the previous decisions were approved June 17, 1891.

In the meantime the company had filed (1885) selections of land, including this, in the local land office, as inuring to it, under the grant, and these were accepted by the register and receiver and certified to the commissioner, but under the practice of the department could not be passed on until Carraher's appeal had been disposed of, and when reached in January, 1893, this land, through oversight or other cause, was omitted from the certification to the company. In 1888 Carraher presented a second application for the same land to the register and receiver, and procured the following receipt:

"Timber Culture.

"Receiver's Receipt No. 607.

Application No. 607.

"Receiver's Office, Des Moines, Iowa.

"May 31st, 1888.

"Received of John Carraher the sum of nine dollars — cents, being the amount of fee and compensation of ³⁴ register and receiver for the entry of northeast of N. E. quarter of section one in township 89 of range 46, under the first section of the act of Congress, approved June 14th. 1878, entitled 'An act to amend an act entitled "An act to encourage the growth of timber on the Western prairies."' "

"\$9.00.

M. V. MCHENRY,

"Receiver."

This was forwarded to him by his attorney, accompanied by a letter:

"Sioux City, Iowa, June 2, 1888.

"Mr. John Carraher—My Dear Sir: I have the pleasure of handing you herewith your timber culture entry receiver's receipt No. 607 for N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, 1, 89, 46.

"Respectfully,

"GEO. W. WAKEFIELD.

"P. S. You can take possession and proceed to comply with the timber culture laws."

He proceeded at once to comply with the timber culture act, and was in possession of the land from that time until his death in 1901, since which time plaintiff, to whom Carraher conveyed it a few days before he died, has been in possession. Some question is made as to the character of this possession, but, without reviewing the evidence, it is sufficient to say that we think it such as is required to constitute adverse possession, provided it shall be construed to have been in good faith and under claim of right or color of title. The defendant acquired whatever interest in the land the railroad company had, or might obtain, in 1887, and the correspondence between the parties indicates that it had overlooked its claim thereto, and did not receive paper title until January, 1903. This action was begun October 23, 1902, and the ultimate issue to be determined is whether defendant has lost title through the adverse possession of the plaintiff and his grantor. It is conceded that the grant to the railroad company was in praesenti, and as the company had earned the land and all contests pending before the land department had been disposed of prior to 1892, its ownership for the ten ³⁵ years preceding the commencement of the action was such as to be subject to the doctrine of adverse possession: *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. Rep. 158, 55 L. ed. 999; *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 24 Sup. Ct. Rep. 166, 48 L. ed. 291; *Iowa Railroad Land Co. v. Fehring*, 126 Iowa, 1, 101 N. W. 120, and cases cited.

Some claim is made that this case is distinguishable from those first cited, in that before certification in 1903, the land department ascertained that the tract was not within six miles of mineral claims, and therefore asserted active jurisdiction in determining whether it was within an exception contained in the grant. This was a mere matter of detail in connection with the certification, and did not tend to show that the company had not acquired ownership under the grant thirty years previous, or that it might not have obtained the certificate at any time after 1891. On the contrary, the investigation resulted in confirming such ownership during this long period. As observed in *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992: "The delay of the government in issuing a

patent does not affect the power of the company to assert in the meantime, by possessory action, its rights to lands which are in fact nonmineral." This was a direct action by the railroad company to recover the lands under the grant, and is not otherwise in point. All held in *St. Paul etc. R. Co. v. Olson*, 87 Minn. 117, 94 Am. St. Rep. 693, 91 N. W. 294, was that in computing the period of the statute of limitations, the time a contest between the parties was pending before the land department of the government should be excluded. The act of Congress approved March 3, 1887, providing for the adjustment of railroad grants, did not purport to disturb the ownership of lands already earned, and, moreover, there was no showing that any readjustment of this grant was attempted. The case is within the rule of the decisions cited, and the defendant's title has been such as to be subject to adverse possession at least since 1891.

³⁶ 2. Counsel for appellant first contend that the possession of Carraher was not in good faith. At the time he filed his last application under the tree culture act the appeal from the rejection of his first application had been pending nearly five years. His second application was received in 1888, and not until three years thereafter did the Secretary of the Interior affirm the decisions rejecting the first. At that time the filing of the second application was ordered to be canceled, but whether Carraher was advised of this is not disclosed. Not having been accorded a hearing nor given any previous notice of the department's intention to cancel his entry, it is not to be inferred that he was subsequently informed of what had been done: See *Wilbur v. Cedar Rapids etc. Ry. Co.*, 116 Iowa, 65, 89 N. W. 101, and cases cited. He subdued the soil and undertook to plant and cultivate the trees as required by the act of Congress, and there is no ground for saying that he was not acting in good faith, save this knowledge of the adverse decision on his first application in 1891. He was not claiming under that, but by virtue of the receipt which had been obtained in 1888, and under which, for all that appears, he supposed he might acquire the land. That he was mistaken can make no difference, so long as he honestly believed, though mistakenly, that he had the right to acquire the land under the tree culture act. He had the assurance of his attorney, who was a judge of the district court when the letter was written, and this, with

the acceptance of his application at the local land office, might well have convinced him of such right.

The entire doctrine of adverse possession is based upon the existence of defective titles; for where titles are good there is no occasion for invoking it. The case differs from *Litchfield v. Sewell*, 97 Iowa, 247, 66 N. W. 104, in that there defendant knew he had no right to the land, while here the fair inference to be drawn from the evidence is that Carraher supposed he had been accorded the right to earn it under the tree culture act: See *Coleman v. Billings*, 89 Ill. 183; *Barrett* ³⁷ v. *Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795, 41 N. W. 439. Good faith is to be presumed, and we think the evidence insufficient to justify a finding to the contrary.

3. The plaintiff's claim of right, for the time required to acquire title under the timber culture act at least, was subservient to that of the government, and since then the period of the statute of limitations has not run. The controlling question, then, is whether the statutory period shall be computed from the time possession was taken under the receiver's receipt or from the time he might have so complied with the laws which entitle the applicant to a patent. In other words, is the claim of right sufficient if against all, save the government, or must the claim be that of entire ownership, and therefore against the world? The possession of Carraher was taken for the purpose of divesting the government of title by complying with the provisions of the timber culture act, and was necessarily hostile to all others. In effect, he conceded ownership by the government, which, unless he executed his purpose, would continue. It was an admission that the United States, rather than himself, held the fee and was entitled to retain it for the eight years required by the law for him to earn it: See act of Congress approved June 14, 1878. His first occupancy was under the second entry, in 1888, at which time the land had been earned by the railroad company, and as the grant was in praesenti, it or its grantee could have maintained ejectment against him at any time within the period of limitation. When, if ever, did this period, which is ten years in this state, begin to run? If after Carraher might have earned and acquired title under the timber culture act, then the period had not expired when this action was begun; if when he entered into pos-

session under the receiver's receipt, then it has run, and plaintiff's title should be quieted. In *Cole v. Des Moines Valley R. Co.*, 76 Iowa, 185, 40 N. W. 711, title was quieted in the plaintiff, though his entry had been canceled, but he had been ³⁸ in adverse possession more than ten years subsequent to the lapse of time within which he might have earned the homestead. The same is true of *Wilbur v. C. R. & M. R. R. Co.*, 116 Iowa, 65, 89 N. W. 101.

The supreme court of Nebraska, without deciding that the running of the statute might not begin sooner, held, in *Carroll v. Patrick*, 23 Neb. 834, 37 N. W. 671, that "a land officer's certificate, therefore, under our statute, is color of title. As between individuals, the statute of limitations begins to run from the time the party entering the land did all that was required of him to perfect his purchase." At such time the claim is that of ownership and apparently all lacking is the paper title. It has ceased to be subservient to, and has become adverse to, the government: See *Chicago etc. R. Co. v. Allfree*, 64 Iowa, 500, 20 N. W. 779. If, in fact, earned, the government retains but the naked legal title, and the claimant has become the real owner. The land is then segregated from the public domain, and has become private property: *Durham v. Hussman*, 88 Iowa, 29, 55 N. W. 11; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20, 9 S. W. 305; *Cavender v. Smith*, 3 G. Greene, 349, 56 Am. Dec. 541; *Cady v. Eighmey*, 54 Iowa, 615, 7 N. W. 102; *Steele v. Boley*, 6 Utah, 308, 22 Pac. 311; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925. But it is not essential that the land be actually earned in compliance with the law. It is enough that the party in possession in good faith so believes and asserts claim of ownership against the government, as well as all others.

Up to this point we apprehend there can be no controversy, although language may be found in some decisions indicating that the legal title must have passed from the government: See *Arnold v. Woodward*, 14 Colo. 164, 23 Pac. 444; *Gibson v. Chouteau*, 80 U. S. 92, 20 L. ed. 534. But the claim of one who enters land with the purpose of acquiring title from the government by compliance with its laws is quite as hostile, as though patent had been ³⁹ issued, to all others, though subservient to the government.

And the weight of authority is to the effect that the claim of right may be subservient to the government if hostile to all others: *Clemens v. Runckel*, 34 Mo. 41, 84 Am. Dec. 69; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Lord v. Sawyer*, 57 Cal. 65; *Alabama State Land Co. v. Kyle*, 99 Ala. 474, 13 South. 43; *Francoeur v. Newhouse (C. C.)*, 43 Fed. 236; *Northern Pac. R. Co. v. Kranich (C. C.)*, 52 Fed. 911. See *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152, 87 Am. St. Rep. 342, 86 N. W. 1007.

The principle is well stated in the first-mentioned case: "The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existence of his title. They recognized a title in another person, 'the United States,' who was supposed to be the proprietor, and as to the United States their possession was not hostile, but they did expect to acquire the title of the United States, believing themselves to have right of pre-emption to the exclusion of all other persons, and a present right to the use and possession of the land. The defendant has the actual possession, within the meaning of the statute of limitations, with a claim, not of absolute title, but of a right which was adverse to all other persons."

The only decision we have discovered to the contrary is *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95. But there the company under which plaintiff held became entitled to the land in 1886, and, though defendant had occupied it since 1866, he had made no effort to acquire the land from the government as a homestead until 1894. His application was then rejected by the officers of the local land office, and their decision later confirmed on appeal. Suit was begun in 1898, and the statute of limitations of ten years pleaded in bar. It is manifest that defendant was a mere trespasser throughout. His attitude was entirely different from that of a party whose application has been received by the officers of the government, and who has entered into possession in good faith and continues therein in what he supposes to be conformity with the laws of Congress. Nevertheless, the court delivered an opinion exhibiting extended research to the effect that a claim of right upon which adverse possession may be based must be against the

whole world, including the government. No doubt the judges have made all the statements attributed to them in this opinion, but it is to be said in extenuation that each had application to the particular facts of the case in hand, and that in none, save those the court declined to follow, was the question as to whether the fact that the claim was subservient to the government involved. Indeed, the character of the claim under a government entry does not appear to have been given due consideration. If effective, it is exclusive of others. It is an assertion of right to the land, which, if well founded, must defeat the claims of all others. It involves a right of possession as absolute as though the party owned the title. It purports to exclude everyone from its enjoyment, and even as against the government to assert the right to divest its title by compliance with the law. The statute of limitations never runs in favor of or against the government, and we are inclined to hold, in harmony with the weight of authority, that the relation of the citizen's claim to the government's title ought not to interfere with the running of the statute against all others, and that the period should be computed from the time Carraher entered into possession under the receiver's receipt.

The decree was right, and is affirmed.

Adverse Possession of public property is discussed in the monographic note to 76 Am. St. Rep. 479-495; and the adverse possession of land of a quasi public character, such as that held by railway companies, is discussed in the monographic note to Northern Pacific Ry. Co. v. Ely, 87 Am. St. Rep. 775-782. Subsequent decisions on these questions are Northern Pac. Ry. Co. v. Hasse, 28 Wash. 353, 92 Am. St. Rep. 840; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292; St. Paul etc. Ry. Co. v. Olson, 87 Minn. 117, 94 Am. St. Rep. 693.

STATE v. SAVRE.

[129 Iowa, 122, 105 N. W. 387.]

ELECTIONS—Residence.—The word “residence” in election laws is synonymous with the word “home” or “domicile,” and means a fixed and permanent abode or habitation to which a person, when absent, intends to return. (p. 453.)

ELECTIONS—Residence.—The precinct in which an unmarried man rooms, keeps his personal effects, and sleeps, and not the one in which he simply takes his meals, is his place of residence in determining his right to vote. (p. 457.)

ELECTIONS—Illegal Voting—“Willfully.”—To vote “willfully,” when that word is applied to illegal voting, means “designedly” or “purposely,” and involves either knowledge of disqualification or a reckless disregard of the question of qualification. If a person ascertains all the facts, and concludes that he is qualified and votes, his act is not “willful,” though in fact he is mistaken and not entitled to vote. (p. 459.)

ELECTIONS—Illegal Voting—“Willfully.”—To vote “willfully,” when that word is applied to illegal voting, when not qualified, necessarily involves either knowledge of disqualification or a reckless disregard of whether qualified or not. (p. 462.)

ELECTIONS—Illegal Voting—Evidence of Intent.—One charged with illegal voting may show that he acted upon legal advice based upon a fair statement of the facts, as bearing on the question of his intent and that he acted upon the supposition that he had the right to vote. (p. 462.)

C. W. Mullan, attorney general, L. DeGraff, assistant attorney general, A. A. Kugler and Eaton & Salisbury, for the state.

C. D. Ellis, H. G. Bartlett and G. E. Marsh, for the appellee.

123 LADD, J. The accused is alleged to have voted at the municipal election on March 27, 1905, in the first ward of the city of Osage, when his place of residence was in the third ward. Section 1090 of the Code declares that “no person shall vote in any precinct but that of his residence,” and section 642, relating to municipal elections, that “each qualified elector may vote thereat who is a resident of the city or town and, at the time, has been ten days a resident of the precinct in which he offers to vote.” The penalty denounced for the violation of these statutes is found in section 4921, enacting that “if any person willfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not

twenty-one years of age, or who is not a citizen of the United States, or who is not qualified, by reason of other disability, ¹²⁴ to vote at the place where and the time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year." The defendant cast his ballot at the place alleged, and the issues raised on the trial were: 1. Had his residence been in that ward during the ten days previous? And 2. If not, was his act in voting there willful?

1. The word "residence" as employed in the election statutes is synonymous with "home" or "domicile," and means a fixed or permanent abode or habitation to which the party, when absent, intends to return: *Vandepool v. O'Hanlon*, 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119; *Sharp v. McIntire*, 23 Colo. 99, 46 Pac. 115; *State v. Aldrich*, 14 R. I. 171; *Chase v. Miller*, 41 Pa. 403; *Hannon v. Grizzard*, 89 N. C. 115. As said in the case first cited, "he is entitled to vote only in the county where his home is, where his fixed place of residence is for the time being, and such place is and must be his domicile or place of abode, as distinguished from a residence acquired as a sojourner for business purposes, the attainment of an education, or any other purpose of a temporary character."

There is no absolute criterion by which to determine one's place of residence. Each case must depend on its particular facts or circumstances. Three rules, however, are well established: 1. That a man must have a residence or domicile somewhere; 2. When once established, it remains until a new one is acquired; and 3. A man can have but one domicile at a time: See 10 Am. & Eng. Ency. of Law, 2d ed., 598. Ordinarily, little difficulty is experienced in determining the residence of a man with a family, for it is, save in exceptional cases, where the family live or have their home: *Brewer v. Linnaeus*, 36 Me. 428. See *Schlawig v. De Peyster*, 83 Iowa, 323, 32 Am. St. Rep. 308, 49 N. W. 843, 13 L. R. A. 785. But the occupation of single men is often such that they are seldom at the same place for any considerable time. And in determining their domicile it is of the utmost importance that the law be so ¹²⁵ construed as not to deprive them of the right to exercise the privileges of citizenship. On the one hand, the intention alone cannot fix the place of abode, nor, on the

other, can conduct in stopping for a time at a particular locality. One cannot by his intention alone fix his dwelling place, and his stay may be for a temporary purpose only. As observed in *Cohen v. Daniels*, 25 Iowa, 83, the intention and the acts must concur. This was lucidly explained in an opinion by Wright, C. J., in *Hinds v. Hinds*, 1 Iowa, 36: "True it is there must be the fact of the intent. Now, what fact? We answer, the act of abiding; the fact of a dwelling; a habitation; and having this residence—having an abode—this abode, this dwelling, then, if the intent exists, the domicile is perfect. In other words, the mere intent, without the fact of residence or abiding, cannot constitute the domicile. Neither can the intent, without having the abode, the home, the place to dwell, constitute the residence. Residence, as there used, we think, has reference to the fact that the citizen or person has a place that, to use an expressive word, is called 'home,' with no present intention of removing therefrom. Not that the person is to remain continuously there, in order to retain his residence or domicile, but if absent, for a long or short time, with the animus revertendi, the domicile still continues": See, also, *Whitecomb v. Whitecomb*, 46 Iowa, 437; *Fitzgerald v. Arel*, 63 Iowa, 104, 50 Am. Rep. 733, 16 N. W. 712, 18 N. W. 713; *State v. Minnick*, 15 Iowa, 123.

Mere bodily presence or absence cannot have controlling effect in determining residence when once established. Many qualified voters spend most of their time in pursuits out of the ward or even the state. Persons who travel for business or pleasure for long or short periods do not lose their residence by such absence. But bodily presence ordinarily is essential in effecting a domicile in the initiative. One might intend to dwell in a place as his permanent abode, and yet never see it. So he might dwell there without thought of remaining. In neither event would he be a resident within ¹²⁶ the meaning of the election laws. There must be the act of abiding without the present intent of removing therefrom. As said in *Story on Conflict of Laws*, section 41, there must be to constitute residence "an actual home, in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite length of time." The vital inquiry, then, in determining the residence of a person always is, Where is his

home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends?

In the case at bar it was made to appear from defendant's answers, when at the polls, that he had obtained two meals a day at the boarding-house of Mrs. Henderson situated in the first ward, and that his offices were located in the third ward, and that he had been in the habit of voting where he obtained his meals. Thereupon his right to vote was challenged, and he took the usual oath. On the trial it developed that he was a member of the firm of Hanson & Savre, engaged in the practice of medicine, having offices in the second floor of a building in the third ward. In these was kept the firm's medical library and a stock of medicines. There were two waiting-rooms, a room for electrical treatment, two consultation-rooms, a room with hot air apparatus, and a bathroom. Both Hansen and defendant were unmarried, and slept in a bed in the room where the electrical apparatus was kept. It contained no conveniences, save for sleeping. In defendant's consultation room were the usual equipments of such a place, but none for housekeeping. He had no trunk, but passed the usual office hours in the rooms, and spent his evenings there when not otherwise engaged. They had occupied these offices three years, during which time the defendant had taken his meals at as many different places. In 1903 he had procured them at Mrs. Collin's in the fourth ward, and later at the restaurant of a hotel in the third ward, and then at Mrs. Henderson's. This was in the third ward until the early winter, ¹²⁷ when she moved into the first ward, where she remained until shortly before April 1, 1905, when she returned to the third ward. The defendant purchased meal tickets—that is, tickets entitling him to twenty-one meals whenever he wished to eat—and took dinner and supper at Mrs. Henderson's when not out of town. Only such time was spent as is necessary and ordinarily incident to eating at a boarding-house, such as reading a paper when waiting to be served or for a moment after eating. He seldom ate breakfast; but, when he did, he obtained it at a restaurant in the third ward.

The evidence was such as to leave no doubt of defendant's place of residence. It was not purely a matter of in-

tention, as he had been advised. A person cannot live in one place and by force of imagination constitute some other his place of abode. The intent and the fact, as already stated, must concur. Surely a man's home is not an eating or boarding-house, where he stops merely long enough to obtain food, be this two or three times a day. It has none of the essentials of a home, unless that of supplying the necessary food be one. It is ordinarily temporary, and is changed according to convenience or taste of the patron. Defendant tested three different places in as many years, and each in a different ward of the city, and to say that in making each change he established a new domicile is ridiculous. The home of an unmarried man is where he has his rooms in which he keeps such personal effects as he has, where he rests when not at work, and spends his evenings and Sundays. The defendant made the rooms of his office his home. Even though he testified that he had intended to make his home where he took his meals, he had never effectuated that purpose, for he continued to live at his offices. What he doubtless meant was that he intended to do so for the purpose of voting. But the actual place of residence controls, and one cannot be improvised by merely forming an intention to claim it elsewhere.

128 In *Smith v. Thomas* (Cal.), 52 Pac. 1079, one Phoebe had been a woodchopper for eleven years, but whenever out of work or sick he returned to Neal's place, in Visalia, which he called home, and he was adjudged a resident of the ward in which such place was located and entitled to vote there. In *Behrenmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704, an engineer operating a train between Quincy, Illinois, and Hannibal, Missouri, a distance of about twenty miles, usually started from Quincy at 5 o'clock P. M. each day and returned the next morning. He was unmarried, and took his meals at a boarding-house in Quincy and had his washing done there. But he maintained a well-furnished room over a drugstore in Hannibal, where he slept and which he claimed as his home, and his vote at Quincy was denounced as illegal.

In *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683, one Dwiggins kept store in the town of Ross, where he did all his business and boarded with his father, who lived there. About a year later his father

moved into Grant township, and Dwiggins slept most of the time at his father's home, but a part of the time at the hotel in Ross. Ordinarily he took breakfast and supper at his father's but often ate at the hotel or a boarding-house, kept part of his apparel there, and part at the store, and was town clerk of Ross. The court held that his residence was in the town of Ross, saying: "He retained his business in the town of Ross, claimed that as his residence and his intention was to keep his residence in that town. The intention of a party has an important bearing on the question of residence, especially where the party is unmarried and has no family, as the case was here. So long as he remained in the town of Ross engaged in his business, and treated that as his permanent abode, he had the right to cast his vote in that town": See, also, *Langhammer v. Munter*, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330. In *Warren v. Board of Registration*, 72 Mich. 398, 40 N. W. 553, 2 L. R. A. 203, it ¹²⁹ appeared that the statute had been in force fifty years declaring that in ward elections in the city of Detroit the residence of the elector "shall be in the ward where he boards or takes his regular meals," and was then omitted from a new charter, and the court held that "usage for so long a period, under express sanction of law, should be able to continue without further re-enactment unless the legislative will is expressed to the contrary." The opinion inferentially admits that but for the statute a different conclusion would have been reached. In *Inhabitants of Abington v. Inhabitants of North Bridgeport*, 23 Pick. (Mass.) 170, a house was located on the line between two towns, and the question to be determined was in which did a pauper reside. After citing English decisions to the same effect, the court, speaking through Chief Justice Shaw, declared that "if the line had divided the house more equally, we think, on the authorities, that, if it could be ascertained where the occupant habitually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive."

We conclude that as between the place where one rooms and sleeps and the place where he obtains his meals, without other facts indicating the contrary, the former must be regarded as his residence. It follows that defendant had never been a resident of the ward at which he voted.

2. The penalty of the law is denounced against any person who shall "willfully vote" in a precinct other than that of his residence. The state argues that by "willfully" is meant no more than "intentionally," "deliberately," or "voluntarily." Several cases are cited in support of this contention. In *State v. Wondahl*, 95 Iowa, 470, 64 N. W. 240, such is said not to be the proper definition, though as employed in the instruction and indictment, it meant intentional as distinguished from accidental. In *State v. Teeters*, 97 Iowa, 458, 66 N. W. 754, the accused was charged with obstructing the highway, and admitted that he had placed an obstruction to travel over the land alleged to ¹³⁰ have been the road, and in these circumstances willful was held to be the same as intentional: But see *State v. Preston*, 34 Wis. 685. In *State v. Clark*, 102 Iowa, 685, 72 N. W. 296, election officers were indicted under section 4928, providing that "if any such judge [of election] willfully refuse the vote of any person who complies with requisites as prescribed by law to prove his qualifications," he shall be punished. It is manifest that in this connection the motive is unimportant. If the voter has qualified, he is entitled to vote, and, if rejected, the only other question is whether this privilege was denied him through mistake or purposely. All held in *State v. Lightfoot*, 107 Iowa, 344, 78 N. W. 341, was that to charge that an act was committed "willfully and unlawfully" was not equivalent to saying that it was done maliciously. Much must necessarily depend upon the context and on the character of the act denounced in determining the true meaning of willful when used to characterize it. Often, when found in a penal statute, it is held to import something more than merely the intentional or deliberate doing of an act. In *Parker v. Parker*, 102 Iowa, 500, 71 N. W. 421, it was said to involve "a bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose or contrary to duty or without authority and careless whether he have the right or not." To the same effect, see *Werner v. Flies*, 91 Iowa, 146, 59 N. W. 18; *Kletsing v. Armstrong*, 119 Iowa, 505, 93 N. W. 500; *State v. Whitener*, 93 N. C. 590; *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21; *Spurr v.*

United States, 174 U. S. 728, 19 Sup. Ct. Rep. 812, 43 L. ed. 1150; Commonwealth v. Kneeland, 20 Pick. (Mass.) 206; Williams v. People, 26 Colo. 272, 57 Pac. 701; State v. Alcorn, 78 Tex. 387, 14 S. W. 663; Hateley v. State, 118 Ga. 79, 44 S. E. 852.

It will be observed that the section denounces no penalty against those voting who are disqualified merely. To render these amenable to the law, it must also appear that they acted willfully in so doing. But it could not have been ¹³¹ the purpose of the legislature to limit "willfully," as here used, to the mere intention of the elector to cast his ballot, for every one in possession of his senses who votes at all does so intentionally. Manifestly, the word has relation to the qualifications of the voter, and whether, notwithstanding his disqualification by reason of nonresidence, or nonage or not being a citizen of the United States, he has purposely persisted in participating in the election. The duty devolves upon every citizen to use ordinary care in ascertaining his right to exercise the elective franchise, and if one without qualification and careless whether he have the right or not votes, his lack of knowledge will furnish no excuse. But if a person upon due inquiry ascertains all the facts, and, basing his judgment on these in good faith, concludes that he is qualified to vote and does so, his act is not "willful," within the meaning of this statute, even though upon a more rigorous investigation, in the light of exact legal rules and maxims, it shall turn out that he was not in fact qualified. This does not mean that a mistake of law will afford any defense, for everyone is presumed to be as familiar with the election laws as with others. The cases relied on by the state are to this effect. Thus, it was held in *United States v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14,459, that the belief that defendant had a right to vote was no justification, as she knew she was a woman and was conclusively presumed to know that the law did not extend the privileges of suffrage to women: See, also, *People v. Barber*, 48 Hun, 198. In *Hamilton v. People*, 57 Barb. 625, the statute prohibited persons convicted of felony and not pardoned from voting. The accused had been so convicted when seventeen years of age, and offered to prove that he had reason to suppose that, having been a minor, the statute did not apply to him.

This was rejected on the ground that ignorance of the law excuses no one. In *State v. Boyett*, 32 N. C. 336, defendant knew he had not lived in the district the time required by statute, and in *State v. Hart*, 51 N. C. 389, defendant ¹³² voted in the county of Greene, when he resided in the county of Pitt, in which county only the law permitted him to vote for governor. In *McGuire v. State*, 7 Humph. 54, the accused, foreign born, had not obtained his second naturalization papers, though these were required to qualify him to vote: See, also, *Thompson v. State*, 26 Tex. App. 94, 9 S. W. 486; *Gardner v. People*, 62 N. Y. 299; *State v. Shea*, 106 Iowa, 735, 72 N. W. 300.

It is manifest that in all of these cases the mistake was one of law solely, and, of course, the rule obtained in each that this furnished no excuse. The distinction is noted in *McGuire v. State*, 7 Humph. 54, for, in illustration, the court said: "If the voter believe himself to be twenty-one years of age, when he is not, and vote, he does not know of the existence of the disqualifying act and may on that ground be excused. But if he knew that he is only twenty years of age, yet believes he is old enough in point of law to vote, such ignorance of the law will not excuse him. If a voter honestly believes that he has resided six months in the county before the election, and the fact turns out otherwise, he may be excused. But if he knew that he has been only four months in the county before election, yet believes that to reside four months is, in point of law, residence enough, he shall not be excused. If a voter believe that he was born in the United States, and it turns out that he was born in a foreign country, he may be excused. But if he knows he is a foreigner, and has not taken the oath of allegiance to the United States, but has only made his declaration of renunciation, etc., and thinks the latter in point of law sufficient to entitle him to vote, this ignorance of the law shall not excuse him; for he voted knowing a state of facts which, in point of law, disqualified him."

This distinction was emphasized in *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575, where the charge of illegal voting was based on the minority of the accused. The evidence tended to show that he supposed he was of age, and ¹³³ the court, in sustaining an exception to a charge, said: "The precise time when a man arrives at the age of twenty-one years is a fact, knowledge of which he derives neces-

sarily from his parents, or other relatives or acquaintances having knowledge of the time of his birth. If acting in good faith, on information fairly obtained from them under an honest belief that he had reached the age, he votes, having the other necessary qualifications, illegal voting should not be imputed to him. The intent which makes up the crime cannot be affirmed." *Commonwealth v. Bradford*, 9 Met. (Mass.) 268, is somewhat in point. There the statute provided that "if any person, knowing himself not to be a qualified voter, shall, at any election, willfully give in a vote for any officer to be chosen," he shall be punished. The court held that, in view of the requirement of knowledge, "willfully" meant "designedly" or "purposely," and, with reference to the *nisi prius* court's instruction that advice of counsel could not be regarded as negating knowledge, said: "In order to convict a party under this statute, which is extremely liberal in this respect, it is necessary to prove, not only that the party had no right to vote, but that he knew it. As the qualification depends on domicile, and that is often a qualified question of law and fact, we have no doubt that if the voter in good faith and with an honest purpose to ascertain the right shall make a true statement of the facts of the case to a professional man, or any other man of skill and experience capable of advising him correctly, the evidence of such advice and the facts upon which it is taken are competent as bearing on the question whether he knew he had not the right to vote. For although the jury, with the aid of all the evidence laid before them, with the lights thrown upon it by an exposition of the rules of law, may be satisfied that he had not the qualification of residence, and, of course, had not the right to vote, yet they may also be satisfied that he did not know that he was not a legal voter; and the means he took to inform himself have a direct bearing on this last question": See, also, *State v. 134 Macomber*, 7 R. I. 349; *People v. Harris*, 29 Cal. 678; *McCrary on Elections*, 4th ed., sec. 587 et seq. To vote willfully, when not qualified, necessarily involves either knowledge of disqualification or a reckless disregard of whether disqualified or not.

3. The determination of a person's place of residence is often difficult, and frequently depends upon nice distinctions and complicated questions of law and fact. For this reason a person who is in doubt as to where his residence

is may state fairly all the facts to, and take the opinion of, persons learned in the law, and proof thereof is admissible as bearing upon his intent in casting his ballot. Such was the decision in *Commonwealth v. Bradford*, 9 Met. (Mass.) 268, and is clearly to be implied from what was said in *State v. Sheeley*, 15 Iowa, 404. See, also, *McCrary on Elections*, 4th ed., 602. Such evidence has a tendency to show that the act of voting where disqualified was without intent, and that the voter acted upon the supposition that he was a resident, and therefore entitled to vote.

4. The defendant testified that he supposed that he was a resident of the first ward, and voted there with that understanding. It also appeared that two years previous, being in doubt as to where he should vote, he took the advice of an attorney at law, who expressed the opinion that he might cast his ballot either where he roomed or where he boarded, according to the place he intended to regard as his home. This view seems to have been shared by two other attorneys of the same place who also imparted to him the same advice. Contrary to the state's contention, the controlling facts were, then, like those existing when he voted in the first ward. The record contains no circumstances to the contrary, save those detailed, demonstrating the absurdity of the proposition. That a candidate for office in the first ward was a brother of his office boy, and that he was irritated by his right to vote being challenged, were of little significance in ¹³⁵ view of his practice for several years of voting where he obtained his meals. The court directed a verdict of acquittal. The case should have gone to the jury. Proof that the accused cast his ballot in a ward other than that of his residence made out a *prima facie* case for conviction. He was in possession of all the facts, and is presumed to have known the law. The only issue for submission involved a finding as to the condition of his mind, whether in what he did he acted willfully, and as bearing thereon his evidence that he supposed his residence was in the first ward and the advice of the attorneys was admissible, but not conclusive.

As the state appealed, this ruling, not the judgment, is reversed.

One's Residence for the purpose of voting is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return: *Berry v. Wilcox*, 48 Am. St. Rep. 706, and monographic note. To bring about a change of residence, an intention to change is not sufficient, but the change must actually be made: *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205. See, too, *In re* *Petition of Mulford*, 217 Ill. 242, 108 Am. St. Rep. 249.

BUTSON v. HOME SAVINGS AND TRUST COMPANY.

[129 Iowa, 370, 105 N. W. 645.]

BUILDING AND LOAN ASSOCIATIONS—Mortgage Foreclosure—Amount of Recovery.—On foreclosure of a member's mortgage of a building and loan association, it can only recover the amount, with interest, actually paid to, or advanced for the mortgagor, less payments made as dues, premiums, interest and fines. The fact that the association is insolvent and in the hands of a receiver does not alter the rule. (p. 469.)

BUILDING AND LOAN ASSOCIATIONS—Insolvency—Payments by Borrower.—If a building and loan association, by reason of insolvency or otherwise, ceases business, having unpaid stock and loans outstanding, borrowers are released from payments of monthly installments, and the contract will be treated as an ordinary loan at legal interest upon which the payments already made will be credited under the rule governing partial payments. (pp. 469, 470.)

BUILDING AND LOAN ASSOCIATIONS—Payments on Loan. Payments made by a borrowing member of a building and loan association on his stock are not deprived of their true character as payments on his loan by the fact that credit therefor may not be applied on the note representing the loan until the time arrives for final settlement, and may then be increased by profits or decreased by losses which have accrued upon the stock. (pp. 471, 472.)

Healy Brothers & Kelleher, for the appellant.

W. H. Bremner, W. A. Graham and Frick & Crandall, for the appellees.

³⁷⁰ WEAVER, J. On April 18, 1896, the plaintiff was the owner and holder of five shares of stock in a building and ³⁷¹ loan association known as the "Iowa Deposit and Loan Company." Prior to the date named plaintiff had obtained a loan from said association in the sum of \$300, to be paid in the usual manner by maturing the aforesaid shares of stock. The payment of the loan was further secured by a mortgage upon the plaintiff's property, and the stock at this time had been so far paid up that it had a withdrawal value of \$125.51. At this point dealings between plaintiff and the

defendant Home Savings and Trust Company began. This company paid for the plaintiff to the deposit and loan company the sum of \$174.49, being the difference between the original loan, \$300, and the withdrawal value of plaintiff's stock, \$125.51. By this transaction the loan from the deposit and loan company was satisfied and the mortgage was thereupon released. The plaintiff then subscribed for five shares of stock in the Home Savings and Trust Company, and gave to said company his written obligation to it for the sum of \$300, and secured the same by a pledge of the said last five shares of stock and by the mortgage now in controversy. In the papers executed between the plaintiffs and defendant the only reference made to the transaction with the deposit and loan company was in the following clause, indorsed upon or attached to the certificate issued to the plaintiff: "In consideration of the transfer of five shares of stock from the Iowa Deposit and Loan Company to the Home Savings and Trust Company, Des Moines, Iowa, when forty-five monthly deposits have been made on this stock to the said Home Savings and Trust Company, this certificate shall be treated as matured and the holder thereof shall be entitled to receive its full book value in cash."

While the note and mortgage in question were made and delivered upon the theory that said Home Savings and Trust Company had made to the plaintiff a loan of \$300, said defendant did not, in fact (except by way of alleged credit ³⁷² hereinafter mentioned) lend, pay, or advance to or for plaintiff any other sum or amount than the said item of \$174.49, which was required to enable the latter to take up his obligation to the deposit and loan company. Thereafter the plaintiff continued to make monthly payments to the said Home Savings and Trust Company on said five shares of stock, as well as payments of premiums and interest on the basis of a loan of \$300, for the period of about thirty-nine months. The aggregate of payments thus made is \$249.60, distributed as follows: Stock dues, \$117; premiums, \$70.20; interest, \$58.50; and fines, \$3.90. At the end of said period of thirty-nine months the Home Savings and Trust Company went into voluntary liquidation, the defendant W. H. Bremner being appointed trustee to take charge of and wind up the business of the corporation. Thereupon the plaintiff made no further payments upon his said obligation, but later made to said Home Savings and

Trust Company and to its said trustee a written offer and tender to pay the additional sum of \$100, and demanded a surrender of his note and a cancellation of the mortgage. The tender being refused, plaintiff instituted this action on April 11, 1902, for an accounting concerning the amount due to the said corporation and to enforce cancellation of the mortgage, offering at the same time to pay whatever amount should be found justly due from him. Thereafter, on October 4, 1892, the insolvency of the corporation being apparent, its affairs were placed in the hands of the defendant Whisenand, as receiver, for settlement.

Prior to the appointment of the receiver the corporation and its trustee filed their joint answer herein, averring that the loan to plaintiff was for \$300, and that after giving due credit for the withdrawal value of the stock in the deposit and loan company, and for all payments since made, there was still due from plaintiff \$174.03, for which sum by way of cross-bill they asked judgment and foreclosure of the mortgage. After the appointment of the receiver he became a party defendant to this action, and filed his separate ³⁷³ answer and cross-bill. His answer repeats in substance the averments made in the answer of his codefendants—admits the payments made, admits the withdrawal value of plaintiff's stock is \$296.60, but alleges that by reason of an impairment of the capital plaintiff has become liable to certain assessments amounting to \$113.81, and that there is still due upon the debt from plaintiff the sum of \$174.03, for which sum he demands foreclosure of the mortgage. Later said receiver amended his answer and cross-petition and increased his claim for recovery upon the note and mortgage to \$297.03. Plaintiff's reply to the cross-petition contains substantially a reaverment of the matters contained in his petition. On trial of the issues joined the district court found against the plaintiff, dismissing his bill, and in favor of the defendants upon the cross-bill, assessing the amount of plaintiff's indebtedness at \$300.27 and decreeing a foreclosure of the mortgage. From this decree the plaintiff has appealed. The foregoing extended statement of the history of this case is practically undisputed and renders unnecessary any discussion of fact propositions.

1. We will first inquire as to the legal effect of the original transaction between the plaintiff and the defendant

Home Savings and Trust Company. Was it in fact a loan of \$300 as contended by the defendant, or a loan of \$174.49 as contended by the plaintiff? At that date plaintiff's deposit and loan company stock had a withdrawal value of \$125.51. Had plaintiff desired to take up the loan it would have required a withdrawal or surrender of his stock and the payment of \$174.49 in cash. Stated in the language of counsel for appellee: "Butson owed the Iowa Deposit and Loan Company \$300. His stock in that company was worth \$125.51. Therefore, to cancel the loan and his debt to the deposit and loan company, he or some one for him must pay to the company the difference between \$300, the debt, and \$125.51, the value of the stock. The amount thus required ³⁷⁴ was \$174.49." If this admirably clear statement were applied to a similar transaction between two individuals, one of whom is not a building and loan association, the conclusion that the debtor's obligation to the person who paid this difference for him was exactly \$174.49, and no more, would be so clear as to make wholly unnecessary argument in its support. It is insisted by the appellee, however, that, in addition to canceling the plaintiff's debt to the deposit and loan company, the effect of this deal was to make the latter a subscriber to the stock of the Home Savings and Trust Company with an advance payment thereon of \$125.51, and a debtor to its loan fund for the sum of \$300.

This statement is literally correct from appellee's standpoint, but a little exploration under its surface will demonstrate beyond question the error in the result reached by the trial court. The cross-petition filed by the receiver for the Home Savings and Trust Company serves, in effect, to convert this action into one for the foreclosure of the mortgage, and the law governing such proceedings must be the measure of the rights of the parties for that purpose. The statute provides that when a building and loan association goes into court and demands recovery upon one of its contracts, "no greater recovery shall be had than the net amount of principal actually received, with interest thereon at the rate of not greater than twelve per cent per annum on the net amount of the loan actually received by and paid to the borrower with statutory attorney fees; no evasion of this provision shall be had by means of any dues, membership fees, fines, forfeitures or other charges, any agreement to the contrary notwithstanding": Code, sec. 1898.

The "net amount of the loan" actually received by the plaintiff is therefore an inquiry which must be answered before we can ascertain whether the demand of the company is or is not excessive. It is not pretended that the Home Savings and Trust Company purchased the loan originally held by the deposit and loan company. That debt was paid, canceled, ³⁷⁵ and discharged. It is not claimed that the Home Savings and Trust Company paid out to the plaintiff or on his account any other or greater sum than \$174.49; but the debt of \$300 is said to have been created by advancing to him or on his account the said sum of \$174.49, and by crediting him with an advance payment of \$125.51 on his stock. Admit it, and yet the sum of \$174.49 remains the "net amount of the loan" actually received by the borrower. The net effect of it all is simply a scheme or device by which the association is enabled upon a net loan of \$174.49 to collect monthly dues, premiums, and interest on the basis of a loan of \$300. For the difference appellant received no value whatever, except in credit upon stock which was immediately and as a part of the same transaction assigned back to the association, to be matured for the payment of the same loan. This may be a legitimate "business," if the borrower is willing to submit to it, but it is manifestly inconsistent with the fundamental principles for the promotion of which building and loan societies were devised.

It will clarify the situation very materially if we keep in mind that a loan by a building and loan association upon the pledge of its stock is neither more nor less than an advance payment of the face or par value of such stock under an agreement by which the borrower is to proceed to mature the stock by a series of payments; and by bringing it to maturity the debt is paid. This fact or agreement is recognized by the contract in suit. The note sued upon is by its express terms a promise to pay to the Home Savings and Trust Company "the sum of \$300, being an advance payment on my five C shares of its capital stock." Now, if the company, upon proper security being given, advances to the holder of ten shares of its stock the sum of \$1,000, and the holder immediately, and as a part of the same deal, returns to the company \$400 as an advance installment upon the same stock, or if, as in the present case, one advancement is set off against the other, and the company pays over the

³⁷⁶ difference only, is the net amount actually paid to and received by the borrower in such case \$1,000 or is it but \$600? That the smaller sum is the true amount is so apparent that to offer argument in its support is to impeach the intelligence of those to whom it is addressed. To hold otherwise is to permit a building and loan association to make a loan for any named sum, retain twenty, fifty, seventy-five, or even greater per cent of that sum as advance stock payments, while the borrower, receiving in fact but a small fraction of the nominal loan, goes on paying monthly premium and interest charged on the full face of the written obligation. If this device is to be upheld, what becomes of the statutory provision which specifically declares that the net amount of the loan actually received by and paid to the borrower shall furnish the basis for computing the amount of recovery, and that the court shall not suffer this rule to be evaded by any system of dues, membership fees, premiums, fines, forfeitures or charges of any kind?

Without following this discussion any further we hold that for the purposes of this case the net amount of the loan secured by the mortgage sought to be foreclosed was \$174.49, and no more. Taking this as a basis of computation, let us proceed to ascertain the state of the account between the parties under the rule of the statute (Code, sec. 1898) as applied by us in *Iowa Deposit etc. Co. v. Matthews*, 126 Iowa, 743, 102 N. W. 817. In this connection, it should be said it is shown without controversy that plaintiff in apparent good faith sought and offered to pay the balance of his indebtedness prior to March 3, 1902, and before the insolvency of the company was demonstrated, and that on the date named these efforts culminated in a written tender to the trustee in charge of the company's affairs to pay the sum of \$100 in discharge of the claim against him. In his petition he again offers to pay whatever amount is due the defendant association. For the purposes of testing the sufficiency of this tender, we will therefore attempt to state the account ³⁷⁷ as of March 3, 1902, assuming for the present that the contract is one within the protection of the law governing building and loan associations. If to the net loan, \$174.49, we add twelve per cent interest from April 18, 1896, to March 3, 1902, \$143.01, we find an aggregate of \$317.50, which marks the statutory limit beyond which the associa-

tion could not by any device charge the plaintiff in an action upon the loan contract. Indeed, if we understand the record correctly, the net amount of the loan was reduced to even less than \$174.49 by deducting therefrom at least one or two months' dues, premiums and interest in advance; but as this is not urged in argument, we do not take it into account. Against the aggregate of allowable charges above mentioned, we have conceded payments as follows: Monthly dues, \$117; monthly premiums, \$70.20; monthly interest, \$58.50; monthly fines, \$3.90—or a total of \$249.60.

It appears, then, that at the time of the tender the utmost sum for which the association could enforce recovery in any event was the difference between these aggregates, or \$67.90. But it is suggested that the company being now insolvent and in the hands of the receiver, a different rule is to be applied, and in support of this proposition we are cited to *Spinney v. Chapman*, 121 Iowa, 38, 100 Am. St. Rep. 305, 95 N. W. 230, *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317, and *Hale v. Kline*, 113 Iowa, 523, 85 N. W. 814. We find nothing in these or other authorities relied upon by appellees with which this opinion is out of harmony. This is not a proceeding to which the association with all its individual members have been made parties for an adjustment of their mutual equities, and we do not undertake to say what rules might obtain under such circumstances, but we may with propriety suggest that it would be a peculiar quality of equity which would permit a party to increase the amount of his debtor's obligation by declaring his own insolvency. On the contrary, it is well settled that a receiver or assignee in insolvency proceedings takes the debtor's estate subject to all the outstanding rights and equities which ³⁷⁸ attached to it in the hands of the debtor himself: *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816; *Warner v. Jameson*, 52 Iowa, 70, 2 N. W. 951; *Roberts v. Corbin*, 26 Iowa, 316, 96 Am. Dec. 146.

It has often been held that where a building and loan association by reason of insolvency or otherwise ceases business, having unpaid stock and loans outstanding, borrowers are released from payments of monthly installments, and the contract will be treated as an ordinary loan at legal interest upon which the payments already made will be credited under the accepted rule governing partial payments. This rule is made subject to some modification in certain jurisdictions,

but in some the borrower is held to a literal performance of his contract after the association becomes insolvent: *Low St. B. A. v. Zucher*, 48 Md. 448; *Cook v. Kent*, 105 Mass. 246; *City B. & L. A. v. Goodman*, 48 Ga. 445.

This rule is applied simply because by the act or default of the association the maturity of the stock becomes impossible and the whole plan or scheme on which the loan was taken out is made to fail. The rule is intended to relieve, not to increase, the burden of the borrower, and if under any possible contingency the rule would operate to make a debtor liable for a greater amount than he would have to pay to discharge his debt according to the literal terms of the contract, no court would apply it. When plaintiff offered to take up the loan and tendered payment of all the association could have enforced against him had the judgment then been rendered, his right to have the obligation surrendered and the mortgage canceled was from that moment fixed. Strictly speaking, the lien of the mortgage then ceased to exist, and no act or default of the association, thereafter occurring, could have the effect to restore said lien or deprive the plaintiff of his right to a release of record. None of the cases relied upon by the appellee undertake to hold that in a foreclosure of a building and loan mortgage by a receiver the debtor is not entitled to the benefit of the rule established by Code, section 1898. The statute itself provides ³⁷⁹ for no exceptions to its operation, nor is there any hint or suggestion in any of its parts from which such an exception can be implied. Its language is general: "In the event that judgment is obtained against a borrower from a building and loan association, no greater recovery shall be had than the net amount of the principal actually received with interest," etc. Were we to say that this provision is not applicable to the case before us, it would amount to a practical nullification of the act in a very essential particular. There is an attempt to charge the plaintiff with certain alleged assessments made upon his stock for the payment of losses incurred in the business of the corporation. Issue is taken upon this claim in the pleadings, and as it does not seem to be supported by any competent or sufficient evidence in the record, we do not therefore consider whether in any event the plaintiff could be held upon such assessments.

2. Other questions are argued by counsel, but as those already considered are decisive of this appeal, we shall not

discuss them. The equities of the case are strongly with the plaintiff. It is putting it very mildly to say that the claim asserted by the defendant association and enforced by the decree below is oppressive to the last degree, and requires some better reason than has been suggested in argument to command our approval.

The plaintiff received from the defendant corporation a loan or advancement of \$174.49, less advance charges. Within a little more than three years from that date he had paid on this loan and to mature the stock by which his obligation was to be discharged the sum of \$249.60, when the corporation went into voluntary liquidation, thereby declaring its inability or unwillingness to perform its part of the contract. According to its own computation and on a basis of a loan of \$300, the utmost amount of its claim on September 24, 1901, was \$99.23. On April 26, 1902, the answer filed by the trustee in this case increased that demand to \$174.03. On February 11, 1904, the receiver comes into ³⁸⁰ the action and again increases the demand to \$297.03, and the court entered a decree against him in the sum of \$300.27; and that, too, while the association and its receiver expressly admit that the plaintiff's stock at the date of the decree had a withdrawal value of \$296.60. The amount of this judgment, if the plaintiff must pay it, added to the \$249.60 already paid, makes a total of \$549.87. In other words, he will pay \$375.38 for the use of \$174.49, although the return payments began immediately and amounted to more than the principal sum within less than two and a half years from the date of the loan. The mythical story of Sisyphus, condemned forever to roll a heavy stone up the mountain-side, only to have it escape his grasp and fall deeper than ever into the valley below, must have been inspired by some prophet's vision of a twentieth century borrower endeavoring to pay a loan upon terms like these. We feel confident that the appellee's claim is justified neither by its contract nor by the statute under which such associations do business.

We do not overlook the argument by which payments made upon stock are sought to be distinguished from payments upon the loan. That distinction is largely a play upon terms—merely a matter of bookkeeping. For if both parties carry out the contract according to its stipulation, the debt is paid, as we have already repeatedly suggested, solely and

only by bringing the stock to maturity. Every payment, therefore, which goes to advance or accelerate the maturing process, is of necessity a payment in some degree or measure on the debt, nor are such payments deprived of their true character as such by the fact that credit therefor may not be applied upon the note representing the loan until the time arrives for final settlement, and may then be increased by profits or decreased by losses which have accrued upon the stock.

The decree appealed from is therefore modified by reducing the amount found against the plaintiff to \$67.90, and by taxing the costs of both courts to the receiver.

Modified and affirmed.

The Insolvency of Building and Loan Associations as affecting the liability of members is the subject of a monographic note to Curtis v. Granite State Provident Assn., 61 Am. St. Rep. 24-30. The settlement with borrowers prescribed by statute for solvent associations does not apply to insolvent ones: Spinney v. Miller, 114 Iowa, 210, 89 Am. St. Rep. 351; and if a foreign association has become insolvent and its affairs have passed into the hands of a receiver, they are no longer governed by its by-laws, and a borrowing member has a right to have his liability determined by the law of his domicile: Spinney v. Chapman, 121 Iowa, 38, 100 Am. St. Rep. 305.

CUYKENDALL v. DOE.

[129 Iowa, 453, 105 N. W. 698.]

JUDGMENTS, FOREIGN—**Attack on Jurisdiction.**—A party, when sued upon a judgment rendered in a foreign state, may impeach its validity, for want of jurisdiction in the court rendering it. (p. 476.)

JUDGMENTS by Confession—**Foreign Judgment.**—A judgment by confession under warrant of attorney regularly entered in a state where the debtor resided when the power was given, in conformity to the law of that state, will be enforced in another state, though the entry of judgment in the same manner is not authorized by the law of the latter state. (pp. 476, 477.)

JUDGMENTS by Confession by Attorney.—If a note authorizes an attorney to appear for the maker at the suit of the payee and confess judgment, it authorizes the entry of a judgment upon the admission or confession of the debtor through the attorney without the formalities involved in an ordinary proceeding or action at law. (p. 479.)

JUDGMENTS by Confession—**Provision for Stay of Execution.** A stipulation between the parties that if judgment upon a note is

confessed before its maturity, no execution shall issue before the debt thus evidenced becomes due, does not prevent the exercise of the power to confess judgment after the maturity of the note and debt. (p. 479.)

JUDGMENTS by Confession.—If a power to confess judgment authorizes the making of the confession “as of the last week, or any other subsequent term or time after the date hereof,” it authorizes a confession of judgment in vacation. (p. 480.)

JUDGMENTS by Confession—Sister State—Judgment—Enforcement—Jurisdiction.—If a foreign judgment has been duly entered, the omission to file with the court the instrument upon which such judgment is based does not affect the validity of the judgment in a suit thereon in another state. (p. 480.)

JUDGMENT by Confession—Power of Attorney—Waiver of Statute of Limitations.—An attorney empowered to confess judgment on a note has no authority to waive the statute of limitations. (p. 480.)

JUDGMENTS by Confession—Sister State—Judgment—Limitation of Actions.—If a note is accompanied by a power of attorney to confess judgment thereon, and authorizing suit in the state where the debtor then resided, at any time within twenty years from the date of the maturity of the note, and judgment is confessed within such time, it is no defense to an action on the judgment in another state that an action on the note was barred by the statute of limitations of that state. (p. 480.)

JUDGMENTS by Confession—Sister State—Judgments—Sufficiency.—The record of a sister state judgment by confession showing an appearance, a confession, the date, the principal sum due, the amount of costs, the date from which interest is to be computed, and which is officially attested, sufficiently establishes the validity of the judgment when suit is brought thereon in another state. (p. 481.)

JUDGMENTS by Confession—Nonresidence of Debtor.—If a note contains a power to any attorney to appear for the maker and confess judgment in accordance with the law of the state where the note is made, such power authorizes the entry of judgment after the maker of the note has become a nonresident, without service of notice to him, or other appearance than by attorney. (pp. 481, 482.)

J. B. Rockafellow and Follett & Curtis, for the appellant.

J. B. Bruff, for the appellee.

⁴⁵⁴ **WEAVER, J.** On May 3, 1884, the plaintiff, J. Walter Cuykendall, then residing in the state of Delaware and being indebted to the defendant, Nelson R. Doe, made and delivered to said defendant his promissory note or written promise to pay the sum of one hundred and fifty dollars, with interest, on or before ⁴⁵⁵ January 1, 1885. Following said written promise, and as a part of same instrument subscribed by the plaintiff, was the following clause: “And further I do hereby authorize and empower any attorney or prothonotary of any court of record, within the state of Delaware,

or elsewhere, to appear for me at the suit of Nelson R. Doe, his executors, administrators or assigns, and thereupon to confess judgment on the above obligation against me to the said Nelson R. Doe, his executors, administrators or assigns, as of the last week, or any other subsequent term or time after the date hereof, with stay of execution until the first day of January, 1885, aforesaid, and I do hereby release all and all manner of errors or error in any such judgment, and in the execution to be issued thereon."

Soon after the making of this obligation plaintiff removed from the state of Delaware and at no time since has been a resident therein. He has been a resident of Iowa continuously from the year 1890 to the present. The debt represented by the note has never been paid.

By the statutes of Delaware it is made the duty of the prothonotary or clerk of a court of record, "on application of the obligee, or assignee, of a bond containing a warrant for an attorney at law or other person to confess judgment, to enter judgment against the person who executed the same, for the amount which, from the face, appears to be due, without the agency of an attorney, or declaration filed, and with such stay of execution as may be herein mentioned; particularly mentioned on his docket, the real debt and time from which interest is to be calculated": Del. Laws 1852, p. 102, c. 37, sec. 5. It is also further provided that: "A judgment, entered by the prothonotary of the superior court upon an obligation, without declaration filed, according to the provisions of section 5, chapter 37, shall have the same force and effect as if a declaration had been filed and judgment confessed by an attorney, or judgment ⁴⁵⁶ obtained in open court": Del. Laws 1852, p. 391, c. 110, sec. 13.

On September 25, 1900, one William F. Cansey, an attorney at law, claiming to act under the authority of the warrant of attorney contained in the aforesaid written obligation, confessed judgment thereon in favor of the defendant herein in the superior court of Delaware in and for Sus-

sex county. The entry of said judgment of record is in the following form:

"196 Nelson R. Doe

vs.

J. Walter Cuykendall,
Note delv'd atty.
W. F. Cansey.

Debt \$150.

Int. from May 3, 1884.
Atty \$2.76.

Pro'y \$1.19.

—————
\$3.77

Pd. by pl'tff's atty.

Debt Sine Breve:

And now, to wit, this twenty-fifth day of September in the year of our Lord one thousand and nine hundred, the defendant, J. Walter Cuykendall, appears by Wm. F. Cansey, Esq., his attorney, and confesses judgment to the plaintiff for the sum of one hundred and fifty dollars, lawful money of the state of Delaware, with costs of suit and release of all errors.

Payable January 1, 1885.

Entered at 8:20 o'clock
a. m.

Attest: George W. Jones,
Pro'y."

Thereafter, as we gather from the record, Doe began an action at law against Cuykendall in the district court of Cass county, Iowa, to recover upon the judgment aforesaid, but for some reason dismissed it before trial was had. The note upon which the judgment had been confessed having ⁴⁵⁷ been brought to this state as a matter of evidence in said proceeding, and being deposited in the hands of the clerk of the trial court, Cuykendall, immediately upon the dismissal of said action, brought this suit in equity, alleging that right of action upon said note and judgment was barred by the statute of limitations, and asking the return of said note, that Doe be enjoined and the note delivered up for cancellation. To this claim the defendant answered, denying that his right of action was barred by the statute of limitations, and by way of counterclaim alleged the recovery of the judgment in Delaware and demanded recovery thereon. Replying to the counterclaim, the plaintiff pleaded the statute of limitations, denied the validity and sufficiency of the

confession of judgment, and alleged that the superior court of Sussex county, Delaware, never had obtained jurisdiction over the plaintiff for the rendition of such judgment. Upon trial to the court the issues were found in defendant's favor, and judgment rendered against plaintiff on the counterclaim. The plaintiff appeals.

1. It is said that, even conceding the validity of the confession of judgment under the laws of Delaware, the proceeding by which such judgment was obtained is so far out of harmony with our own practice and so contrary to the spirit and policy of our own laws that the courts of Iowa will not recognize such a judgment as affording a ground of recovery. It may be conceded that, while the constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings, of every other state" (article 4, section 1), it is yet competent for a party when sued upon a judgment rendered in a foreign state to impeach its validity for want of jurisdiction in the court rendering it: *D'Arcy v. Ketchum*, 52 U. S. 165, 13 L. ed. 648; *Thompson v. Whitman*, 85 U. S. 457, 21 L. ed. 897; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. It is also ⁴⁵⁸ true that there may be judgments which are perfectly valid and enforceable in the state where rendered, yet are not entitled to full faith and credit under the constitutional provisions above referred to: *Steel v. Smith*, 7 Watts & S. 447; *Weaver v. Boggs*, 38 Md. 255; *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 66 Md. 511, 8 Atl. 265, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34 L. ed. 670.

But none of the exceptional cases appear to go to the extent contended for by appellant. Confession of judgment under warrant of attorney is a practice which has prevailed in many, if not most, of the older states of the Union from an early day. Wherever the legislature has recognized such contracts and provided for their enforcement, the courts have universally upheld the validity of the statute. Recognizing the somewhat drastic nature of the proceeding and the possibility of its abuse, the courts are everywhere disposed to construe the power thus given by the debtor very strictly, and to refuse to give force and effect to a confession not made in accordance therewith, but where the power has not been exceeded and the judg-

ment has been regularly confessed and entered in a court of the state where the debtor resided when the warrant is executed, we find no case where recognition has been denied it in another state. In executing the warrant of attorney authorizing another person to confess judgment in his name, the debtor is held to have in view the laws and practice of the state of which he is subject, and to consent in advance that the person presenting the warrant may be considered his representative with power to submit to the jurisdiction of the court.

The holding in *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. Rep. 92, 34 L. ed. 670, cited and relied upon by the appellant, is not opposed to this doctrine. In that case the obligation and the warrant of attorney were a New York contract, while the obligor whose rights were involved was a citizen of Maryland. By the ⁴⁵⁹ warrant the obligor authorized "any attorney of record in the state of New York, or any other state, to confess judgment" against him. The holder of the obligation and warrant of attorney did not place the instrument in the hands of an attorney for a confession of judgment, but deposited it directly with the prothonotary of a court in Pennsylvania, and judgment was entered thereon without a formal confession by any person. This departure from the terms of the warrant was in strict accordance with a statute of the state of Pennsylvania, and the judgment entered thereon was without doubt enforceable within its jurisdiction. When suit was brought upon such judgment in Maryland against the obligor residing in that state, the court denied a recovery, holding the judgment to have been rendered without jurisdiction; and this holding was affirmed in the supreme court of the United States. Referring to the argument advanced that, as the statute of the state of Pennsylvania authorizing the prothonotary to enter such judgment without an appearance and without the intervention of, or confession by, an attorney, was in force at the date of the contract, it should be considered as a part of it, the court says: "But we do not think that a citizen of another state than Pennsylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter state. What Bengé authorized was a confession of judgment by any attorney of any court of record in the

state of New York, or any other state, and he had a right to insist upon the letter of the authority there conferred."

In other words, the judgment was held void, not because the warrant of attorney was invalid, but because its terms had been disregarded in entering judgment without the prescribed confession. This is very far from holding that, had judgment been confessed by an attorney strictly in accord with the power granted, it would not be entitled to full faith and credit in each of the states of the Union. In the case at ⁴⁶⁰ bar the contract was made in Delaware by a resident of that state, with a view to the laws and practice there prevailing; and assuming for the present that the judgment was entered in accordance with such laws and practice upon a confession made in due observance of the terms of the warrant of attorney, we know of nothing in the laws or policy of this state which authorizes us to say the owner of such judgment may not maintain action upon it in this jurisdiction. The fact that the legislature of this state has prescribed rules governing confessions of judgment, which rules do not include confessions upon warrant of attorney, and that this court has held that a judgment entered upon such a warrant in this state is of no validity (*Hamilton v. Schoenberger*, 47 Iowa, 385), is not controlling upon the question before us. The decision here cited does no more than to hold that, this state having provided a system of procedure and of remedies, that system must be considered exclusive, and parties cannot by contract import into our procedure a practice otherwise unknown to our courts. As sustaining the views expressed in this paragraph, see *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68; *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820; *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611, 26 N. E. 393; *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790; *First Nat. Bank v. Garland*, 109 Mich. 515, 63 Am. St. Rep. 597, 67 N. W. 559, 33 L. R. A. 83; *Sipes v. Whitney*, 30 Ohio St. 69; *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576; *Free-man on Judgments*, 4th ed., sec. 558a. Indeed, the validity of judgments confessed under warrant of attorney, and the sufficiency of the jurisdiction of courts to render the same in states where such practice is allowed, seem to have been fully recognized and affirmed by this court in *Crafts v. Clark*, 38 Iowa, 237.

2. It is next urged that the confession of judgment is not in strict pursuance of the power granted by the warrant of attorney. The provision of the warrant is that the attorney ⁴⁶¹ may appear for the debtor at the suit of Nelson R. Doe and confess judgment in his favor, and counsel interpret this as giving authority for such appearance and confession, only after an action has been begun upon the obligation by the payee or holder thereof. We do not so read the contract. A confession of judgment, as that expression is ordinarily employed, means the entry of a judgment upon the admission or confession of the debtor without the formality, time, or expense involved in an ordinary proceeding. Moreover, when such a warrant is presented to an attorney with direction or demand that judgment be confessed thereon, the acceptance of the same is, within the meaning of the warrant, an "appearance at the suit of the holder," and his confession, if otherwise regular, is binding upon the debtor.

It is further alleged that, by the provision of the warrant providing for a stay of execution to January 1, 1885, an implication arises that the power to confess judgment must be exercised, if at all, before the date named. It will be observed that the promissory note in question did not become due until January 1, 1885, and we are disposed to hold that the provision for stay of execution to that date indicates no more than an agreement or stipulation between the parties that, if judgment were confessed before the maturity of the note, as is the well-known practice in states where confessions are allowed (*Crafts v. Clerk*, 38 Iowa, 237), no execution should issue before the debt thus evidenced became due. From this no implication can fairly be extracted that the power must be exercised before the note becomes due, or not at all.

Neither is the objection to the judgment because entered in vacation well taken. We are cited in this connection to *Roundy v. Hunt*, 24 Ill. 598, and other Illinois cases, but neither of these cases is directly in point, and they seem to turn upon the effect of the statutes of that state. In the case before us it is ⁴⁶² shown affirmatively, and without dispute, that the judgment was entered in conformity with the statutes of Delaware and the recognized practice of its courts. The warrant of attorney is very broad and au-

thorizes the making of the confession "as of the last week, or any other subsequent term or time after the date hereof." We hold, therefore, that the confession in vacation was expressly authorized: *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68.

Finally, upon this branch of discussion, it is urged that the judgment should be held invalid because the note and warrant of attorney were not placed and kept on file in the court where the judgment was entered. But this is a mere detail of practice, the omission of which cannot, in our opinion, affect the validity of the judgment, if otherwise duly entered: See *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765. However desirable it may be that these matters of evidence should be made and preserved of record, failure to do so has no effect to show want of jurisdiction in the court to enter the judgment.

3. The proposition advanced by appellant that the attorney assuming to confess judgment had no authority to waive the statute of limitations is sound: *Walrod v. Manson*, 23 Wis. 393, 99 Am. Dec. 187; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739. But there is no room for the application of that doctrine to this case. While it is true that action on the note was fully barred in this state before the judgment was entered thereon in Delaware, it also appears that, upon written promises to pay, accompanied by a warrant of attorney such as was executed by the appellant, action may be brought in the latter state at any time within twenty years from the date of maturity. Such being the fact, the further fact that the action on the note was barred in this state would not operate to abbreviate the period of limitation in the state where the contract was made, and the ⁴⁶³ judgment against the appellant having been confessed and entered there within less than twenty years prior to the commencement of this action, the plea of the statute of limitations was not then, and is not now, available to the judgment debtor.

4. Of the record entry of the judgment, we may say that it is very brief and informal, but shows with clearness the appearance by attorney, the confession by him of judgment, the date thereof, the principal sum for which appellant was indebted, the amount of costs, and the date from which interest was to be computed; and the entry is attested by the official signature of the prothonotary. This

we regard sufficient. At least it is not so wanting in form or substance that we can properly hold it of no validity as a judgment.

5. The jurisdiction of the Delaware court to enter the judgment is challenged, because at the time of its entry appellant had ceased to be a resident of that state, and because no notice or summons of any kind was served upon him, and there was no appearance to the proceeding by him or by anyone in his behalf, except the appearance by Cansey under the warrant contained in the note. If the warrant of attorney was of any force or effect when made, it can hardly be seriously argued that appellant could render it void and valueless by the simple expedient of leaving the state. The statement of the proposition is its own refutation. The very purpose which the law for confession of judgment under warrant of attorney was designed to effect was to enable the creditor to obtain judgment without delay, trouble and expense attendant upon bringing the debtor into court by formal action and service of process.

As we have seen, the statute under which appellant's contract was made explicitly provides that, when an attorney appears under the authority of the warrant for the purpose of confessing judgment, the party giving the authority ⁴⁶⁴ for such appearance shall be held to be in court, and personal judgment may be entered against him without any declaration filed, and the judgment shall have the same effect as if entered in open court. None can deny, we think, that a debtor may employ an attorney and authorize him, in case action is brought by a creditor, to appear in his behalf and consent to the entry of judgment against him. It is equally certain that, if such authority is not revoked and the creditor brings suit within the statute of limitations, a judgment entered upon the appearance and by the consent of the attorney so authorized will be a binding personal judgment against the debtor, though he reside in another state and has been served with no notice or process of any kind to bring him within the jurisdiction of the court where the action is pending. It is going but a step further to say that a debtor may put in the hands of the creditor himself written authority to any practicing attorney in whose hands the writing may be placed, to appear in his behalf and confess judgment upon a debt upon which he concedes his liability; and where such practice is authorized by the laws of a state, we

can conceive of no reason for saying that the person thus represented by one holding his written authority so to appear in his behalf is not in court, or that a personal judgment thus procured is not valid and enforceable and entitled to recognition in every jurisdiction of the Union. Such, as we have already indicated, is the uniform holding of the courts: *Van Norman v. Gordon*, 172 Mass. 576, 70 Am. St. Rep. 304, 53 N. E. 267, 44 L. R. A. 840; *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; *First Nat. Bank v. Garland*, 109 Mich. 515, 63 Am. St. Rep. 597, 67 N. W. 559, 33 L. R. A. 83; *Pirie v. Stern*, 97 Wis. 150, 65 Am. St. Rep. 103, 72 N. W. 370; *Patterson v. Indiana*, 2 G. Greene, 492; *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521, 63 S. W. 489, 54 L. R. A. 502.

Counsel cite us to section 14, page 391, of chapter 110, Laws of Delaware of 1852, which provides that an attorney confessing ⁴⁶⁵ judgment in certain cases shall give written direction to the officer, showing the debt and the time from which interest is to be reckoned, which statement or items shall be entered upon the docket. On reading the section referred to, it appears to be made applicable only to cases where confession is made upon a contract providing for a penalty, and not to an ordinary note or other instrument by the terms of which the amount of the debt is liquidated. The further contention that the judgment here appealed from is excessive is groundless. It seems to be the practice in Delaware not to compute interest to the date of the judgment entry, but to find and enter judgment for the principal debt with a notation of the date from which interest is to be allowed, and such was the entry in the judgment in controversy. There was no error, therefore, in assessing both principal and interest against the appellant in an action brought to recover the judgment debt.

It follows from what we have said that the decree entered by the trial court is correct, and it must be affirmed.

A Judgment of a Court of one state by confession under a warrant of attorney is entitled to full faith and credit in other states, if the court which rendered it had jurisdiction so to do. Such a judgment has, in general, the qualities, incidents, and attributes of other judgments: See the monographic note to Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 324-326.

Power to Confess a Judgment must be clearly given and strictly pursued, or the judgment is invalid: Mayer v. Pick, 192 Ill. 561, 85 Am. St. Rep. 352; Estate of Claghorn, 181 Pa. 600, 59 Am. St. Rep. 680.

HARVEY v. MASON CITY AND FORT DODGE RAILROAD COMPANY.

[129 Iowa, 465, 105 N. W. 958.]

PRINCIPAL AND AGENT—Authority of Agent.—An agent authorized only to lease and generally look after his principal's lands has no authority to construct a ditch on such land for the benefit of his own, and his act in so doing is not binding on his principal. (p. 486.)

WATERS, SURFACE—Damages from Overflow—Contributory Negligence.—If it is sought to recover damages caused by an overflow of surface water resulting from an insufficient outlet, the fact that the land owner seeking to recover constructed drainage ditches across his land in the direction of such outlet does not affect his right to recover unless it is shown that the collection of water at the outlet was increased and augmented thereby, and that he thereby contributed to his own injury. (p. 487.)

WATERS, SURFACE—Insufficient Outlet—Liability.—If a Railroad Company fails to provide a sufficient drain or outlet through its right of way to afford a reasonably prompt passage for the surface water seeking outlet there in times of heavy or long-continued rainfall, it is liable to adjoining land owners for the overflow of their lands resulting therefrom. (p. 488.)

WATERS—SURFACE—Damage from Overflow—Permanent or Continuing Injury.—If the injury to land is caused by a wrongful overflow thereof by surface water, is of a permanent character, and will continue indefinitely unless a change is effected by human labor, the damages are permanent and recoverable once for all, and are measured by the decrease in the fair market value of the property; but when the injury from such overflow is temporary in its nature, or is of a recurring character, the damages are ordinarily regarded as continuing, and one recovery against the wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong. (p. 489.)

WATERS, SURFACE—Damages from Overflow—Permanent or Continuing Injury.—Damages arising from the occasional flooding of land by surface water caused by an insufficient culvert upon the land of an adjacent proprietor are not original and permanent, but continuing, although if the claim for damages is made, and the action is tried on the theory that they are original and permanent, the parties will be bound by the judgment. (p. 492.)

WATERS, SURFACE—Damages for Overflow.—A land owner, to recover damages for a wrongful overflow of his land by surface water, must show that he has in fact suffered injury therefrom, and can recover only for the injury thus sustained and not for any threatened injury. (p. 493.)

WATERS, SURFACE—Measure of Damages for Overflow.—The measure of damages for injury to land caused by its wrongful overflow by surface water is the difference between its fair market value immediately before and immediately after the injury. (p. 495.)

WATERS, SURFACE—Measure of Damages for Overflow.—In determining the value of land immediately before and immediately after an injury thereto caused by the wrongful overflow of surface

water, the value and condition of the crops thereon, if any, and the extent to which they are injured or destroyed, are material matters for the consideration of the jury. (p. 496.)

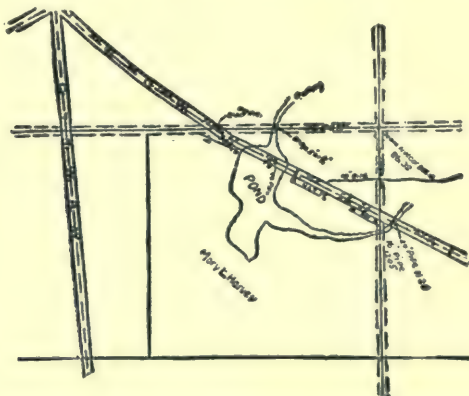
WATERS, SURFACE—Damages for Overflow of Land.—If one person's land is overflowed by surface water through the negligent act of another, the former is entitled to recover nominal damages, although he furnishes no evidence affording a proper measure of actual damages. (p. 497.)

DAMAGES—Failure to Find.—If the recovery of nominal damages, to which a party is entitled, determines and adjudicates some valuable right in real property, the refusal to allow them is reviewable on appeal, and constitutes reversible error. (p. 498.)

Gray & Gray and Frick & Crandall, for the appellant.

Healy Brothers & Kelleher and E. C. Stevenson, for the appellee.

467 **WEAVER, J.** The plaintiff is, and for many years has been, the owner of a quarter section of land in Calhoun county, Iowa. The land is somewhat low and in its natural condition there is a shallow pond or slough of some ten or fifteen acres in extent near the western boundary. The natural slope and drainage of most of the quarter section and of some of the adjacent lands is in the direction of this pond, the outlet of which was to the west across the highway bounding the tract on that side. In the year 1902 the defendant company, by condemnation or by purchase, secured a right of way and constructed its railroad across the farm and through the pond near its outlet, substantially as shown upon the accompanying diagram.



468 The track across the premises is laid upon an embankment or fill at a height of about six feet above the pond. In

constructing the roadbed, defendant attempted to provide for the escape of the drainage from the pond in the direction of its natural flow by putting in a tile culvert. The tile is twenty-four inches in diameter laid at the bottom of the fill, the exposed ends being re-enforced and strengthened by cement work. There is no suggestion on part of the defendant that this culvert was intended as a temporary makeshift, or that it desires or proposes to substitute another of other material or of greater capacity. On September 25, 1903, plaintiff instituted this action. In addition to the matters hereinbefore stated, her petition alleges that the culvert which we have described is wholly insufficient to carry off the water which would otherwise escape in that direction in times of flood, and that by reason of its incapacity the water has been set back, causing injury to her land and crops, for which she seeks a recovery in damages. The defendant answered in denial. There were other counts in the petition presenting other claims on which issue was joined, but none of these latter issues are involved in this appeal, and we shall dispose of it as if the claim first mentioned was the only one considered in the court below.

At the close of the testimony on part of plaintiff, the defendant presented a motion for a directed verdict in its favor on the grounds (1) that no proper proof of damages had been offered by the plaintiff, and (2) that plaintiff, by herself or by her agent, had contributed to the injury for which she was asking damages. The motion was sustained, and it is from the judgment entered upon the directed verdict that plaintiff appeals.

The record shows that the court below, throughout the course of the trial, consistently ruled that the measure of the plaintiff's damages, if any, was the difference between the value of her land with a good and sufficient culvert through the railroad embankment and the value of the same land ⁴⁶⁹ with the culvert as constructed, and considerable testimony in support of her claim of damages on that theory was given to the jury. From this circumstance we conclude that the ruling upon the motion for a directed verdict, though general in form, was in fact based upon the second ground therein specified; that is, that plaintiff could not recover because of her own contribution to the injury of which she complained. However, as both propositions are insisted

upon by the appellee in this court, and as both have been argued by counsel, we shall proceed to their consideration.

1. Beginning with the last proposition above referred to, let us inquire whether there was such a showing of contributory negligence or fault on the plaintiff's part as to justify the court in holding as a matter of law that she was not entitled to recover.

The testimony shows that plaintiff is a resident of Illinois, and has never been in actual occupation of the land. The quarter section immediately east of the plaintiff's land is owned by her brother, who is also a resident of Illinois. This brother appears to have had authority from plaintiff to lease her land and look after her interests therein in a general way, and he has occasionally made brief visits to the neighborhood. It appears that in the summer of 1903, shortly before the commencement of this action, plaintiff's brother had one or two tile ditches made on his own land, and to effectuate the drainage extended them down upon or across his sister's land in the direction of the pond of which mention has been made. Some years prior to the construction of the railroad an open ditch had been constructed from the land owned by one Brown, immediately to the north of plaintiff's land, draining into or in the direction of the pond. A tile ditch also extends from the land of Brown on the west side of the railroad, discharging its waters into the borrow pit or ditch on the right of way; but these waters, as we understand the situation, do not affect the flooding of the land on the east ⁴⁷⁰ side of the fill. It is the claim of the defendant company that the facts above recited show without dispute that plaintiff has contributed to the flooding of her own land and is therefore without remedy. We think this position cannot be sustained. In the first place, there is no showing whatever that the extension of the ditches from the land of her brother across the premises was by plaintiff's authority, or with her knowledge or consent. It is true that her brother was her agent, and, generally speaking, she would properly be held to have notice of and be bound by his dealings with others in reference to the leasing or management of her land; but his agency, so far as the record discloses its character, gave him neither implied nor apparent authority to construct a ditch upon her land for the benefit of his own.

But, even if we assume that the ditches were cut by him with the consent of plaintiff, there is the further insuperable objection to the order of the court that there is no such clear and satisfactory showing of any injurious result therefrom as to authorize the court to withdraw the case from the consideration of the jury. It is not shown—certainly not clearly shown—that any water was brought to the pond which did not naturally drain in that direction. Indeed, the pond seems to be the natural catch-basin of the surface drainage of a considerable area of land to the east and north, and unless it be made to appear that by the acts of the plaintiff, done or permitted since the construction of the railroad, the volume of water to be discharged through the culvert augmented the alleged floods beyond the amount or quantity which otherwise would have drained in that direction, and thereby contributed to the injury for which she seeks to recover from the defendant, her right to damages is in no manner affected by the construction of the ditches. Whether any such results did follow from acts done or permitted by the plaintiff was clearly a question of fact upon which plaintiff was entitled to the verdict of the ⁴⁷¹ jury: See *Schrope v. Trustees*, 111 Iowa, 113, 82 N. W. 466; *Collins v. City of Keokuk*, 91 Iowa, 293, 59 N. W. 200.

In leaving this branch of the case it is well to suggest that we have discussed the matter of plaintiff's alleged contribution to the injury to her land upon the theory adopted by counsel in argument; but we do not wish to be understood as conceding that the doctrine of contributory negligence has any proper application to actions like the one now before us: See *Randolf v. Town of Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Correll v. City of Cedar Rapids*, 110 Iowa, 336, 81 N. W. 724.

2. The nature and extent of the legal rights of adjacent land owners in respect to surface waters and drainage, and the measure of damages to be assessed for a violation of those rights, have been the subject of much and varied litigation from an early day in the world's civilization. Increase in land values and increased necessity to make the soil yield the largest possible return to its owner contribute to make the subject one of continually growing importance, but unfortunately for the best interests of society there is perhaps no question of law not settled by statutory en-

actment upon which there exists a greater confusion of authorities. But in the case now before us no question is raised as to the obligation of the defendant company to provide a suitable and sufficient opening through its embankment for the escape of the water from plaintiff's premises at the place of its natural outlet or discharge, the contention on behalf of the company being that plaintiff offered no proof of injury to her land by reason of the insufficiency of the culvert; and, if this point be overruled, it is further contended that there is an entire failure of evidence as to the damages, if any, resulting to the plaintiff. This state of the record renders it unnecessary for us to go into any examination of the authorities as to plaintiff's right to demand an exit for the surface drainage of her land across the defendant's right of way; but, taking the right for granted, we are to inquire ⁴⁷² whether there is any testimony tending to show a violation thereof on part of the defendant, and if a violation, whether there is any showing of damage which would have been submitted to the jury. If the witnesses testifying in the case can be believed, there can be little, if any, doubt that the twenty-four-inch tile culvert provided by the defendant was wholly insufficient to afford reasonably prompt passage for the water seeking outlet there in times of heavy or long-continued rainfall. The admitted facts as to the topography and formation of the land in that vicinity, a large area of which sloped to this point as a common outlet for its surplus waters, amply corroborate and uphold the statement of the witnesses in this respect. It is shown with equal clearness that by reason of the insufficiency of the culvert the water was at times dammed against the railway embankment and flooded back over a considerable portion of plaintiff's land, interfering materially with its use and destroying the grass. There is no merit, therefore, in defendant's claim that no actionable injury to plaintiff's premises was shown.

The one debatable question presented in argument is as to the measure of plaintiff's damages. It has quite frequently been held that damages for injury of a permanent character to real property, and especially where the wrong complained of is in the nature of a nuisance, which will continue indefinitely without change from any cause but human labor, are recoverable once for all, and that ordi-

narily the measure of such recovery is the decrease in the fair market value of the property on account of such injury: *Troy v. Cheshire R. R.*, 3 Fost. (N. H.) 83, 55 Am. Dec. 177; *Powers v. City of Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *Bizer v. Ottumwa H. P. Co.*, 70 Iowa, 145, 30 N. W. 172. In such case the damages are said to be original. But where the injury from the alleged nuisance is temporary in its nature, or is of a continuing or recurring character, the damages are ordinarily regarded as continuing, and one recovery against the wrongdoer is not a bar to successive ⁴⁷³ actions for damages thereafter accruing from the same wrong: *Powers v. City of Council Bluffs*, 15 Iowa, 652, 24 Am. Rep. 792; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925; *Schlitz Brewing Co. v. Compton*, 142 Ill. 511, 32 N. E. 693, 34 Am. St. Rep. 92, 18 L. R. A. 390; *Denver etc. Irr. Co. v. Mid-daigh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; *Pettit v. Grand Junction*, 119 Iowa, 352, 93 N. W. 381.

The principle upon which a party creating a continuing nuisance is held liable to successive actions for damages is that he has a legal right and is under legal obligation to remove, change or repair the structure or thing complained of, and thereby terminate the injury to his neighbor; and, failing so to do, each day's continuance of the nuisance is a repetition of the original wrong, and a new action will lie therefor: *Kansas Pac. R. R. v. Muhlman*, 17 Kan. 224; *New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427. If the structure or thing complained of is of a lasting character, though perhaps not strictly permanent according to the ordinary definition of the term, it has also been held that the person injured may elect to treat it as permanent and recover original damages, and a judgment obtained in an action tried upon that theory will operate as a bar to any further claim for damages on account of the continuance of the nuisance: *Aldworth v. City of Lynn*, 153 Mass. 53, 25 Am. St. Rep. 608, 26 N. E. 229, 10 L. R. A. 210; *Ridely v. Seaboard etc. R. R.*, 116 N. C. 923, 20 S. E. 962; *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639, 18 S. E. 330, 22 L. R. A. 627; *Fowle v. New Haven etc. Co.*, 112 Mass. 334, 17 Am. Rep. 106. And see *Hollenbeck v. Marion*, 116 Iowa, 69, 89 N. W. 210; *Noe v. Chicago etc. R. R.*, 76 Iowa, 360, 41 N. W. 42; *Hodge v. Shaw*, 85 Iowa, 137, 39 Am. St.

Rep. 290, 52 N. W. 8. The confusion which is found in the precedents has arisen not so much from the statement of governing principles as from the inherent difficulty in clearly distinguishing injuries which are original and permanent ⁴⁷⁴ from those which are continuing, and in assigning each particular case to its appropriate class.

In *Powers v. City of Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, this court cited with approval the definition of permanent injury given in *Troy v. Cheshire R. R. Co.*, 3 Fost. (N. H.) 83, 55 Am. Dec. 177: "Whenever the nuisance is of such character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause except human labor, there the damage is an original damage, and may be at once fully compensated." This definition we still think correct, but a failure to carefully construe and apply it has led to some apparent inconsistencies in this and some other courts. It will be observed from a reading of the quoted paragraph that the term "permanent," so often made use of in connection with the right to recover original damages, has reference not alone to the character of the structure, or the thing which produces the alleged injury, but also to the character of the injury produced by it. In other words, the structure or thing producing the injury may be as permanent and enduring as the hand of man can make it, yet if the resulting injury be temporary or intermittent, depending on future conditions which may or may not arise, the damages are continuing, and successive actions will lie for successive injuries. This thought, which is clearly implied in the quoted definition, is further elaborated in the same case (*Troy v. Cheshire R. R. Co.*, 3 Fost. (N. H.) 83, 55 Am. Dec. 177), as follows: "But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, then the injury to be compensated in a suit is only the damage that has happened." Stating the same rule in somewhat different form, it has also been said that "when such structure is permanent in its character, and its structure and maintenance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there can be as ⁴⁷⁵ many successive recoveries as there are successive in-

juries": St. Louis etc. R. R. Co. v. Biggs, 52 Ark. 240, 20 Am. St. Rep. 174, 12 S. W. 331, 6 L. R. A. 804.

In a note to the same case in 20 American State Reports, 176, Mr. Freeman gives it as the consensus of the authorities that "when the original act creating a nuisance to land is permanent in its nature, and is at once productive of all the damage which can ever result from it, and at once destroys the estate for all practical purposes, so that when the act is completed all the damage that can be effected thereby is consummated, the entire damages must be recovered in one action, and the statute of limitations begins to run against the cause of action from the time of the complete erection of the nuisance." In support of this proposition the annotator cites several of our own cases. Possibly as good an illustration of the distinction as can be suggested is in the case of the construction of a milldam across the course of a stream. So far as the dam operates to permanently overflow the land of another and take away from the owner all beneficial use of his property, the damage may be treated as original and all recovered in one action, but so far as it may cause only a periodical or occasional flooding, the damage is continuing, and successive recoveries can be had: Bizer v. Ottumwa H. P. Co., 70 Iowa, 145, 30 N. W. 172; Close v. Samm, 27 Iowa, 503; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Watson v. Van Meter, 43 Iowa, 76. Not keeping in mind this distinction between the permanent character of the cause and the resultant injury, the court has been led in a few instances to appear to make the former the sole test whether the damages in question were original; but we think this has never been done where the question here presented has been raised and considered. More frequently than otherwise, in cases of this class, the court has simply decided the question before it on the theory upon which it has been presented by counsel, without attempting to determine its correctness as an abstract principle.

As applied to obstructions of water and drainage ways 476 by railway embankments, some courts have drawn a distinction, not generally recognized, between those which are constructed solidly, without culvert, trestle or other opening for the escape of water, and those in which an opening is provided, but proves to be insufficient for the purpose. According to these precedents, the first condition above mentioned presents a case for original damages, and the latter

a case for continuing damages. Such seems to have been the thought controlling the decision in *Haisch v. Keokuk etc. R. R. Co.*, 71 Iowa, 606, 33 N. W. 126, and *Stodghill v. Railroad Co.*, 53 Iowa, 341, 5 N. W. 495.

Applying the test suggested by the foregoing discussion, we are disposed to hold that damages arising from the occasional flooding of land by reason of an insufficient culvert upon the land of an adjacent proprietor are not original, although if the claim for damages be made and the action be tried on the theory that they are original, the parties will be bound thereby. In this conclusion we are supported by the great preponderance of the authorities: *Austin R. R. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885; *Reid v. City of Atlanta*, 73 Ga. 523; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427; *Wells v. New Haven etc. R. R. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724; *Hargreaves v. Kimberly*, 26 W. Va. 787, 57 Am. Rep. 121; *Esty v. Baker*, 48 Me. 495; *Cumberland etc. Canal Co. v. Hitchings*, 65 Me. 140; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Plate v. New York C. R. R.*, 37 N. Y. 472; *Railroad Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279; *Smith v. Point Pleasant etc. R. R.*, 23 W. Va. 451; *Burnett v. Nicholson*, 86 N. C. 99; *Ohio etc. R. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; *Dorman v. Ames*, 12 Minn. 451 (Gil. 347); *Carriger v. East Tennessee etc. R. R. Co.*, 7 Lea (Tenn.), 388; *Jungblum v. Minneapolis etc. R. R. Co.*, 70 Minn. 153, 72 N. W. 971; *Chicago etc. R. R. Co. v. Schaffer*, 124 Ill. 112, 16 N. E. 239. The case of ⁴⁷⁷ *Fowle v. New Haven etc. R. R. Co.*, 107 Mass. 352, which has been quite frequently cited as sustaining the opposite theory is, upon that point, expressly disapproved by the same court in the later case of *Aldworth v. City of Lynn*, 153 Mass. 53, 25 Am. St. Rep. 608, 26 N. E. 229, 10 L. R. A. 210.

It must be remembered, also, in the case at bar, that the embankment complained of was lawfully made, for a lawful purpose, and wholly upon the premises of the defendant. In itself it did not constitute an invasion of the plaintiff's property or property rights, and the injuries, if any, to the adjacent land were consequential, only arising from the negligence of the defendant in constructing it. Such being the case, it would seem an elementary proposition

that to recover damages the plaintiff must show that he has in fact suffered injury therefrom, and not simply that an injury is threatened. Possibly the threatened injury might be sufficient ground to sustain a suit in equity for an injunction (*Moore v. Chicago etc. R. R. Co.*, 75 Iowa, 263, 39 N. W. 390), but we find no precedent for holding it a sufficient basis for an action at law for the recovery of damages. This rule has been directly and indirectly affirmed by us on repeated occasions: *Miller v. Keokuk etc. R. R. Co.*, 63 Iowa, 680, 16 N. W. 567; *Sullens v. Chicago etc. R. R. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *Powers v. Council Bluffs*, 45 Iowa, 652; *Hunt v. Railroad Co.*, 86 Iowa, 22; *Drake v. Chicago etc. R. R. Co.*, 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215; *Van Orsdol v. Railroad Co.*, 56 Iowa, 470, 9 N. W. 379; *Pettit v. Grand Junction*, 119 Iowa, 352, 93 N. W. 381.

The *Powers* case, above cited, has been much criticised as announcing the doctrine that the right of action to the land owner dates from the negligent act which results in injury to his property, and as making an improper application of the rule of permanent damages. It has also been repeatedly distinguished by us in later cases, and we have declined to extend the application of the doctrine there announced: *Pettit v. Grand Junction*, 119 Iowa, 352, 93 N. W. 381; *Costello v. Pomeroy*, 120 Iowa, 213, 94 N. W. 490; *Drake v. Chicago etc. R. R. Co.*, 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215. The first criticism above mentioned is based ⁴⁷⁸ upon a misapprehension of the facts there presented. The wrongful act there charged was the negligent changing of the course of a stream in such manner that a gradual cutting back and widening of its channel from its point of discharge ensued. The change was made in 1859, but the recession of the cut did not reach plaintiff's lot until the year 1866. More than five years after the latter date plaintiff brought suit, and his claim was held to be barred. The right of action was not held, as has been supposed, to have accrued when the course of the stream was negligently changed, but when the plaintiff's premises were actually encroached upon. Such was our construction of the rule of *Powers'* case in deciding *Miller v. Keokuk etc. R. R.*, 63 Iowa, 680, 16 N. W. 567, although we later fell into the error of citing it in the opposite effect in *Grand Lodge v. Graham*, 96 Iowa, 592, 65 N. W. 831, 31

L. R. A. 133. We think, however, that so far as the Powers case goes to the time when a right of action accrued to the property owner, it is correctly interpreted in the Miller case, and is strictly in harmony with the weight of authority. It is also an important consideration that the Powers case was against a municipal corporation, the liability of which for injuries of this nature is restricted within much narrower limits than is the liability of the private citizens: *Vanderweile v. Taylor*, 65 N. Y. 341; *City of Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585. The further question whether the injury there under consideration should have been held to be permanent and damages recoverable once for all from the moment the stream ate its way across the boundary of plaintiff's lot, admits of more doubt, and whether we should be inclined to apply the undoubted rule of law there affirmed to another case involving like fact conditions, we need not now consider or decide: *Aldworth v. City of Lynn*, 153 Wash. 182, 85 Am. St. Rep. 948, 64 Pac. 479 230, 54 L. R. 210; *Wells v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724; *Hargreaves v. Kimberly*, 26 W. Va. 787, 57 Am. Rep. 121; *Doran v. City of Seattle*, 24 Wash. 182, 85 Am. St. Rep. 948, 64 Pac. 479 230, 54 L. R. A. 532; *City of Nashville v. Comar*, 88 Tenn. 415, 12 S. W. 1027. Whether in any case or under any circumstances one person can, by unlawful aggression upon the property of another, put the latter in position whereby his only remedy is to sue for so-called permanent damages, and by so doing license or ratify the wrong done, and thus in effect be forced under the forms of the law to sell his property or to surrender valuable rights, is a question we need not now decide. But see *Ohio etc. R. R. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279. It may also be noted in this connection that we have held that even where permanent damages are allowed it is within the discretion of the court to enjoin the nuisance: *Downing v. City of Os-kaloosa*, 86 Iowa, 352, 53 N. W. 256.

3. The question as to the measure of damages for a continuing injury to the land and its manner of application is one of those which are under such an endless variety of circumstances that a rule effectuating substantial justice in one instance would often work manifest injustice in another. As a result, we find the courts making use of vari-

ous rules by which, when injury has been shown, the amount of compensation may be determined. In some cases, loss or depreciation in the rental value of the property injured is said to be the true measure: 21 Am. & Eng. Ency. of Law, 2d ed., 127, note 2. To loss in rental value may sometimes be added expenses incurred on account of the nuisance: *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172. Under some circumstances, loss of profits may be considered: *Gibson v. Fisher*, 68 Iowa, 29, 25 N. W. 914. Compensation for interference with the comfortable use and enjoyment of property, especially when a homestead, may be compensated in damages: *Randolf v. Town of Bloomfield*, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; *Churchill v. Burlington Water Co.*, 94 Iowa, 89, 62 N. W. 646. And the cost of repairing or restoring the injured property has not infrequently been held to be the rule: *Lentz v. Carnegie*, 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219; *Larsen v. 480 Oregon Ry. etc. Co.*, 19 Or. 240, 23 Pac. 974; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *Watson v. Town of New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167. In many cases not unlike the one at bar the difference between the value of the injured premises before and after each repetition of the wrong is the approved standard of compensation: *Gulf etc. R. R. Co. v. Helsley*, 62 Tex. 593; *Texas C. R. R. Co. v. Clifton*, 2 Wills. Civ. Cas. (Tex.), sec. 489; *Galveston etc. R. R. Co. v. Becht* (Tex. Civ. App.), 21 S. W. 971; 13 Cyc. 153, note 83. The foregoing is not an exhaustive statement of the various measures of damages which have been recognized, but is sufficient to indicate the tendency to make the legal remedy sufficiently flexible to provide reasonably adequate compensation to the injured party, according to the peculiar circumstances of the cases as they arise. This court has had quite frequent occasion to pass upon claims for damages for the flooding of lands on account of obstructions to the flow of streams and of surface waters. In many of them the obstruction complained of has been a railway embankment in which the facilities provided for the escape of water have been alleged to be insufficient or inadequate for the purpose. In *Drake v. Chicago etc. R. R. Co.*, 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215, the plaintiff's land was flooded for two successive seasons, and it was held that the proper measure of damage was "the

difference between the value of the premises immediately before the injury happened and the value of the same immediately after."

In *Sullens v. Chicago etc. R. R. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 505, upon a similar claim on account of successive floods, an instruction to the jury that the "measure of damages for each year is the difference between the fair market value of the land immediately before the injury each year and its fair market value immediately after such injury" was approved. The rule was again approved in *McMahon v. City of Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, and in *Peden v. Chicago R. R. Co.*, 78 Iowa, 131, 42 N. W. 625, 4 L. R. A. 401. It appears, therefore, that the rule as to the measure of damages applicable ⁴⁸¹ to the present case is quite well settled for this state, and unless we are to abandon the rule announced in *Sullens v. Chicago R. R. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 505, and other precedents of that class, we must hold that plaintiff's damages are to be found by ascertaining the depreciation, if any, in the value of her land on account of the injury of which she complains. The measure here approved is probably not in accord with the rule generally applied by other courts, but it works substantial justice and we are not disposed to change it. It is very possible that in a case where the injury is to a matured crop, the value of which can be fairly ascertained independently of the land upon which it stands, and perhaps under some other peculiar circumstances, a different rule may be properly invoked: *Sabine etc. R. R. Co. v. Brouard*, 69 Tex. 617, 7 S. W. 374; *Green v. Taylor etc. R. R. Co.*, 79 Tex. 604, 15 S. W. 685; *Whitbeck v. New York C. R. R. Co.*, 36 Barb. (N. Y.) 644; 13 Am. & Eng. Ency. of Law, 2d ed., p. 709. Of course, in determining the value of the land before and after the injury, the value and condition of the crops, if any, and the extent to which they are injured or destroyed, are material matters for the consideration of the jury.

Upon the trial in the court below the plaintiff offered testimony as to the depreciation in the value of her land, but in most cases fixed the date for the comparison as that of the completion of the railway embankment, instead of the date of the flooding of the land. In one instance, however, the witness, one J. Buffnam, had his testimony directed to

the date of the flood, and, while the examination was somewhat indefinite, it was sufficient, we think, to take the question to the jury. The testimony as to the value of the land at the time of the construction of the embankment, which was within a year or less before the alleged injury, was perhaps objectionable if the case was being tried as one for continuing damages; but no specific objection was made thereto as being too remote. Plaintiff was presenting her case evidently upon the theory that her damages were original, ⁴⁸² and, if defendant wished to raise the point that they were continuing, we think it should have made its position clear, and, failing to do so, it cannot accomplish a successful ambushade under cover of a general objection that the evidence is "incompetent, irrelevant and immaterial, and not a correct measure of recovery." In the absence of any demand by defendant that the damages be assessed as original, rather than continuing, there was no error in the admission of the testimony offered which would justify us in holding that the case should not, in any event, have been submitted to the jury: *Hollenbeck v. Marion*, 116 Iowa, 69, 89 N. W. 210.

4. If the conclusion stated in the preceding paragraph be unsound, and it be conceded that there was no evidence affording a proper measure of actual damages, it still remains true that if, by reason of the defendant's neglect in failing to provide a suitable culvert, the water was backed up over plaintiff's land, she was entitled to recover nominal damages, and to have the case go to the jury for that purpose: *Woodman v. Tufts*, 9 N. H. 88; *Casebeer v. Mowry*, 55 Pa. 419, 93 Am. Dec. 766; *Morman v. Ames*, 12 Minn. 451 (Gil. 347); *Jackman v. Arlington Mills*, 137 Mass. 277; *Hooten v. Barnard*, 137 Mass. 36; *Wells v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, 23 N. E. 724; *Gould on Waters*, 3d ed., sec. 210; *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167; *Plate v. New York C. R. R. Co.*, 37 N. Y. 472; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Foster v. Elliott*, 33 Iowa, 216; *Plumleigh v. Dawson*, 1 Gilm. (Ill.) 544, 41 Am. Dec. 199; *Watson v. Van Meter*, 43 Iowa, 76; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732. We do not overlook the fact that we have often held that failure to award nominal damages, where a plaintiff is entitled to nothing more, is not a ground for reversal: *Crawford v. Bergen*, 91 Iowa, 675, 60 N. W. 205;

Portman v. Klemish, 54 Iowa, 198, 6 N. W. 265; Rowley v. Jewett, 56 Iowa, 492, 9 N. W. 353; Phoenix Ins. Co. v. Findley, 59 Iowa, 591, 13 N. W. 738; Wise v. ⁴⁸³ Foster, 62 Iowa, 114, 17 N. W. 174; Norman v. Winch, 65 Iowa, 263, 21 N. W. 598; Lippert v. Lippert, 110 Iowa, 550, 81 N. W. 777; Rice v. Whitley, 115 Iowa, 748, 87 N. W. 694. The thought of these cases and the reason of the rule is that this court does not sit to determine mere moot questions, or questions which involve matters of merely abstract or technical right, the decision of which determines nothing beyond the taxation of costs. This is as far as we have ever gone in the application of the rule. There are cases, however, in which the recovery of nominal damages determines and adjudicates valuable rights, and under such circumstances the refusal to allow them is reviewable upon appeal. The case before us is of that nature. The recovery of even nominal damages would operate as an adjudication of the insufficiency of the culvert, and that adjudication would be binding upon the parties in any subsequent action brought for the continuance of the nuisance: Bennett v. Marion, 119 Iowa, 473, 93 N. W. 558; Gould on Waters, 3d ed., sec. 210; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Plate v. New York C. R. R. Co., 37 N. Y. 472; Mersereau v. Pearsall, 19 N. Y. 108. Title to land is not infrequently determined by an award or denial of nominal damages for an alleged wrong. The act of the defendant in the present case in erecting the embankment in such manner as to cast the water back upon the plaintiff's land was equivalent to the assertion of an easement therein, and it might well happen that an action to recover nominal damages would be the most efficient method by which to prevent the acquisition of such easement by prescription: Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167. Says the court in the cited case: "When one encroaches upon the inheritance of another the law gives a right of action, and even if no actual damages are proved, the action will be sustained and nominal damages recovered, because unless this could be done the encroachments acquiesced in might ripen into a legal right": See, also, Bassett v. Manufacturing Co., 28 N. H. 438; Delaware etc. Canal Co. v. Torrey, 33 Pa. 143. This court recognized and conceded the correctness ⁴⁸⁴ of this proposition in one of the earliest cases in which the merely technical right to nominal damages was held an insufficient ground

for reversal: See *Watson v. Van Meter*, 43 Iowa, 76. In that case, after announcing the rule referred to, we said: "It is true that if plaintiff is entitled to nominal damages for the purpose of establishing a permanent right, and the jury fail to assess such damages, a new trial should be granted."

So far as the question of practice in this branch of the case is concerned, the order of the trial court directing a verdict for the defendant is also erroneous, within the spirit of the decision in *Carl v. Granger Coal Co.*, 69 Iowa, 519, 29 N. W. 437. In that case the plaintiff showed himself entitled to nominal damages only, but the jury returned a verdict in his favor for substantial damages. The trial court having entered judgment for defendant notwithstanding the verdict, we held it to be erroneous, saying: "The plaintiff was clearly entitled to judgment in his favor, unless the verdict was set aside for some sufficient reason. This has not been done, and when such a motion is made and comes on for hearing, it would be competent to give plaintiff the option of taking a judgment for a nominal amount."

For the reasons stated, a new trial must be ordered, and the judgment appealed from is therefore reversed.

The Liability of Railroad Companies for interfering with the natural flow of surface waters is discussed in the monographic note to *Mizzell v. McGowan*, 85 Am. St. Rep. 718, and in the cases of *Shahan v. Alabama etc. R. R. Co.*, 115 Ala. 181, 67 Am. St. Rep. 20; *Missouri Pac. Ry. Co. v. Keyes*, 55 Kan. 205, 49 Am. St. Rep. 249; *Edwards v. Charlotte etc. R. R. Co.*, 39 S. C. 472, 39 Am. St. Rep. 746. According to *Uhl v. Ohio River R. R. Co.*, 56 W. Va. 495, 107 Am. St. Rep. 968, the failure of a railroad company to make culverts in its embankments of sufficient capacity to permit the overflow water from an adjacent river to rise and fall with the stream is negligence, creating a liability to a property owner thereby injured; but according to *Johnson v. Southern Ry. Co.*, 71 S. C. 241, 110 Am. St. Rep. 572, if surface water is thrown back on land by a railroad embankment constructed with due care, the resulting damages are included in the compensation received in the condemnation proceedings. See, further, *Ginter v. St. Mark's*, 95 Minn. 14, 111 Am. St. Rep. 458.

If a Cause of Action is in Nature Permanent, and the recovery for such injury would confer a license on the defendant to continue it, entire damages may be recovered in a single action; but where the cause is not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once a heavy recovery for entire, permanent and lasting damages, including the future, damages cannot be recovered in a single action, but actions may be maintained repeatedly as long as the cause of injury continues

to inflict damages: *Hurthal v. Boom Company*, 53 W. Va. 87, 97 Am. St. Rep. 954, and see the cases cited in the cross-reference note thereto. Consult, also, *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 76 Conn. 311, 100 Am. St. Rep. 994; *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 102 Am. St. Rep. 881.

HILD v. HILD.

[129 Iowa, 649, 106 N. W. 159.]

DEEDS—Delivery—Presumption.—A strong presumption of the delivery of a deed arises when it is given to one of the grantees and is retained by him for two years and until his death. (p. 501.)

HOMESTEADS—Partition of.—A homestead, though not liable for the debts of its deceased owner, may be partitioned prior to the settlement of his estate in probate. (p. 501.)

F. L. Goeldner, for the appellants.

Stockman & Hamilton, for the appellee.

650 Per CURIAM. The title to forty acres of the land in controversy was formerly in one Nicholas Besser. Nicholas Hild and his wife were in possession of the property when the husband died intestate, June 26, 1904. It now appears that on May 5, 1902, Besser executed a conveyance of the land to Nicholas Hild and Margaret Hild jointly, and for some reason placed it in the possession of Nicholas Hild. Thereafter, on May 14, 1902, Besser executed another conveyance of the same property to Nicholas Hild individually, but did not take up or resume possession of the one first made. The controversy in this proceeding is whether the title passed by the first or second conveyance here mentioned.

It is the contention of appellants that the first deed was never delivered as such, but was taken by Hild for examination, and, not being satisfied to accept it in that form, the second deed was made and duly delivered. The plaintiff's claim is upon the theory that the first deed was duly delivered and that a subsequent change of the grantor's mind or a delivery of the new conveyance could not have the effect to eliminate the vested right of Margaret Hild as a grantee. It will be observed that the question here raised turns entirely upon the fact whether there was any delivery of the

first deed. It is true that the mere fact that the instrument passed into the hands of Nicholas Hild is not of itself sufficient to constitute a delivery, but the fact that it was placed in his possession and remained there until his death two years later carries with it a very strong presumption of delivery, a presumption which could be overcome only upon a clear and satisfactory showing that no delivery was intended by ⁶⁵¹ the parties. The trial court, having the witnesses before it, found for the plaintiff, and from an examination of the record we are inclined to coincide with that conclusion. There is nothing in the testimony calling for any special discussion by this court.

It is next urged that a partition of the real estate cannot be had until the debts of the estate are paid. It appears from the record that the tract in question is a homestead, and so far as shown it is not and cannot be liable for the debts of the deceased. We see, therefore, no reason why partition should be delayed for a settlement of the estate.

The decree of the district court is affirmed.

Partition in connection with the distribution of the estates of decedents is the subject of a monographic note to Buckley v. Superior Court, 41 Am. St. Rep. 140-151.

SIOUX CITY v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[129 Iowa, 694, 106 N. W. 183.]

EQUITY—Municipal Corporations.—Whoever appeals to equity for relief must do so with clean hands and an apparently clear conscience. This rule applies as well to a municipal corporation as to an individual or other corporation. (p. 507.)

ESTOPPEL—Municipal Corporations—Inconsistent Positions.—If a city in an action involving the title to land asserts title thereto, and alleges that in reliance thereon it has conveyed a portion of the land to a codefendant, it cannot thereafter claim such land from its codefendant, although in such suit no issue or defense was joined in by the city and the codefendant. (p. 508.)

ESTOPPEL Against Municipal Corporations—Dedication.—If land is dedicated to a city and thereafter used for the very purposes for which the dedication was made and intended, the city is estopped to deny such use. (p. 509.)

ESTOPPEL.—Public Right to Use and Occupy Streets and other lands dedicated for public use may be lost by estoppel. (p. 509.)

ESTOPPEL Against Municipal Corporations.—If a railroad company expends large sums of money in improving property, relying upon a title acquired by it from a city, and such city acquiesces in the use of the land by the railroad company and asserts a conveyance of the land by it to such company in litigation involving the title thereto, it is estopped to subsequently deny the title of the railroad company to the land. (p. 509.)

DEDICATION—Abandonment.—If a railroad company permits the use of a portion of its depot grounds lying along a river to be used for the landing of boats, with no intent to dedicate any portion thereof to any purpose inconsistent with its own use, the railroad company is not thereby divested of the title to any part of such grounds, although they were conveyed to it solely for railroad purposes. (p. 510.)

ACCRETIONS.—Title to Accreted or Reclaimed Land goes with the fee of the land to which it is annexed. (p. 510.)

J. N. Weaver and E. J. Stason, for the appellant.

J. C. Davis, T. F. Bevington, W. S. Kenyon and Henderson & Fribourg, for the appellees.

695 **SHERWIN, J.** The land involved in this litigation is known as the "River Front Property," lying between Pierce and Jones streets, the southern boundary line of which is the Iowa bank of the Missouri river, in Sioux City east addition. Horace C. Bacon, as trustee for the Sioux City Land and Ferry Company, acquired title to this land from the government. Two plats of Sioux City east addition and Sioux City proper were made, the first in 1856, before title was obtained by the land and ferry company, and the second in 1858, after it had obtained title. On the plat of 1856 the word "levee" appears on the river front property, both east and west of Perry creek; the land in question being east of said creek. On the plat of 1858 the word "levee" does not appear at all, but the words "depot ground" appear on the S. one-half of blocks 34 and 35, and on the land south thereof toward the river. In February, 1869, the city of Sioux City passed an ordinance vacating for the use of the Sioux City and Pacific Railroad Company for depot grounds all streets and alleys, and "all of the levee belonging to the city" within the territory, embracing the land involved in this suit. Later in the same month, by virtue of ordinance providing therefor, it executed a deed to the Sioux City and Pacific Railroad Company, the material parts of which are as follows:

“Know all men by these presents, that by virtue of two several ordinances passed by the city council of the city of Sioux City, in Woodbury county, in the state of Iowa, on the twelfth day of February, 1869, the one of which is entitled ‘An ordinance vacating certain streets and alleys and levee within the corporate limits of Sioux City, in Woodbury ⁶⁹⁶ county, Iowa,’ and the other entitled ‘An ordinance to grant the right of way and depot grounds to the Sioux City and Pacific Railroad Company,’ both of which ordinances have been published so as to become operative; the said city of Sioux City, in pursuance of the provisions of the said ordinances and in consideration of the matters and things recited and set forth therein, and of the benefits to the said city from having the station and depot buildings of the said Sioux City and Pacific Railroad Company located and erected within the said city, as well as the sum of one dollar paid into the city treasury of said city by the said railroad company at or before the making hereof, does hereby grant and quitclaim unto the said Sioux City and Pacific Railroad Company . . . all of the lands heretofore known or described on the recorded plats or maps of said city as levee, streets, alleys, or public grounds included within the following boundaries, to wit:

“Beginning at the intersection of the east line of Pierce street, with the south line of Second street; thence east along the south line of Second to Virginia street; thence south along the west line of Virginia street to the north line of First street; thence west along the north line of First street to the west line of Jones street; thence south along the west line of Jones street to the Missouri river; thence northwesterly along said river to the east line of Pierce street; thence north along the east line of Pierce street to the place of beginning, together with the right to erect, build and maintain on any of the lands within the boundaries hereinbefore set forth, depots, stations, buildings, warehouses, machine-shops, sidetracks, switches, turnouts, turntables, engine-houses, wharves, landings, or any of them, as the said railroad company may see fit, and any and all such other buildings and fixtures as may be proper for the accommodation of the business of said company, with full power to grade, level, embank, fill up, and excavate the same in such manner as said company may see fit and proper, provided that the said railroad company shall at all times and at all places within the

said city so make its grades, embankments and excavations as not to obstruct the established drainage of said city, and shall be subject to all ordinances and regulations made by the city council in regard to sewerage and drainage; together also with the right to use, occupy and enjoy the levee, or margin, of the Missouri river, between Pierce street and 697 Jones street, in Sioux City East addition, the same being within the boundaries aforesaid, and to erect, construct and maintain thereon such wharves, landings and other structures for the use and convenience of said railroad company, and of persons navigating the said river, as the said railroad company may see fit, and to use, occupy and enjoy the use, benefit and profit thereof forever. To have and to hold the lands hereinabove granted and quitclaimed, the right of way, wharves, landings, levees, together with all the rights, powers, privileges, immunities and profits hereinabove mentioned and intended unto the said Sioux City and Pacific Railroad Company, and to the successors and assigns thereof, forever."

In 1870 the city passed an ordinance granting to the Sioux City and Pacific Railway Company the right to convey a portion of this property to the Iowa Falls and Sioux City Railroad Company. Parts of such ordinance are as follows:

"Whereas, the city of Sioux City has by ordinance No. 69 and by other ordinances and deeds, given to said Sioux City and Pacific Railroad Company certain property rights and privileges within the following limits, viz. [here follows a specific description of the property]; and whereas, it is desirable that, for the accommodation of the public, the city of Sioux City and the Iowa Falls and Sioux City Railroad Company, that a portion of said lands, rights and privileges be granted by said Sioux City and Pacific Railroad Company to said Iowa Falls and Sioux City Railroad Company, for the same purpose designated in the several ordinances, deeds, etc., granting said rights, privileges and property to said Sioux City and Pacific Railroad Company: Now, therefore, be it ordained by the common council of the city of Sioux City, Woodbury county, Iowa, that the Sioux City and Pacific Railroad Company be, and they are hereby, authorized and permitted without let or hindrance, and without in any manner forfeiting, disturbing or affecting their rights and property not so conveyed, to convey to said Iowa Falls

and Sioux City Railroad Company any portion of the rights and property above described for the purpose of erecting, maintaining and using thereon depots, stations, buildings, ⁶⁹⁸ warehouses, machine-shops, sidetracks, switches, turnouts, turntables, engine-houses, wharves, landings, or any of them, as said Sioux City and Pacific Railroad Company now have the right to do by virtue of the said several ordinances aforesaid, and of the said several deeds aforesaid."

In June, 1871, the Sioux City and Pacific Railroad Company conveyed a portion of the property to the Iowa Falls and Sioux City Railroad Company, and in October, 1888, the latter company conveyed it to the defendant the Du-buque and Sioux City Railroad Company.

In 1876, George W. Jones brought an action against the city of Sioux City, the Sioux City and Pacific Railroad Company, and others, and alleged in his petition that he owned an interest in the land in question as a member of the partnership composing the Sioux City Land and Ferry Company. He further alleged that the city had conveyed the land to the railroad company, but that the conveyance passed no title. The city answered, alleging a dedication to the public of the land between blocks 33, 34, and 35 and the river, and that, in pursuance of such dedication, it had granted it to the railroad company for railroad purposes. The railroad filed a cross-petition against Jones, as we understand the record, and there was a decree that it was the absolute owner of blocks 33, 34, and 35, and the land south thereof to the river.

In 1897, S. P. Yeomans and others commenced an action in equity against the city of Sioux City, the Sioux City and Pacific Railroad Company and others claiming title to the land described in the ordinances and deed from the city to the railroad company and other property, basing their claim of title on the alleged fact that said land had never been platted for public use, and that the title thereto remained in the plaintiffs as the original owners thereof, who were members of the Sioux City and Ferry Company, or their grantees. To this petition the city and the railroad company filed separate answers and cross-bills, in both of which the plats ⁶⁹⁹ of 1856 and 1858 were referred to and relied upon, as were also the ordinances and the deed granting the land in question to the railroad company, and the city also plead the decree in the Jones case, and both alleged that it was

therein adjudged that the land in question was dedicated to public uses, and that the grant thereof by the city to the railroad company was confirmed. The city prayed that it have a decree on its cross-bill confirming and quieting its title to all of the land involved in that suit, subject to the rights that it had granted to its codefendants as set forth in its answer. There was a full trial of the Yeomans case which resulted in a decree for the defendants, a portion of which is as follows:

"It is further ordered, adjudged and decreed that the city of Sioux City became and was the owner in fee simple of each and all the premises in controversy, and is now the owner in fee simple of said premises and all thereof, as against the plaintiffs and each of them, subject only to the right, title and interest of the codefendants hereinafter stated, and that the said plaintiffs are barred and estopped from having or claiming any interest in any of said premises adverse to the right, title or interest of said city of Sioux City. It is further ordered, adjudged and decreed that the defendant, the Sioux City and Pacific Railroad Company, is the owner in fee simple, by deed from the city of Sioux City, of all that part of the premises in controversy lying south of the south line of Second street to the Missouri river, and between the east line of Pierce and the east line of Jones street, in Sioux City east addition, and all extensions of the north and the south streets between said points to the Missouri river; and that the defendant, the Sioux City and Pacific Railroad Company, is the absolute owner of said premises by its deed from said city and adverse possession thereof, and estoppel against plaintiffs under the issues made under the cross-bill of said defendant, and that plaintiffs are barred and estopped of all interest in said premises."

The decree in the Yeomans case was entered in 1900, and in 1902 this suit was brought; the plaintiff basing its ⁷⁰⁰ title upon an alleged dedication of the land in controversy for a public levee, and alleging that its transfer to the railroad company was null and void, and contending further that, if valid when made, the grantee has since lost its rights by the use of the land by the public for landing and levee purposes, and still further that the land is reclaimed land and no part of the property which was granted to the Sioux City and Pacific Railroad Company. The defendants contend that the land was dedicated to Sioux City by the plats

thereof, and was legally conveyed to them by the city, and that, if such be not the case, they acquired title by adverse possession. They also rely upon the adjudications in the Jones and Yeomans cases, and upon an equitable estoppel and laches. In the view which we take of the other questions, it is unnecessary to decide whether the land in dispute was dedicated to the public for use as depot grounds and other railroad purposes, or whether the defendants have acquired title by adverse possession. However the former question should be decided as an original proposition, we are clearly of opinion that the appellant should not now be allowed to question such dedication, or to question the defendants' title to the land in controversy in this suit.

We shall therefore direct our attention to the other propositions relied upon to sustain the judgment below. And we may say, in passing to their consideration, that we think the recital herein of the facts appearing of record furnishes in itself a strong argument in support of the conclusion we reach. It is a fundamental principle of jurisprudence that whoever appeals to a court of equity for relief must do so with clean hands and with an apparently clear conscience. And this principle applies as well to a municipal corporation as to an individual or other corporation. In the suits of Jones and Yeomans against the city and the railroad companies claiming under title acquired through the city, the city defended on the ground that there had been a dedication of the land ⁷⁰¹ in controversy in this suit and other land designated on the plat of 1856 as "levee," by the plats themselves, and it plead, further, that relying on said dedication it had conveyed the land in question to the Sioux City and Pacific Railroad Company for the uses to which it had been dedicated, viz., railroad purposes. In the Jones case, while there was no trial because of a failure on his part to prosecute, the Sioux City and Pacific Railroad Company had filed a cross-bill against Jones, on which it took default and a judgment which established its title and right to all of the land now involved, except the portion thereof which the appellant claims to have been since reclaimed. As between Jones and the railroad company there was clearly an adjudication on the company's cross-bill and the judgment was in exact accord with the contention of the city and the railroad company.

In the Yeomans case there was a full trial on the merits, both as to the claims of the railroad company and the city; the city there again asserting that it had acquired title by dedication to all of the land involved in that suit and that it had conveyed a portion thereof to the railroad company. As we have heretofore shown, the decree in the Yeomans case covered the cross-bills of both the city and the railroad company, and determined the interest of each in the land there involved and that the title of both was absolute, the railroad company acquiring its title by deed from the city. Acting in good faith upon its conveyance from the city and upon the position taken by the city in the Jones and Yeomans cases, the Sioux City and Pacific Railroad Company and its grantees and successors have expended large sums of money in building depots, freight-houses, tracks, etc., some of which improvements at least are located on the land in controversy.

That the plaintiff should now be estopped from asserting title to this land is apparent for two reasons. In the first place, it should not be permitted to question the defendants' ⁷⁰² titles because of the advantage it gained, particularly in the Yeomans case, by pleading and proving that it acquired title to all of the land by dedication, and that it had conveyed a portion thereof to the railroad company. While no issues were joined between the city and the railroad company, each claimed a distinct portion of the land in suit and the respective rights of the two defendants in that suit were, in fact, determined upon their pleadings and proof. They were not defending in common in the sense used by the appellant in argument here, but each was asserting title to a different tract of land. We are of the opinion, therefore, that the city is estopped by the adjudication in that case. No one should be allowed to assume antagonistic positions in litigation with reference to the same property, or to the same fact, or state of facts, when such action will prejudice another party to the same suit or series of suits: *Crawford v. Nolan*, 70 Iowa, 97, 30 N. W. 32; 2 Black on Judgments, sec. 632; *Lilley v. Adams*, 108 Mass. 50; *Hanley v. Foley*, 57 Ky. 519; *Louisiana Levee Co. v. State*, 31 La. Ann. 250; *Toope v. Prigge*, 7 Daly (N. Y.), 208; *Ker v. Wauchope*, *Gaudy v. Gaudy*, 2 Eng. Rul. Cas., 310, and notes; *Kaehler v. Dobberpuhl*, 60 Wis. 256, 18 N. W. 841; *Edes v. Garey*, 46 Md. 24; *Brown v.*

Roberts, 24 N. H. 131; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49; Johnson *v.* Flanner, 42 La. Ann. 522, 7 South. 455. Whether the record presents a case for the application of the strict doctrine of *res judicata*, as contended by the appellees, we do not decide. See on this subject, however, Devin *v.* City of Ottumwa, 53 Iowa, 461, 5 N. W. 552; Corcoran *v.* Chesapeake & O. Canal Co., 94 U. S. 741, 24 L. ed. 190; Louis *v.* Brown Tp., 109 U. S. 162, 3 Sup. Ct. Rep. 92, 27 L. ed. 892; Wells on *Res Judicata*, sec. 5; Hukm. Chand. *Res Judicata*, 174.

The appellant, while insisting that there was no dedication by plat, contends for a common-law dedication, and says that its conveyance to the railroad company could not divest the title of the land and ferry company. We do ⁷⁰³ not quite understand why the city should take this position if it seeks only to protect public rights. If it acquired rights by any sort of dedication, it should not now be permitted to deny the rights of the appellees because of the manner of dedication. But the plat of 1858 does not dedicate to the public for levee purposes the land south of blocks 33, 34, and 35. Nor do we think the evidence sufficient to establish a common-law dedication thereof for such purposes. The great weight of the evidence shows that the public levee was west of Pierce street, and, if this be true, the city has never acquired rights to the land in question, by possession or otherwise, unless it was dedicated for depot grounds by the plat of 1858. If it was so dedicated, as the appellant has at all times heretofore maintained, then it has been used for the very purposes for which it was intended, and the city cannot now deny such use.

But if it be conceded that the city is estopped on no other ground, we think it conclusively estopped by permitting the appellees to expend large sums of money in improving this property, relying upon the title acquired from the city, in connection with its other acts. That the public right to the use and occupancy of streets, and other lands dedicated for public use, may be lost by estoppel, is well settled in this state, and the facts before us present a case where the rule should be applied with its fullest force: Brown *v.* City of Cedar Rapids, 117 Iowa, 302, 90 N. W. 711; Corey *v.* City of Fort Dodge, 118 Iowa, 742, 92 N. W. 704; Uptagraff *v.* Smith, 106 Iowa, 385, 76 N. W. 733; Blennerhassett *v.* Forest City, 117 Iowa, 680, 91 N. W. 1044; Weber

v. Iowa City, 119 Iowa, 633, 93 N. W. 637; Markham v. City of Anamosa, 122 Iowa, 689, 98 N. W. 493; Johnson v. City of Burlington, 95 Iowa, 197, 63 N. W. 694; Smith v. City of Osage, 80 Iowa, 84, 45 N. W. 404, 8 L. R. A. 633; Simplot v. City of Dubuque, 49 Iowa, 630.

The appellant argues that, if there was either a statutory or common-law dedication for any purpose prior to 1869, the railway companies have lost their rights under conveyance from the city by the long-continued use of the ⁷⁰⁴ land by the public for levee and other public purposes. We find no sufficient evidence to sustain this contention, however. There has been an occasional use of the river front for the landing of boats; but, as we have already said, the public levee was west of the land in question, and whatever use the public has made of the land south of the railway tracks and along the river front has been with the consent of the companies and without any intent on their part to dedicate any portion of it to a public use inconsistent with their own use thereof. If the city or the public did not acquire any interest in the land except for depot grounds or general railroad purposes, the land has not been diverted from such use.

In our view of the case the accreted or reclaimed land goes with the fee, and the city has no right thereto under any theory. If the title is in the railroad companies, it certainly has none, and, if in the state or in the owners of the land and ferry company, it is equally without right thereto: *Saunders v. New York etc. R. R. Co.*, 144 N. Y. 75, 43 Am. St. Rep. 729, 38 N. E. 992, 26 L. R. A. 378; *County of St. Clair v. Livingston*, 23 Wall. (U. S.) 46, 23 L. ed. 59; *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Gould on Waters*, 3d ed., sec. 133. The railroad companies have protected their property from the ravages of the river, and whatever land has been reclaimed or accreted belongs to them rather than to the city: *Musser v. Hershey*, 42 Iowa, 356; *Cook v. City of Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. Rep. 336, 27 L. ed. 401.

There is no equity in the plaintiff's bill and the judgment should be, and it is, affirmed.

The Doctrine of Equitable Estoppel cannot be invoked, according to the better opinion, against a municipal corporation so as to acquire title to real estate held by it in its public or sovereign capacity. The authorities on this question, however, are somewhat conflicting: See *Village of Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176; monographic notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495; *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 778-780.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

ATTORNEY GENERAL v. MAYBURY.

[141 Mich. 31, 104 N. W. 324.]

PUBLIC OFFICE—*Intention to Abandon.*—An office cannot be abandoned without an intention, actual or imputed, to abandon it. (p. 515.)

PUBLIC OFFICE.—*The Voluntary Relinquishment of an office by abandonment, which is to be ipso facto a vacation of the office, should be equally well defined as other well-defined modes of voluntary relinquishment, and should not be confounded with mere nonuser and neglect of duty which would be grounds for proceedings against an officer, but do not of themselves produce a vacation of the office without judicial proceedings.* (p. 515.)

PUBLIC OFFICE.—*The Intention to Abandon an office may be inferred from the conduct of the officer. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created, and no judicial determination is necessary.* (p. 515.)

PUBLIC OFFICE—*Abandonment by Leaving Country.*—Where a city officer suddenly leaves for a foreign country pending proceedings by the council for his removal, and thereafter makes no claim to his office for seventeen months, the jury are authorized in finding that he has abandoned the office. (pp. 515, 516.)

John J. Speed and A. J. Groesbeck, for the appellant.

Timothy E. Tarsney and P. J. M. Hally, for the appellee.

32 McALVAY, J. This is a proceeding by the attorney general, on the relation of De Witt H. Moreland, upon an information in the nature of a quo warranto against respondent, William H. Maybury, to test his right and title

to the office of commissioner of public works of the city of Detroit.

In answer to the charge that he has usurped, intruded into, and unlawfully held and exercised this office, respondent set up in his plea and rejoinder that on June 28, 1903, said office became and was vacant, and respondent was appointed by the mayor to fill the vacancy for the unexpired term thereof, and took his oath of office, filed his bond, and entered upon the duties of said office, which he has exercised ever since; further, that relator was, by the common council of the city of Detroit, upon charges of malfeasance and neglect of duty in office, duly and lawfully removed from said office, and relator thereby ceased to be commissioner, and said office became vacant, whereupon respondent was duly appointed as aforesaid; and further, ³³ that pending the hearing upon said charges, and before the appointment of respondent, relator voluntarily abandoned said office and departed out of this state, intending thereby to surrender and did surrender said office; that after such appointment and the return of relator to Michigan he recognized respondent's right to the office, knowing that he held and exercised the duties of said office, and during all the time since has made no claim or intention to claim said office until the filing of the information in this case. The jury found generally that respondent was entitled to hold the said office of commissioner of public works, and to a special question submitted by the court as follows, "Did the relator, after his return to Detroit, voluntarily relinquish all claim to the office of commissioner of public works?" the jury answered, "Yes."

Relator moved for judgment in his favor notwithstanding the verdict, for the reason that the evidence was not sufficient in law to sustain such verdict. This motion was denied, and a judgment upon said verdict entered in favor of respondent.

The relator appeals to this court. The errors assigned apparently relate to all of the testimony and evidence introduced in the case on the part of the respondent, to the charge of the court, and also the action of the court in denying the motion for a judgment in favor of relator notwithstanding the verdict.

It is clear that all of the proceedings taken by the committee of the common council in investigating charges

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against relator, and the action of said council upon the report of said committee in removing the relator from office, were not authorized by law, and were irregular and void; and, so far as such proceedings are concerned, they could not in any manner, and did not, operate to create a vacancy, or affect the relator's right and title to said office.

The case was not submitted to the jury upon the theory that the action of the common council created a vacancy, but upon the single question of abandonment of the office ³⁴ by relator. On the part of respondent it was claimed that relator, during this investigation of the so-called charges against him by the committee of the council, and on June 20, 1903, without notice to his attorney who was acting for him; and before his examination as a witness had been completed, suddenly left Detroit. He did not notify the secretary of the department of public works, and the council received no notice. His private papers were all taken out of his desk. The proofs also show that his baggage was sent to the depot, and he went by street-car in the evening, and took the train at a suburban station; that he went to Mexico; that between the date of relator's return and the commencement of this suit, a period of seventeen months, relator made no claim or demand upon respondent or the city authorities for this office or its emoluments, or attempted to perform any of its duties; that respondent was appointed to fill the vacancy June 28, 1903, and entered at once upon the duties of the office, and has so continued up to the present time. The claim of relator was that the council proceedings were irregular and void; that he left the state on account of ill-health; that he wrote a notice to that effect to the council, which he left to be delivered to his attorney; that he never had an intention of abandoning his office, and had not done so; that his attorney came to Mexico, and informed him that a grand jury was to be called in Detroit, and he returned at once with him; that shortly afterward he retained counsel for the purpose of regaining possession of his office. Documentary and oral testimony was presented by each party in support of these claims.

We do not think that the court erred in permitting the jury to consider the council proceedings as bearing upon the question of relator's intention when he left Detroit to abandon the office. The testimony of other witnesses show-

ing the facts and circumstances incident to his leaving, and also testimony as to his acts and conduct after his return, as bearing upon the same question, were admitted in evidence. The court charged that this was the ³⁵ only question in the case for the jury to consider. Upon this view of the case, we think this testimony was properly admitted. For this purpose it was proper to show not only what occurred just before he went away, but also what he did and said relative to this matter after he returned. All of the authorities seem to be in accord in holding that an office cannot be abandoned without the intention, actual or imputed, of abandoning it; that voluntary relinquishment of an office by abandonment, which is to be ipso facto a vacation of the office, should be equally well defined as other well-defined modes of voluntary relinquishment, and should not be confounded with mere nonuser or neglect of duty, which would be grounds for proceedings against an officer, but do not of themselves produce a vacation of the office without judicial determination. The intention to abandon an office may be inferred from the conduct of the party. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created, and no judicial determination is necessary. The question of the intention of the relator was a question of fact for the jury, who found against the relator; and the evidence, if believed by them, was sufficient to support such a finding. The special question as to whether relator acquiesced in the occupancy of the office by respondent, submitted to the jury by the court, was answered in the affirmative. It was submitted, as stated at the time, "for the guidance of the court, if the court thinks it is material in rendering judgment in the case." This was in fact safeguarding the relator's rights, and it was not error to submit the question.

Relator contends that the evidence was not sufficient in law to sustain the general verdict in favor of respondent, and that notwithstanding such verdict the court should have entered a judgment for relator. The question to be determined was whether the relator did or did not on the 20th of June, when he left Detroit, abandon his office. The jury found that when relator left Detroit, June 20, 1903, he left with the intention of abandoning ³⁶ said office, and rendered a general verdict for respondent. A vacancy

having been created by relator's abandonment of his office, the appointment of respondent by the mayor was regular and within his authority. The evidence was sufficient, in law, if believed by the jury, to sustain the verdict.

We find no error in the case. The judgment of the circuit court is affirmed.

Moore, C. J., and Grant, Montgomery and Ostrander, JJ., concurred.

ABANDONMENT OF A PUBLIC OFFICE.

- I. Intention of Incumbent to Abandon Rights, 516.
- II. Nonuser or Neglect of Duties, 516.
- III. Removal from State, County, or District.
 - a. Removal from State, 517.
 - b. From County or District, 517.
- IV. Surrender of Office to Successor, 518.
- V. Acquiescence in Wrongful Removal, 519.

I. Intention of Incumbent to Abandon Rights.

One of the recognized modes by which an office may become vacant is by a voluntary abandonment of his rights therein by the incumbent: *Relender v. State*, 149 Ind. 283, 49 N. E. 30. In determining whether or not an officer has abandoned his office, the first and primary object of inquiry is his intention, for ordinarily there can be no abandonment by him without an intention, actual or imputed, to abandon. His intention is a question of fact, and may be inferred from his acts, conduct and statements: See the principal case, ante, p. 512; *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648.

II. Nonuser or Neglect of Duties.

The voluntary relinquishment of an office by abandonment, which is ipso facto a vacation of the office, should not be confounded with mere nonuser or neglect of duty, which constitute ground for proceedings against an officer, but which does not of itself produce a vacancy in the office without a judicial determination: See the principal case, ante, p. 512; *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648. To quote from the opinion of Justice Marshall in the last case cited: "A right may be forfeited or lost by neglect or misconduct, though the party has continually asserted or claimed it. Its vacation by abandonment implies a voluntary and intentional rejection, disclaimer, or surrender of it by the party to whom it pertains. An office may be forfeited by nonuser or by official misconduct or misbehavior. A partial neglect to perform certain duties of an office may amount to misbehavior, and as such be cause of forfeiture. But no partial neglect or nonuser can, in itself, be sufficient evidence of abandon-

ment—which implies a mental renunciation of the office. And if abandonment may be inferred conclusively from nonuser or neglect of duties, so as to amount in itself to an absolute vacation without express renunciation of the office once lawfully held by the party, it can be only when the nonuser or neglect is not only total or complete, but of such continuance or under such circumstances, so clearly indicating absolute relinquishment, as to preclude all future question of the facts.” To the same effect is *De Canio v. Mayor etc. of New York*, 15 Misc. Rep. 38, 36 N. Y. Supp. 423; *Barbour v. United States*, 17 Ct. of Cl. 149.

Where persons elected commissioners of highways in a township fail to organize as a board, with the ability to execute the power conferred upon them, and to do the business required of them by the public exigencies, this failure to act is equivalent to an abandonment of their official duties, and their office becomes vacant: *People v. Spencer*, 101 Ill. App. 61. However, the mere failure of an officer to qualify within thirty days after the date of his commission is said to raise no presumption that he has abandoned the office: *State v. Peck*, 30 La. Ann. 280.

When a member of the board of trustees of a village willfully absents himself from the meetings of the board and neglects to perform the duties of his office for eight months, he will be deemed to have resigned his office, and it may be filled in the manner prescribed by law: *Harrison v. People*, 36 Ill. App. 319.

Where an officer is unable, because of some infirmity, such, perhaps, as insanity to attend to his duties for some fifty days, his office does not become vacant: *State v. Baird*, 47 Mo. 301. But an officer who voluntarily enlists in the army and thus disables himself to perform his official duties, thereby constructively resigns his office by an abandonment of it: *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 367.

III. Removal from State, County, or District.

a. Removal from State.—One may abandon an office by removing from the state, so that he cannot resume it upon his return: *Relender v. State*, 149 Ind. 283, 49 N. E. 30; *Prather v. Hart*, 17 Neb. 598, 24 N. W. 282. See, too, *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310, 35 Pac. 163. In the principal case, ante, p. 512, it will be noted that the relator was held to have abandoned his office by abruptly leaving the state pending the investigation of charges against him looking toward his removal, and by failing to perform the duties and to demand the emoluments of the office for seventeen months. So, where an officer becomes a defaulter, flees from the state, and indicates a settled purpose to relinquish his office, it may be regarded as vacant without any judicial determination: *Osborne v. State*, 128 Ind. 129, 27 N. E. 345; *Supervisors v. Semler*, 41 Wis. 374.

b. From County or District.—If the law requires an officer to reside in the county or district in which he holds his office, and during his

term he ceases to reside in such county or district, his violation of the law operates as an abandonment of his office and creates a vacancy therein. However, a merely temporary removal or absence for a limited time from the county or district to which the law restricts his residence, with no intention of abandoning his office, or of ceasing to discharge the duties thereof, will not result in terminating his title: *People v. Brite*, 55 Cal. 79; *Yonkey v. State*, 27 Ind. 236; *Relender v. State*, 149 Ind. 283, 49 N. E. 30; *Lyon v. Commonwealth*, 6 Ky. (3 Bibb) 430; *Curry v. Stewart*, 71 Ky. (8 Bush) 560; *McGregor v. Allen*, 33 La. Ann. 870; *State v. Skirving*, 19 Neb. 497, 27 N. W. 723; *In re Bagley*, 27 How. Pr. 151; *Crawford v. Saunders*, 9 Tex. Civ. App. 225, 29 S. W. 102; *Ehlinger v. Rankin*, 9 Tex. Civ. App. 424, 29 S. W. 240. As to whether this rule applies to a councilman who removes from the ward from which he was elected to another ward in the city, see *State v. Craig*, 132 Ind. 54, 32 Am. St. Rep. 237, 31 N. E. 352, 16 L. R. A. 688.

A perplexing question sometimes arises as to whether an office becomes vacant when the boundaries of the county or other political subdivision from which an officer has been elected are so changed that his residence is no longer within the district which he represents. Some courts have answered this question in the affirmative (*Mauck v. Lock*, 70 Iowa, 266, 30 N. W. 566; *People v. Glass*, 19 App. Div. 454, 46 N. Y. Supp. 572; *In re Buhler*, 43 Misc. Rep. 140, 88 N. Y. Supp. 195; *State v. Choate*, 11 Ohio, 511), and others in the negative: *State v. Hixon*, 27 Ark. 398; *State v. Nelson*, 7 Wash. 114, 34 Pac. 562; *State v. Supervisors*, 21 Wis. 443.

A justice of the peace does not abandon or vacate his office by opening an office in another district wherein he spends much more of his time and transacts much more official business than in the district in which he was elected, if he continues to reside in the latter district, and is present there for official business on a designated day of each month and at such other times as his duties demand: *State v. Springfield*, 97 Tenn. 302, 37 S. W. 5.

Where a justice of the peace removes from the county or district in which he was elected, his subsequent official acts are not void, but are those of a *de facto* officer: *Hinton v. Lindsay*, 20 Ga. 746; *Lexington & H. Turnpike Road Co. v. McMurtry*, 45 Ky. (6 B. Mon.) 214.

IV. Surrender of Office to Successor.

A public office becomes vacant by nonuser, it has been held, and subject to be filled by the appointing power, when the lawful incumbent voluntarily surrenders the office to another under the mistaken belief that the latter has been elected as his rightful successor, and, acting upon such belief for a period of two years, ceases to discharge the duties of the office and fails to make any demand for a restoration thereto; *People v. Hartwell*, 67 Cal. 11, 6 Pac. 873. Somewhat analogous to the California decision is the case of *Turnspeed v. Hudson*, 50 Miss. 429, 19 Am. Rep. 15. There the plaintiff was elected

to an office in 1871 for a term of four years. In 1873 an act was passed providing for an election in November of that year to fill such office. Among the candidates for the election were the plaintiff and the defendant, who entered into an agreement in writing to abide the result of a primary election. At the primary election the defendant was selected, and in November he was elected, whereupon he qualified and took possession of the office, the plaintiff surrendering the same. It was subsequently decided that the statute was unconstitutional and the election void, and thereupon the plaintiff sued to recover possession of the office. It was held that he was not estopped by the agreement with the defendant, and that the agreement and the surrender of the office did not amount to an abandonment or resignation.

If a constable at the close of his term turns over his badge, pistol, and handcuffs to a person who holds a certificate of election, accepts from such person an appointment as deputy, and takes the oath and acts as deputy, he thereby surrenders and abandons the office, so that thereafter he cannot claim to be holding after the term: *People v. Davidson*, 2 Cal. App. 96, 83 Pac. 159.

V. Acquiescence in Wrongful Removal.

An office will generally be deemed vacated or abandoned where the incumbent accepts another office incompatible therewith: *People v. Hanifan*, 96 Ill. 420; *State v. Crowe*, 150 Ind. 455, 50 N. E. 471; *State v. Thompson*, 122 N. C. 493, 29 S. E. 720; note to *Attorney General v. Oakman*, 86 Am. St. Rep. 578. This question is now largely governed by the written law. But the rule at common law is well settled that where one, while occupying a public office, accepts another which is incompatible therewith, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first": *State v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616. And the subsequent resignation of the incumbent from the second office will not restore him to the original one vacated by his own voluntary act: *State v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; *Shell v. Cousins*, 77 Va. 328.

An officer may be deemed to have abandoned his office, so as to lose all rights to his salary, when for years he acquiesces in his removal from the office, making no demand for a restoration thereto, instituting no proceedings looking to that end, and failing to insist on his right to compensation, while he engages in other occupations: *Cote v. Biddeford*, 96 Me. 491, 90 Am. St. Rep. 417, 52 Atl. 1019; *Phillips v. City of Boston*, 150 Mass. 491, 23 N. E. 202. But while an officer, to quote from *Selby v. Portland*, 14 Or. 243, 58 Am. Rep. 307, 12 Pac. 377, "doubtless might legally abandon his office when wrongfully ousted therefrom . . . his failure to keep up a clamor for reinstatement could not certainly be urged as evidence of an abandonment."

WELLS v. MONTCALM CIRCUIT JUDGE.

[141 Mich. 58, 104 N. W. 318.]

PROHIBITION—Conflict of Jurisdiction in Divorce Case.—

If a wife brings an action for a divorce in one court and her husband shortly afterward institutes a like action against her in another court, and the two courts, proceeding simultaneously, make conflicting orders, prohibition is the proper remedy to settle the conflict of jurisdiction, vacate improper orders already made, and prevent the making of others. (p. 521.)

DIVORCE—Conflict of Jurisdiction Between Courts.—If a wife files a bill for a divorce and places the subpoena in the hands of the sheriff for service, the jurisdiction of the court is not affected by the husband's thereafter filing a bill for a divorce against her in another county where he resides, and obtaining service on her before service is effected on him. (p. 522.)

E. O. Grosvenor, Willis Baldwin and Griswold & Tennant, for the relator.

E. J. Bowman and C. L. & C. B. Rarden, for the respondent.

59 **CARPENTER, J.** The circuit court for the county of Wayne, in chancery, and the circuit court for the county of Montcalm, in chancery—courts of co-ordinate jurisdiction—each asserts exclusive jurisdiction over a divorce suit between relator and her husband, Percy D. Wells. Relator, Maude, resides in Wayne county. Her husband, Percy, resides in Montcalm county. Relator, Maude, is the complainant, and her husband, Percy, the defendant, in the suit pending in the Wayne circuit court, while Percy is the complainant and Maude is the defendant in the suit pending in the Montcalm circuit court. The suit pending in the Wayne circuit was first commenced, and the subpoena immediately placed in the hands of a sheriff for service. Before this service was made, the suit was commenced in the Montcalm circuit, and the process issued from that court was served before the process issued from the Wayne circuit. The complainant in each suit asked for the custody of the infant child of the parties, the offspring of the marriage, and each court has issued an injunction restraining the defendant from interfering with the complainant's custody of said child. The defendant in each suit has filed a plea to the jurisdiction, and each court has overruled that plea. Relator now applies to this

court for a writ of prohibition directed to said respondent, requiring him to refrain from exercising jurisdiction of the suit pending in the court of which he is judge.

The first question for our consideration is this: Is a writ of prohibition the appropriate remedy? We have held ⁶⁰ (Wells v. Montcalm Circuit Judge, 139 Mich. 544, 102 N. W. 1001) that mandamus is not the appropriate remedy, saying: "The writ of mandamus will not be allowed to take the place of an appeal or a writ of prohibition, or any other writ to review the action of a lower court."

The writ of mandamus asked for would simply have compelled the vacation of certain orders. This relief would have been inappropriate. Appropriate redress for relator's grievance requires respondent not merely to vacate orders already made, but to refrain from further exercising jurisdiction. This relief can be afforded by a writ of prohibition (see Hudson v. Judge of Superior Court of Detroit, 42 Mich. 239, 3 N. W. 850, 913), but not by a writ of mandamus. No relief can be obtained by appealing from the order overruling the plea. That order is not appealable: See Miller v. McLaughlin, 135 Mich. 646. It is earnestly contended that relator can secure appropriate relief by appealing from a final decree. There is no doubt that the question involved in this case may be reviewed by appealing from a final decree, provided relator does nothing to waive her right to have it so reviewed, but it by no means follows that the remedy by appeal is adequate. Each of the two courts now claiming and exercising jurisdiction has already made, and, it may be presumed, will hereafter make, conflicting orders respecting the custody of the minor child. It may be presumed that each of these courts will proceed at once to enforce such orders. Indeed, it is clear that the interests of the parties and of the child require that the order of the court whose jurisdiction is rightful should be at once enforced. The situation would be intolerable if this condition of affairs must continue during all the time that must elapse before the case can be reviewed after a final decree. This is a case, therefore, in which it is clear that the remedy by appeal is not adequate. Our own decision in Maclean v. Wayne Circuit Judge, 52 Mich. 257, 18 N. W. 396, is authority for the proposition that the writ of prohibition is the appropriate remedy. In ⁶¹ that case the Wayne circuit court in chancery enter-

tained jurisdiction of a matter within the exclusive cognizance of the superior court of Detroit. This court issued a writ of mandamus vacating an injunction, and a writ of prohibition staying further proceedings, saying: "It is a familiar principle that, when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process. If interference may come from one side, it may from the other also, and what is begun may be reciprocated indefinitely." See, also, *Clark County Court v. Warner*, 116 Ky. 801, 76 S. W. 828; *Throop on Public Offices*, sec. 835; *Mechem on Public Offices and Officers*, sec. 1014; *Hudson v. Judge of Superior Court of Detroit*, 42 Mich. 239, 3 N. W. 850, 913.

It is proper, then, to determine in this proceeding whether the Montcalm circuit court had a right to assume jurisdiction of this controversy. At the time suit was commenced in the Montcalm circuit, relator had in good faith filed her bill in the Wayne circuit court. Process had been issued by that court, and was then in the hands of the sheriff of Wayne county for service. The question in this case is not whether the Wayne circuit court had at that time acquired such jurisdiction that it might render a decree binding upon the parties. It is clear that it had not. The question is whether the Montcalm circuit court had a right to prevent its acquiring such jurisdiction. There is authority for saying that, until service of process was actually made, it had that right: See *Union Mut. Life Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. 443; *Owens v. Ohio Cent. R. R. Co.*, 20 Fed. 10. The true rule, however, ⁶² and the rule sustained by the weight of authority (see *Farmers' Loan etc. Co. v. Railroad Co.*, 177 U. S. 51, 20 Sup. Ct. Rep. 564, 44 L. ed. 667; *In re Talbot*, 9 Week. Law Bull. 271; *Spinning v. Trust Co.*, 2 Disn. (Ohio) 336; *Chicago etc. R. Co. v. Board of Commrs. of Chase Co.*, 42 Kan. 223, 21 Pac. 1071), denies that right. It would create unseemly conflicts, if,

after a court has taken cognizance of a controversy of which it has jurisdiction, and while it is proceeding regularly in an attempt to acquire jurisdiction, another court of co-ordinate jurisdiction has power to frustrate that attempt.

It results from this reasoning that the writ of prohibition prayed for in relator's petition should issue, with costs against Percy D. Wells.

McAlvay, Grant, Blair and Montgomery, JJ., concurred.

The Scope of the Writ of Prohibition is the subject of a recent monographic note to *State v. Superior Court*, 111 Am. St. Rep. 929-978.

DEVEREAUX v. JANES.

[141 Mich. 265, 104 N. W. 579.]

GUARDIAN—Notice of Appointment.—Where an order appointing a special guardian is made on the same day that the petition for the appointment was filed, and recites that it was made "on reading and filing the petition," it cannot be presumed, in support of the jurisdiction of the court, that the statutory notice was given, if the record is silent in regard thereto. (p. 524.)

Fred R. Everett and Dooling & Kelley, for the appellant.

A. G. Shepard and Watson & Chapman, for the appellees.

266 MONTGOMERY, J. This is certiorari to review the decision of the circuit judge dismissing a writ of habeas corpus, sued out by the petitioner and plaintiff in error to obtain custody of Lyman H. Janes, who is alleged to be the petitioner's ward. The petition sets out the proceeding before the probate court in part, from which it appears that a petition for the appointment of a special guardian was made on December 14, 1904, and that the same day an order appointing a special guardian was entered in the following terms:

"On reading and filing the petition, duly verified, of J. Porter Janes, praying, for reasons therein set forth, that William Devereaux may be appointed special guardian of said Lyman H. Janes, to collect, take care of, preserve, and manage said estate until a general guardian can be ap-

pointed, and it appearing to the satisfaction of the court that said estate requires immediately care and attention, and that it is necessary that a special guardian should be appointed for the purpose aforesaid, and that said William Devereaux is a competent and suitable person to execute said trust:

"It is therefore ordered that said William Devereaux be, and he is hereby, appointed special guardian of said Lyman H. Janes, with full power and authority to collect, take care of, preserve, and manage said estate, under the order and direction of the court, until a general guardian shall be appointed or until discharged by said court."

The question presented at the outset is whether there was jurisdiction to make the order. If there was not jurisdiction, the order cannot confer any rights upon petitioner: *Partello v. Holton*, 79 Mich. 372, 44 N. W. 619. It is urged by petitioner that there is a presumption that the necessary steps were taken to give jurisdiction. The statute (3 Comp. Laws, sec. 8710) authorizes an appointment of a special guardian by the probate judge "upon such notice ²⁶⁷ as he shall direct." Whatever the presumption may be in case the record fails to show the fact, we think it would be doing violence to the recitations of this order to say either that there was notice or that the record is silent on the subject. The order was made on the same day that the petition was filed, and, more than this, the order recites that the order was made "on reading and filing the petition." This language fairly imports that simultaneously with the filing of the paper which put the court in motion the order appointing a special guardian was made, thus negating any presumption of notice which might otherwise arise.

The order of the circuit judge is affirmed.

Carpenter, Grant, Blair and Ostrander, JJ., concurred.

The Necessity of Giving Notice of an application for the appointment of a guardian is considered in *Kurtz v. St. Paul etc. R. R. Co.*, 48 Minn. 339, 31 Am. St. Rep. 657.

PEOPLE v. HODGE.

[141 Mich. 312, 104 N. W. 599.]

WITNESSES—Leading Questions.—Questions intended to call attention to subjects about which testimony is desired, and not in themselves suggesting the answers expected, are not objectionable as leading. (p. 526.)

ABORTION—Evidence of Other Like Offenses.—If the defendant in a prosecution for abortion claims that the operation was necessary, and that he performed it without criminal intent, a witness may testify that he performed a similar operation on her for the avowed purpose of producing an abortion, that she was to pay him therefor, and that he made improper proposals while treating her. (pp. 526, 527.)

Allan P. Cox and Abbott & Abbott, for the appellant.

Ormond F. Hunt, prosecuting attorney, and Louis C. Wurzer, assistant prosecuting attorney, for the people.

313 HOOKER, J. The respondent, charged with the offense of manslaughter in an attempt to produce an abortion, was convicted, and has appealed. The alleged errors are grouped, and raised three legal questions:

1. Whether certain questions asked witness for the prosecution were leading, and so prejudicial as to call for a reversal of the case.

2. Whether it was error to permit a witness to testify that the defendant had made indecent proposals to her while he was giving her medical treatment.

3. Whether it was error to permit the prosecution to show that respondent had on one occasion, before the act for which he was on trial, performed an operation to produce an abortion upon the last-named witness.

Attention is called to eight questions said to be leading. Among these questions were the following: Elmer Kuhl, a witness responsible for deceased's condition, had testified to a professional interview with a Dr. Kimball about the condition of the girl, and was asked: "What did she say? Did she say anything about marrying?" The answer was: "Yes. She said it would be a dangerous thing to tackle, to do anything like that, and she advised us to get married." Much more was said in the same connection, without other suggestion than that contained in the foregoing question. Again, the witness, having testified at some length concerning the first interview with the defendant, and that

he said that there was no danger, was asked: "What did he say in reference to the tools, if anything?" His answer was that defendant said, "I have all the necessary tools to do this with," and that he took witness into the operating-room and showed him, and said, "If one did not have the necessary tools, he could not go ahead and do this." Again, the witness was asked whether the defendant spoke to him on another occasion with reference to a written statement. The answer was, "Yes. He said he had to have a statement of some kind to bring a sick person to a hospital. He said he was going to take her to Grace Hospital. I signed the statement, and so did the girl." Again, he was asked whether he paid defendant ³¹⁴ any money. In answer he gave a somewhat lengthy conversation upon this subject, all relevant. Counsel admit that the allowance of such questions is usually within the discretion of the trial judge, but say that these were so plainly improper and injurious as to call for reversal. To us they seem proper, and not leading. They were intended to call attention to certain subjects about which testimony was desired. It was proper testimony, and the questions did not in themselves suggest the answers expected.

The other two questions can best be discussed together. It was the claim of the defendant that the operation, which he did not deny, was a necessary one, or, if not, that he believed it to be, and that he performed it without criminal intent. To show a criminal intent one May Lane was called by the prosecution, who testified that defendant performed a similar operation upon her for the avowed purpose of producing an abortion. It is said by counsel that this testimony was inadmissible, under the case of *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277. The cases differ widely. In that case the criminal intent was a necessary conclusion from the act proved. Here it is not, as we have already seen. It depended on the truth or falsity of defendant's defense that the act was done for a legitimate purpose: See *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203.

It remains to consider the second question. May Lane testified in detail to what occurred between her and defendant on the several occasions that he treated her. Upon the subject of payment, which was a proper subject of

inquiry, she said that defendant wanted her to give him what money she could.

“Q. What did he say, if anything, about bringing a young man in? A. He said, if I would do what he wished me to do, to stay with him, he would make the expense lighter. Get what money I could from the fellow, and give him part of it, and I would have more for myself. He threw himself upon me.”

“15 The court admitted this testimony as part of the *res gestae*. It is undeniable that this testimony was well calculated to prejudice the jury, and that the question was whether he had committed a criminal abortion upon May Lane, not whether he sought to have sexual intercourse with her. But it is undeniable that this conversation, if it occurred, characterized the act, which the defendant afterward (in making his defense) claimed was treatment for a venereal disease, with which the proposal was inconsistent. It may be said that when the testimony was admitted he had not testified regarding such disease, and that it would not have been necessary, but for such testimony. May Lane testified to an operation for abortion. It was materially strengthened by showing that it was to be paid for, and the price charged and the proposition to have her get him money from the man in the case were explanatory facts and clearly proper, the other proposition and the attendant circumstances being closely connected with the transaction and in fact part of it.

The conviction is affirmed.

McAlvay, Montgomery and Ostrander, JJ., concurred.

Blair, J., concurred in the result.

The Admissibility in Evidence of other crimes committed by the defendant in a criminal prosecution is the subject of a recent monographic note to Sykes v. State, 105 Am. St. Rep. 976-1006.

THRALL v. GUINEY.

[141 Mich. 392, 104 N. W. 646.]

TAXATION.—A Prohibition Against Double Taxation contained in a state constitution applies only to the taxing of property by that state, and therefore is not violated where stock in a foreign corporation is assessed by that state to a shareholder therein residing, while the property of the corporation is taxed in another state where it is situated. (pp. 531, 532.)

TAXATION.—Shares of Stock in a Foreign Corporation owning property within and without the state are, under the Michigan statutes, assessable to a shareholder residing in that state. (p. 532.)

TAXATION.—Stock in a Foreign Corporation.—A resident of this state, who owns stock in a foreign corporation, cannot complain of an assessment in this state on his stock at four-fifths its value, when one-fifth of the property of the company is situated within the state and four-fifths thereof is located in other states and there taxed according to their laws. (pp. 532, 533.)

Orla B. Taylor, for the relator.

P. J. M. Hally and Timothy E. Tarsney, for the respondent.

393 OSTRANDER, J. The plaintiff in certiorari, the relator below, is administrator of the estate of Harrison H. Taylor, deceased. Mr. Taylor, at the time of his death and for many years prior thereto, was a resident of the city of Detroit. In association with others he developed the Detroit Screw Works, a corporation organized and existing under the laws of the state of Michigan, into a large manufacturing institution. He was a large shareholder in the corporation. On March 31, 1900, the Standard Screw Company, a corporation organized and existing under the laws of the state of New Jersey, acquired the property of the Detroit Screw Works, and Mr. Taylor received in part payment for his stock in the Detroit Screw Works thirty-nine thousand seven hundred dollars of preferred stock, par value, of the Standard Screw Company. The Standard Screw Company is also the owner of manufacturing plants in the states of Massachusetts, Connecticut, Ohio, and Illinois. The property in Michigan constitutes about one-fifth of the entire property of the company. From the organization of the Detroit Screw Works its property has been regularly assessed in this state in the manner provided by law. Since the acquisition of the property by the Standard Screw Company, the real and personal property has

been regularly assessed in Detroit; the present assessed valuation thereof being one hundred and eighty-six thousand two hundred dollars. All of the other properties of the company are assessed and taxed in the respective states where the property is situated, in accordance with the laws of such states. The respondents are the assessors of the city of Detroit. They have assessed the stock of said estate in the Standard Screw Company at the sum of thirty-one thousand seven hundred and sixty dollars, deducting one-fifth of the value on account of the property of the company located in this state.

The writ of mandamus to compel the respondents to strike the assessment of the stock from the rolls was refused. It was urged in the court below, as it is here, that:

(a) The assessment against the Standard Screw Company upon its properties in this state and in the other ³⁹⁴ states above mentioned, and the assessment against said estate upon its shares of stock in said company, result in a double assessment upon the same property and upon the same value.

(b) The assessment against the estate is illegal and contrary to the constitution and laws of the state of Michigan.

(c) The assessment is in violation of the constitution of the United States, and constitutes a taking of the property of the estate without due process of law.

So far as the facts challenge the justice of the taxation complained about, they are forcibly presented in language which we take from the brief for plaintiff in certiorari:

"The precise question here in issue has never been passed upon in this state.

"In the case of *Bacon v. Board of State Tax Commrs.*, 126 Mich. 22, 86 Am. St. Rep. 524, 85 N. W. 307, 60 L. R. A. 321, it was held that shares of stock in a foreign corporation were taxable, where all of the property of the corporation was outside of the state.

"In the case of *Stroh v. City of Detroit*, 131 Mich. 109, 90 N. W. 1029, it was held that shares of stock in a foreign corporation were not taxable, where all of the property of the corporation was inside of the state.

"The question here presented is whether stock in a foreign corporation is taxable, where a portion of its property

is within the state and the remainder in other states. Speaking practically, this question is of much more general application than either of those heretofore decided. Many institutions like that in the case at bar have arisen in this state in recent years. In this case Mr. Taylor, in association with others, had built up a large manufacturing business. His interest was represented by stock in the Detroit Screw Works. Under the law, the property of the corporation was taxed, but the stock in the corporation was not taxed. Thus this property bore its proportionate share of taxation. For business reasons satisfactory to itself, the corporation joined with other companies in other states engaged in the same line of business. All of these companies had property situated and taxed in the other states. The combination of the companies added nothing to the total of their property. Mr. Taylor, like the others interested, received stock in the new association or company in payment for his stock in the Detroit Screw Works. This exchange added nothing to the ³⁹⁵ actual property. The actual property of the new company consisted simply of the combined properties of the old companies. The value of the stock in the new company depended solely and entirely on the value of the combined properties. Therefore, the stock interests do not represent new property, but only the proportionate shares of the shareholders in property already in existence. In a sense, it may be said that the stock going to the shareholders of each constituent company represents their respective share in the property of that company.

“Now, if these shares of stock are also subject to taxation, it results in double taxation, and places an extraordinary penalty on business associations with men engaged in the same line of business in other states. Of course, combinations of the same kind between companies in this state in the same line of business would not be subject to the same penalty. Unfortunately this penalty will fall upon the state itself; for if, by forming such associations, men subject themselves to double taxation, the inevitable result will be that they will remove from this state to those which pursue a more just and liberal policy upon this subject.

“The board of assessors have attempted to steer a middle course between the Bacon case and the Stroh case by

deducting from the value of the stock the value of the property inside of the state. This, however, only obviates the difficulty *pro tanto* and still leaves actual double taxation as to the remainder. As we shall demonstrate later, there is no legal authority for this method of taxation, nor is there any machinery for so doing. We are, therefore, clearly remitted to the question as to whether the Bacon case or the Stroh case shall control under the facts in this case."

The attack of relator is made upon a particular assessment of property, and also upon legislation, or upon the construction of legislation, claimed by respondents to sustain the assessment. The statute (1 Comp. Laws, sec. 3831) reads as follows:

396 "For the purposes of taxation, personal property shall include:

"5. All goods, chattels, and effects belonging to inhabitants of this state, situate without this state, except that property actually and permanently invested in business in another state shall not be included. . . .

"7. All shares in corporations organized under the laws of this state, when the property of such corporations is not exempt, or is not taxable to itself; or when the personal property is not taxed.

"8. All shares in banks organized within this state, under the laws of this state or of the United States, at their cash value, after deducting the assessed value of real property owned by and assessed to such banks.

"9. All shares in foreign corporations, except national banks, owned by citizens of this state."

The language of the statute does not suggest a rule of taxation not uniform. It is said in the case of *Stroh v. City of Detroit*, 131 Mich. 109, 90 N. W. 1029, the statute having been applied by taxing officers according to its terms, that the result was not consistent with the policy of the state nor the constitutional rule of uniformity. In that case the owner of stock in a foreign corporation, the entire property of which was in Michigan and was taxed in Michigan, was assessed the value of his shares. It was held that the assessment of the shares should be vacated. In *Bacon v. Board of State Tax Commrs.*, 126 Mich. 22, 86 Am. St. Rep. 524, 85 N. W. 307, 60 L. R. A. 321, also, the law was applied by the taxing officers according to its

terms. An owner of shares of stock in a foreign corporation was assessed the value of his shares. It appeared that the property of the corporation was situated and was taxed outside the state. The assessment of the shares was sustained. In each of these cases there was, in fact, double taxation of property, if the shares of stock are considered as mere evidence of the interest of the holder of them in the property of the corporation. In only one of the cases was there such double taxation in this state. It is plain that the constitutional rule can apply only to the taxing of property by this state, and this being so, judicial interference with the ³⁹⁷ subject can go no further than to see that as to taxes levied by and within the state the rule is observed.

Has the legislature exempted these shares of stock from taxation? It is said that the facts make a case to be governed by the provisions of clause 5, above quoted, and that proper construction would be expressed by the formula that shares of stock in foreign corporations shall be subject to taxation, except when the property is actually and permanently invested in business in another state. We are of opinion that this contention must be held to be disposed of against relator by the decision in *Bacon v. Board of State Tax Commrs.*, 126 Mich. 22, 86 Am. St. Rep. 524, 85 N. W. 307, 60 L. R. A. 321.

It is said, also, that there is no statutory provision for taxing the stock of a foreign corporation after deducting the value of its property within this state. Undoubtedly this is true, and it is also true, as pointed out, that if assessors are to adopt the method pursued in this case, in assessing citizens of this state who own shares of stock in foreign corporations having some property within the state, difficulties will arise in fixing values of such shares for the purposes of assessment. In the case before us there has been an assessment of the shares of relator, which he consents is a proper one if they are held to be assessable. We are of opinion that such shares were taxable, and, whatever difficulties may arise in other cases, that he cannot complain of the particular assessment made. There are many difficulties in the assessment of property under laws designed and framed, so far as general enactments can be framed, to insure recognition and operation of constitutional requirements. Courts must meet and deal with such matters

as they arise. We are not here required to say more than that we find no reason to interfere with the assessment complained about.

It will be of little benefit to enter upon a discussion of the contention of relator that the particular assessment violates rights secured to him by the fourteenth amendment to the constitution of the United States. It is in testing the legislation by the constitution of our own ³⁹⁸ state that we have experienced difficulty. In the particular case, relator has the benefit of a construction of the law to which we are committed, and which affects him no differently than it does any other citizen of the state owning property of the same class.

The court rightly refused the writ, and the judgment is affirmed.

McAlvay, Blair, Montgomery and Hooker, JJ., concurred.

The Constitutionality of Statutes Providing that Shares of Stock in all corporations, whether owned by residents or nonresidents, shall be liable to taxation, and that stock held by nonresident stockholders is situated for the purposes of taxation at the place where the principal office of the corporation for the transaction of business is located, is upheld in Corry v. Mayor of Baltimore, 96 Md. 310, 103 Am. St. Rep. 364, and see the cases cited in the cross-reference note thereto. In the recent case of People v. Reardon, 184 N. Y. 431, 112 Am. St. Rep. 628, a statute imposing a tax on sales of corporate stock is held valid.

WITHEY v. PERE MARQUETTE RAILROAD COMPANY.

[141 Mich. 412, 104 N. W. 773.]

CARRIER—Liability to Parent for Child's Baggage.—A father, paying full fare for himself, traveling with a child of such tender years that by custom no fare is demanded for its transportation, may recover upon the contract of carriage for the loss of articles bought and used for the child and packed and carried with the father's baggage. (pp. 535, 536.)

CARRIER—Liability to Husband for Wife's Baggage.—Where a husband buys railway tickets for himself and wife, and has their baggage checked thereon, he can recover on the contract of carriage for the loss of her jewels which were not furnished her by himself. (p. 537.)

EVIDENCE—Opinions as to Value of Injured Baggage.—In an action against a railroad company for injury to wearing apparel car-

ried as baggage, opinion evidence is admissible to show how much the articles depreciated in value by reason of the injury to them. (p. 539.)

TRIAL—Inspection by Jury of Injured Chattels.—The refusal of a court to require the production of articles of baggage claimed to have been injured through the negligence of a carrier is not an abuse of discretion, if the defendant's witnesses have had an opportunity to inspect them, and it is not clear that the jury would be aided by an examination of them. (pp. 541, 542.)

Frederick W. Stevens and Charles McPherson, for the appellant.

Crane & Norris, for the appellee.

413 **OSTRANDER, J.** On Saturday, December 26, 1903, plaintiff, his wife, and their twenty-one months old child were passengers on defendant's road from Monroe, where they had passed Christmas with relatives, to Grand Rapids, their home. As baggage they had on the same train two trunks. These trunks contained various articles of dress and of the toilet, some intended solely for the use of the infant. They contained, also, some articles of jewelry used by and intended for use by the wife, which had been given her by others than her husband, which she took to Monroe with her on her visit, and some gifts made to plaintiff and his wife and to the child at Monroe.

Plaintiff purchased at Monroe two full fare tickets to Grand Rapids, no ticket for the infant, checked the trunks, and received the checks issued for them. At East Paris, **414** near Grand Rapids, the train in question was in collision with an eastbound passenger train. On the following Monday the baggage was delivered at plaintiff's place of residence, and later, at defendant's freight depot, plaintiff's wife picked out from a quantity of goods certain articles which had been in the trunks. As delivered, the trunks, which were broken, contained a portion only of their original contents, and also articles, some of them greasy, not belonging to plaintiff or his wife, coal and pieces of earth or mud. The contents of the trunks were mused, and some of them stained and greased and spotted with mud. In January, 1904, a claim, which reads: "I herewith present my claim for damages sustained by Mrs. Withey and myself in your wreck of December 26, amounting to three hundred and eighty-six dollars and twenty-five cents"—

with a list of articles and figures, was presented to defendant, and later plaintiff began this suit.

The action is *assumpsit*. Liability of defendant is predicated upon the contract of carriage, the nonperformance of the contract by defendant, and the injury of the baggage. No contention was made in the court below respecting the negligence of the defendant and resulting liability to pay plaintiff the damages he sustained.

The case comes here upon twenty-five assignments of error, which may be grouped, and which counsel for defendant has grouped and discussed, under four propositions. Stating these propositions as they are understood, and in the order in which they will be discussed, they are: 1. That plaintiff was not entitled to recover (as he did) for destruction of and damages to articles intended for the sole use of the infant; 2. That he was not entitled to recover (as he did) for loss of and damages to the articles of jewelry belonging to his wife; 3. That the court improperly admitted opinion evidence as to the amount or sum of the damage to particular articles; and 4. That the court should have required, upon defendant's application, production of the damaged articles, so far as they could be produced, for exhibition to the jury.

⁴¹⁵ 1. It is contended that, because no fare was paid for the infant—because it was carried free—the defendant “was a gratuitous bailee as to the baby, and the transportation as baggage of articles intended solely for its use was a mere incident to that gratuity,” and the case of *Flint & Pere Marquette R. Co. v. Weir*, 37 Mich. 111, 26 Am. Rep. 499, is relied upon to sustain the contention. In that case the form of action was, as it is here, *assumpsit*. The plaintiff, on a passage from Detroit to Saginaw upon defendant's road, lost, as he claimed, his trunk, containing personal effects. It appeared that both plaintiff and his trunk were being carried, not for hire, but gratuitously. It was held that, in the absence of a contract for carriage, damages for loss of the baggage could not be recovered in *assumpsit*. The rule in the case cited does not control the present case. Even if it can be said that the child was carried free, a point which we do not consider, it by no means follows that the articles in question, the child's wearing apparel, were carried free. The clothing of the infant was the property of the father, and was in the trunks of

the father, with whom the defendant had made a contract of carriage, both of his person and his baggage.

While it is asserted on the part of defendant that it had the right to charge for the carriage of the infant, it is not claimed that under its rules and practice it does charge anything for the carriage of infants of the age of plaintiff's child. Nor do we base our determination at all upon the fact, which appears in the record, that the infant occupied for hire a seat in the parlor-car during the trip. What we hold, and what we think the correct rule of law, is that a father, paying full fare, for himself, traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract for carriage for the loss or injury of articles bought and used for the child, which articles are a part of, and packed and carried with, his baggage, and upon the ground that such articles are the property of the parent, ⁴¹⁶ in his possession, and properly a part of his proper baggage: *Prentice v. Decker*, 49 Barb. (N. Y.) 21; *Burke v. Louisville etc. R. R. Co.*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Wheeler v. St. Joseph etc. R. R. Co.*, 31 Kan. 640, 3 Pac. 297; *Smith v. Abair*, 87 Mich. 62, 49 N. W. 509.

2. We have before us no question concerning the right of the husband (plaintiff) to recover for injuries to the ordinary wearing apparel of his wife. The contention relates entirely to articles of jewelry, lost or injured, which were not given or furnished by her husband. It is defendant's position that, these being the separate and sole property of the wife, the husband, under the circumstances shown, could not recover for their loss or injury. In his charge the court said to the jury:

"Some question has been raised by defendant's counsel to the effect that the articles contained in this trunk which had been previously given to the plaintiff's wife by others, and which were taken by her to Monroe on this trip as a part of her wardrobe, ought not to be included in your consideration. These articles are the cameo pin, set in pearls, the silk liberty scarf, the set of gold beads, the emerald wreath set in pearls, and perhaps some other articles.

"But after some consideration (although not without considerable hesitation), I have concluded, under the circumstances admitted in this case, to submit that question

to you in relation to these articles thus enumerated. I feel somewhat certain that the husband had such special property in these articles by reason of his possession that he would be entitled to recover their value, if lost, notwithstanding they were the special property of the wife.

"I therefore instruct you as to these articles, which were the wife's property, . . . and which you believe, under the evidence, were either lost or damaged, shall be taken into consideration by you in fixing the amount of damages sustained by the plaintiff."

Error is assigned upon this portion of the charge, and is also assigned upon the refusal of the court to give defendant's eleventh request to charge, which was: "The plaintiff is not entitled to recover for the loss of ⁴¹⁷ or damage to any article belonging to his wife which had not been purchased with funds furnished by the plaintiff."

Of this request it is said by counsel for plaintiff that: "The defendant contends that in no case can any recovery be had, unless the plaintiff establishes an absolute title to the articles, notwithstanding **that the plaintiff was the bailor and the defendant was the bailee, and undertook with the plaintiff to carry the trunks safely.**"

We do not so understand the position of counsel for defendant. No one will contend that in all cases a bailor must show absolute title to the thing bailed in order to maintain an action against the bailee for injury to the subject of the bailment. The question in this case is whether, under the circumstances shown, plaintiff, with respect to the particular chattels, had the interest necessary to enable him to maintain this action. I have been of opinion that upon facts and the declaration, which avers a contract between the parties to transport plaintiff's baggage, of which baggage the articles in question are averred to have been a portion, it must be held that the plaintiff cannot recover the value of the particular property of the wife. My brethren who sat in the case are agreed, and there is reason and authority to sustain them, that the verdict and judgment are right, and that the recovery may be and should be sustained upon the ground that the contract to carry plaintiff and his wife and their common baggage was a contract with the plaintiff: *Jacksonville etc. R. Co. v. Mitchell*, 32 Fla. 77, 13 South. 673, 21 L. R. A. 487; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402,

87 Am. Dec. 575. Analogous decisions are those in *Blanchard v. Page*, 8 Gray (Mass.), 281; *Moran v. Portland S. Packet Co.*, 35 Me. 55. See, also, *Hutchinson on Carriers*, sec. 724. It is not claimed that the articles in question were not proper baggage for the wife. In a sense, the question presented is one of general commercial law, in view of which I yield my own opinion to that of the majority.

3. It is necessary, in considering this proposition, for a **418** better understanding, to make further reference to the record. The plaintiff, his wife, and others were sworn as witnesses for the plaintiff. Each of them had made some examination of the articles about which they gave testimony. Excepting plaintiff's wife, each was permitted, over objection, to estimate in dollars the amount of the injury described by them, or to state the injury in fractions of the value before injury, as that the damage was one-fourth or one-half of the original value of the articles, or that for the purpose for which they were purchased they had no value. The witnesses Smith, Schwartz, Remington, and Berry, called by plaintiff, were treated by counsel as expert witnesses, and each gave answers to hypothetical questions. It is evident that, whether included in the hypothetical question or not, and it usually was, the answer of each witness as to amount of damage was based in part upon a personal inspection of the injured article. A witness with twenty-five years' experience in dry goods was asked by plaintiff's counsel:

"Q. Assuming that that gown was made late in the fall of 1903 by Miss Remington, cost eighty-five dollars when delivered, and was worn the second time, that it had been through a railroad collision, been to the cleaner's, and left after cleaning in the shape it is now, state what in your opinion would be the value of that gown in the present condition for Mrs. Withey's use and wear.

"A. The gown having been injured, the purpose for which it was made is absolutely destroyed. A gown which is made for a dressy dress, to be worn as a dress for dress occasions, when it has become soiled or spotted or injured so that it shows, its value for that is lost entirely; and it is not a gown that is adapted for ordinary uses. She did not buy it for a house dress or street dress. Its value is gone. . . . I should not consider it had any money

value for the purposes for which it was made. It has lost it by its damage."

Another witness, the dressmaker who made the gown, testified that in her opinion it was damaged one-half, or forty-two dollars and fifty cents. These examples acquaint us fairly with the grounds of the exceptions taken. As to two rather expensive ⁴¹⁹ dresses, an opera cloak, and the overcoat of the plaintiff, the injuries complained about were principally to the appearance of the garments, rather than injuries to the fabrics. Each witness had some knowledge, gained from observation, which the jury had not and could not have, except by seeing the injured property, although the witnesses attempted to describe conditions as they saw them.

Counsel for appellant contends that, whatever experience these witnesses may have had in their respective lines, and however competent they may have been to state cost and quality and to describe the injury, it was not competent to state to the jury an opinion of the amount of the damage expressed in dollars. It is a rule of the law of evidence that upon the question of the existence or non-existence of a fact in issue, whether a main fact or an evidentiary fact, the opinion of witnesses is not admissible. What a witness has seen or heard or felt, he knows, and it is for him to put before the jury the facts as he has perceived them by his senses, and for the jury to form an opinion concerning the fact in proof of which the evidence is offered. But there are exceptions, apparent or real, to the rule which excludes opinion evidence. A real exception is that class of opinion evidence which is called "expert evidence." The apparent exceptions are not easily classified. They are sometimes treated as opinions admitted under exceptions to the rule, sometimes as matters of fact. The practical test for receiving or rejecting opinions of lay witnesses seems to be that, when the jury can be put into a position of equal vantage with the witness for drawing them—when by the mere words and gestures of the witness, the data he has observed can be so represented that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion—he may not as a rule give an opinion or estimate: 3 Wigmore on Evidence, sec. 1924.

It was said by Justice Campbell, in *Evans v. People*, 12 Mich. 27, 35: ⁴²⁰ "Experience has shown that many cases exist in which it is impossible, by any description, however graphic, to explain things so as to enable anyone but the witness himself to see or comprehend them as they would have been seen or comprehended could the jury have occupied his position of observation. In such cases the witness must give his own impressions and conclusions, or his narrative is useless, adding, however, as full explanations as the nature of the case will admit, so that his capacity and truthfulness may be tested as far as practicable."

In this state, testimony concerning the amount of damage, largely matter of opinion, has been held properly received in cases not to be distinguished in principle from the one at bar: *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Printz v. People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306; *Enright v. Hartsig*, 46 Mich. 469, 9 N. W. 496.

In *City of Grand Rapids v. Grand Rapids etc. R. R. Co.*, 58 Mich. 641, 26 N. W. 159, cited and relied upon by plaintiff in error, the evidence held to have been wrongly admitted was not opinion as to value of premises merely, but opinion or judgment as to compensation to be awarded for taking premises in condemnation proceedings.

The court carefully instructed the jury. He said in part:

"Several witnesses have been permitted to testify as to their opinions as to value both before and after the alleged injuries to these articles. But I instruct you that you are to assess the plaintiff's damages according to your own best judgment of the evidence and as to the injury done to them; and the evidence that has been thus received may be followed or not, as you find that it is true or not, under the evidence as to the amount of damages the plaintiff has actually sustained.

"If you believe from the evidence in the case that the statements and estimates made by any witness are not warranted, you need not follow such statements. If you believe that they are warranted, you may, to the extent that you find they are warranted by the evidence. In other words, the whole question of the amount of damages sustained by the plaintiff is for you to determine, and you alone, from the evidence, and you are not to be governed ⁴²¹ or concluded by the opinions of anyone else, unless you

believe such opinions to be well founded and based upon the evidence in the case."

4. A subpoena, requiring in terms that plaintiff and his wife produce in court such of the damaged articles as were in their possession, was taken out on the part of defendant, and with a witness fee and an additional fee was served upon both the plaintiff and his wife. The record discloses that a considerable amount of the most expensive clothing could have been, without evident inconvenience, so produced, including the plaintiff's overcoat, and the opera cloak and two dresses belonging to his wife, the value of which it was claimed had been diminished one hundred and twenty-seven dollars and fifty cents by stains, marks, and other injuries to the appearance of the garments received in the collision. None of the clothing was produced, and, upon the motion of defendant's counsel to compel its production, counsel for plaintiff announced that it would not be produced. At different times during the trial the following, with other similar, language was used by the court: "At present I think it is a matter in the discretion of the court to require it, and, being a discretionary matter, I do not feel like exercising it against the wish of the party to bring personal chattels into court for exhibition to the jury. . . . I do not think it is within the province of the court, as I have already said, to compel the production of such evidence. . . . If the party does not care to produce these articles, but chooses rather to have oral testimony as to their condition received, instead of the articles themselves, I think it is a matter that rests with the party and not with the court."

And in the charge to the jury it was said: "Something has been said about the refusal of the plaintiff to produce before you the articles alleged to have been injured or damaged. I think, perhaps, I ought to say something about that to you in these instructions. I have already said in your presence that to produce the articles or not produce them was a privilege belonging to the plaintiff, and to him alone, concerning which the court under the circumstances had no right to interfere. ⁴²² Yet, if it should appear to you by the evidence that it would be practicable to produce those articles in court, the fact that there was a refusal to produce them is a matter you may consider as bearing upon the credibility of the witnesses."

These rulings and this instruction are before us for review. We shall assume that the learned trial judge did not mean to be understood as denying the power of the court to order the production of the garments: *Graves v. City of Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, 19 L. R. A. 641. Treating the rulings made as an exercise of judicial discretion, we are not impressed that the discretion was abused. The witnesses for defendant were permitted before the trial inspection of the principal articles of apparel claimed to have been injured, and we do not think it is clear that the inspection which the jury might have made, if the garments had been produced in court, would have aided them.

Judgment is affirmed.

Moore, C. J., and Carpenter, Montgomery and Hooker, JJ., concurred.

The Right of a Husband or Father to sue for the loss of baggage belonging to his wife or infant child is discussed in the monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 389, 390.

HUNT v. BRANCH CIRCUIT JUDGE.

[141 Mich. 423, 104 N. W. 724.]

EXEMPTION of Life Insurance Money from Claim for Alimony.—Under the statute of Michigan creating an exemption in favor of the proceeds of certificates in beneficial associations, the circuit court has no jurisdiction, on a bill for a divorce and alimony, to enjoin the payment of the proceeds of such a certificate to the defendant. (p. 543.)

Kinney & Briggs and Palmer & Palmer, for the relator.

Lockerby & Cowell, for the respondent.

423 HOOKER, J. The relator was beneficiary in two certificates issued by mutual benefit societies of which his father was a member. Two days after the father's death the relator's wife filed a bill for divorce and alimony, making the societies parties thereto, and obtained a temporary injunction restraining the payment of the benefits to the relator. The relator was brought in by publication, as personal service could not be had upon him, for the rea-

son that he was absent from this state and in the state of Georgia. He employed attorneys at Coldwater, and they filed an order that "on motion of Kinney & Briggs and Palmer & Palmer, solicitors for said defendant, it is ordered that the appearance of said defendant be, and is hereby, entered specially, and for the purpose of filing a petition to dissolve the injunction heretofore issued in this cause," and for general relief. This was accompanied by ⁴²⁴ a petition, made by counsel upon relator's behalf, for a dissolution of the injunction. Upon service of this petition counsel for the complainant filed a petition for an allowance for expenses and maintenance during the pendency of the suit, and caused notice of the hearing of the same to be served on relator's counsel. The two applications were heard at the same time, the motion to dissolve the injunction being denied, and the other being granted and an allowance made. Relator now asks that the court be compelled by mandamus to (1) dissolve said injunction; (2) vacate the order allowing maintenance, etc.

The questions argued are (1) whether the fund was subject to the process of the court; (2) whether there was such a service as to support the action of the court in relation to alimony pendente lite.

The first contention rests upon the statute (2 Comp. Laws, sec. 7754), which provides: "(7754) Sec. 15. The money or other benefit, charity, relief or aid to be paid, provided or rendered by any association authorized to do business under this act, shall not be liable to attachment by trustee, garnishee, or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or of any person who may have any right thereunder."

In other words, the claim is that this class of property is exempt from interference by a court of equity for this purpose and that such courts have no jurisdiction over it. We are reluctantly forced to the conclusion that this statute must be construed in accordance with the relator's contention, and that the writ should issue as prayed, so far as the injunction is concerned.

Upon the other question we must decline to interfere at this stage. If the order for temporary alimony is void for want of jurisdiction, it cannot be enforced. If there

is jurisdiction, we should be disinclined to interfere with the discretion of the circuit judge. Counsel cite authorities ¹²⁵ to support their claim that, by appearing and moving to dissolve the injunction, the defendant appeared generally in the case and conferred jurisdiction, if the court did not already have it: See *Coad v. Coad*, 41 Wis. 23; 3 Cyc. 504, note 28. We find it unnecessary to pass upon the question, and this portion of the relief prayed for is denied.

A writ will issue in accordance with the above opinion, without costs to either party.

Moore, C. J., and Carpenter, McAlvay, and Grant, JJ., concurred.

A Statute Exempting the Proceeds of all life and accident insurance policies from liability for any debt applies to an endowment or investment policy payable to the insured or his estate and having a present cash value: Flood v. Libbey, 38 Wash. 366, 107 Am. St. Rep. 851. The right to exemption is not lost where the beneficiary in a policy deposits the proceeds thereof in a bank: *Holmes v. Marshall*, 145 Cal. 777, 104 Am. St. Rep. 86.

PEOPLE v. WOLVERINE MANUFACTURING COMPANY.

[141 Mich. 455, 104 N. W. 725.]

OBSTRUCTION OF STREETS.—Title to Land cannot be Tried in a prosecution in a municipal court for obstructing a street. (p. 545.)

OBSTRUCTION OF STREETS.—To Oust a Court of Jurisdiction of a prosecution for obstructing a street because the title to land is involved, it is essential that there should be a bona fide contention either as to the existence of the highway or the title of the lands where the obstructions are placed. (p. 545.)

DEDICATION OF STREETS—Sufficiency of Acceptance.—If a plat dedicating a street is approved by the board of public works, and is recorded in the office of the register of deeds, and soon thereafter men in the employ of the city plow, scrape and round up the street for public travel, this shows a sufficient acceptance of the dedication. (p. 546.)

OBSTRUCTION OF STREET.—Where the Dedication of a Street has been accepted by the city opening and working it, abutting owners who have recognized its public character by petitioning the council for its vacation cannot be heard to contend, when prosecuted for obstructing the street, that the prosecution involves title to land, and thereby oust the municipal court of jurisdiction. (p. 547.)

OBSTRUCTION OF STREET.—**Abutting Owners on Both Sides of a Cul-de-sac** used only for their private purposes may build a fence across it without being liable to prosecution in a municipal court under an ordinance forbidding the obstruction of streets. (p. 547.)

Keena, Lightner & Oxtoby and Samuel Harris, for the appellants.

Timothy E. Tarsney and J. W. Dohany, for the respondent.

456 BLAIR, J. The defendants were convicted on June 24, 1904, in the recorder's court of the city of Detroit, of obstructing Thirteenth street, south of Stanley avenue, an alleged public street in said city, under the provisions of a city ordinance. Sentence having been entered upon such conviction, defendants have brought the judgment and record of this court for review upon writ of certiorari.

Defendants in their brief limit the "discussion" to three items, as follows: 1. Respondents in good faith claim title to the property in question; 2. No actual highway existed at the place in question; 3. The city never accepted as a street the parcel or property in question.

It is well settled that the title to lands cannot be tried in proceedings like the present: *People v. Stott*, 90 Mich. 343, 51 N. W. 509, and cases cited. In order to oust the court of jurisdiction, it is, however, essential that there should be a bona fide contention either as to the existence of the highway or the title of the lands where the alleged obstructions are located. The rule is well stated by Chief Justice Christiancy, in *Roberts v. Highway Commrs. of Cottrellville*, 25 Mich. 23, as follows: "And whenever the contest shall appear before the jury to be, really and in good faith, a question of the existence of the highway claimed, or a question involving the title to real estate, rather than a question of encroachment upon a highway admitted to exist, or the existence of which is not in good faith seriously contested, or so clearly shown as to admit of no real and bona fide contest, the whole proceeding should be dismissed by the jury as beyond their jurisdiction in such a proceeding."

457 We think that the existence of the highway is so clearly shown in the case at bar as to admit of no real and bona fide contest. It appears conclusively from the evidence that on the fourteenth day of July, 1895, Senator McMillan, having theretofore purchased the property, executed a

plat in due form, whereby he dedicated, amongst other things, the streets and alleys shown on said plat to the public. On the eighteenth day of July, 1895, the plat designated "McMillan-Edensor Subdivision of Part of Lots 1 and 2, Lafferty Farm, Private Claim 228," was approved by the board of public works of the city of Detroit. On the nineteenth day of July, 1895, this plat was recorded in liber 19 of Plats, on page 96, in the office of the register of deeds for Wayne county. Thirteenth street, the highway in question here, was one of the streets dedicated by said plat. It further appears, by the undisputed testimony, that soon after the recording of the plat a gang of men in the employ of the board of public works, under the direction of a ward boss, plowed three furrows on each side of Thirteenth street its entire length, and then took a road scraper and scraped it up to the center of the road, rounded up the street, and scraped it up for public travel, and the work was paid for by a pay boss for the city. This opening and working the street by the city constituted a clear and unequivocal acceptance of the street, which thereupon became a public street of the city, subject to its jurisdiction and control, till vacated or lost by nonuser or adverse possession, which is not claimed in this case: *City of Mt. Clemens v. Mt. Clemens Sanitarium Co.*, 127 Mich. 115, 86 N. W. 537.

Furthermore, the defendants recognized the public character of the street by their own solemn act. In January, 1903, the defendants presented a petition to the common council asking for the vacation of Thirteenth street south of Stanley avenue, which was referred to the committee on street openings, who reported on March 10th in favor of granting the prayer of the petition upon certain conditions, and a resolution was introduced to that effect. On March 24th the resolution was put on its passage, and ⁴⁵⁸ failed of securing the necessary three-fourths of the votes of the aldermen-elect, there being eighteen yeas and fifteen nays. In March, 1903, and, we suppose, after the failure of the vacation proceedings, defendants constructed a fence across the street, which is the obstruction complained of. Under such circumstances, we think the recorder's court had jurisdiction of the case.

It remains to consider whether Thirteenth street, south of Stanley avenue, was an actual highway in the sense

that its obstruction interrupted travel which otherwise would have taken place. Chief Justice Campbell, delivering the opinion of the court in *Beecher v. People*, 38 Mich. 289, 31 Am. Rep. 316, said:

"The object of the power granted to the city to prevent obstructions to various easements of a public character is not to settle the title, which cannot be tried by a municipal court under city ordinances: *Horn v. People*, 26 Mich. 221; *Roberts v. Highway Commrs. of Cottrellville*, 25 Mich. 23.

"Neither can any such interference in a summary proceeding be had, except where some way actually used has been interrupted in its user or enjoyment. A theoretical easement not actually used is not within the law: *Tillman v. People*, 12 Mich. 401; *Jackson v. People*, 9 Mich. 111," 77 Am. Dec. 491.

The testimony on the part of the people as to the actual use of this portion of the street was not very strong. At the time defendants constructed the fence across the street, they were the owners of the lots on both sides south of Stanley avenue to the railroad tracks, where a fence barred further progress, there being no crossing over the railroad right of way. The fence constructed by defendants had been in place for a year before complaint was made, and defendants gave evidence tending to show that the street was used south of Stanley avenue for their private purposes only. The court instructed the jury upon this subject as follows: "The Wolverine Company would have a right to build a fence across there, if there was no public highway there. ⁴⁵⁹ But it is immaterial whether or not it is used. If I give the city of Detroit a piece of land out here, and they run a street down here, and plow it up and grade it, and it is accepted, it is immaterial whether John Smith or Jones walked over it or not, unless there are some conditions nominated, and if they accept it they are bound to carry out those conditions, if, in law, they are good. If I give it to them, it becomes a part of that plat. If it is dedicated, it becomes a part of that plat that was introduced here, and that was accepted. It is for you to say whether or not it is a street."

As applied to prosecutions for obstructions of highways under city ordinances, like the present, we think the charge was erroneous.

The judgment is reversed, and a new trial granted.

Carpenter, Grant, Montgomery and Ostrander, JJ., concurred.

The Rights, Obligations and Remedies of persons over whose land a public highway runs are discussed in the monographic note to Wright v. Austin, 101 Am. St. Rep. 102-118. And the rights and obligations of parties to private ways are discussed in the monographic note to Dudgeon v. Bronson, 95 Am. St. Rep. 318-330.

A Dedication of Property to a Public Use must, to become effective, be accepted. Formal acceptance, however, is not necessary; acceptance may be inferred from acts of recognition, control or user: Kelsoe v. Oglethorpe, 120 Ga. 951, 102 Am. St. Rep. 138, and cases cited in the cross-reference note thereto; monographic notes to State v. Trask, 27 Am. Dec. 562; Whitesides v. Green, 57 Am. St. Rep. 753-761.

McCARTHY v. PAYNE.

[141 Mich. 571, 104 N. W. 981.]

ESTOPPEL.—Public Policy does not permit a person, who was engaged in an unlawful business when his property was attached, to urge that the officer is estopped to set up the unlawfulness of the business as a defense to an action of trover for a failure to set off an exemption. (p. 550.)

EXEMPTION—Saloon Conducted without a License.—Where one partner in a firm conducting a saloon buys out his copartners, and thereafter continues the business without securing a new license as required by law, he cannot claim his statutory exemption as a saloon-keeper. (p. 551.)

41 Cross, Lovelace & Ross and F. W. Cook, for the appellant.

Turner & Turner, for the appellee.

571 BLAIR, J. This was an action of trover against the sheriff of Muskegon county for the conversion of property which plaintiff selected for his statutory exemption as a saloon-keeper. September 5, 1903, the plaintiff, Thomas McCarthy, formed a copartnership with one James Roe, under the firm name of Roe & McCarthy, and engaged in the business of running a saloon and restaurant on Pine street, in the city of Muskegon, paying the tax, and giving the statutory liquor bond required by law. This partnership **572** was dissolved October 30, 1903, McCarthy buying Roe's interest, assuming the debts of the firm, and continuing to run the business at the same place in his

own name until February, 1904, when it was closed on an attachment brought by the Dallas Transportation Company in a suit to recover an indebtedness due from Roe & McCarthy. The plaintiff paid no state or government tax, other than that which was paid by the firm of Roe & McCarthy, and gave no new liquor bond, but after Roe went out of the firm continued to run the saloon upon the license originally granted to Roe & McCarthy. Under the attachment above mentioned defendant, as sheriff of Muskegon county, levied upon all the property which plaintiff had in the saloon and restaurant, took possession of the place, locked the doors, and excluded everybody therefrom. The saloon business was the business in which the plaintiff was principally engaged. No opportunity was given plaintiff to select his statutory exemption, either at the time of the levy, inventory, or appraisal; but subsequently, without plaintiff's authority or knowledge, defendant pretended to set off as plaintiff's exemption two cash registers, which, at the time of the aforesaid levy, were in plaintiff's possession under a contract of purchase, but to which he had no title.

Before commencing this action plaintiff went to the clerk's office, and from the inventory and appraisal in the attachment suit, and according to the appraised value, selected property to the aggregate value of two hundred and fifty dollars as and for his statutory exemption, and on the same day served upon defendant a notice thereof and demand therefor in writing. The defendant refused to comply with said demand, and thereupon this action was brought. Under his plea of the general issue defendant gave the following notice of special defense:

"Sirs: Please to take notice that under the plea of the general issue, above pleaded, the said defendant will also give in evidence, and insist in his defense, that the personal property sued for in this action is held and was taken ⁵⁷³ by him upon a certain writ of attachment issued out of the circuit court for the county of Muskegon, at the suit of the Dallas Transportation Company, plaintiffs, against the said Thomas McCarthy, as defendant, upon the 2d day of February, A. D. 1904.

"That the said plaintiff in this action, the said Thomas McCarthy, was notified time and time again, after the said levy was made, to come and select his exemptions,

but he neglected to do so; and that under the statute said defendant set out his exemption for him, setting out personal property to the value of two hundred and fifty dollars that the said McCarthy had claimed was his."

At the close of plaintiff's proofs the court, upon motion of counsel for defendant, directed a verdict of not guilty, holding that plaintiff was not in a position to claim his statutory exemption of two hundred and fifty dollars in the saloon business, because of the fact that after plaintiff had bought out the interest of his partner, James Roe, at a time when they were legitimately engaged in the saloon business. the plaintiff, for a period of four months thereafter, ran said saloon in his own name without paying a new tax on said business, and without giving a new bond as required by law and that upon no theory could plaintiff recover.

The grounds upon which plaintiff relies for a reversal of the case may be summarized as follows:

"1. The court erred in directing a verdict for defendant, because the defendant, by his conduct, in attempting to set out for the plaintiff, as defendant in the attachment suit, personal property to the value of two hundred and fifty dollars as and for his statutory exemption, and by his notice under the plea of the general issue in this case, is estopped from now claiming that the status of plaintiff was such as not to entitle him to any exemption under the law.

"2. The court erred in directing a verdict for defendant, because under the undisputed evidence in the case the status of plaintiff was such as to entitle him to claim his statutory exemption of two hundred and fifty dollars in the saloon business."

We think there was no error in the rulings of the circuit judge. The doctrine of estoppel cannot be invoked to change a status made criminal by statute into a lawful ⁵⁷⁴ status. It would be contrary to public policy to permit such a result. It was held by the supreme court of Wisconsin, in *Walsch v. Call*, 32 Wis. 159, that the statute providing for exemptions must be construed to apply only to a lawful trade or business, and that therefore, the plaintiffs having been engaged in keeping a saloon for the sale of intoxicating liquors without having procured the license required by law, no part of their stock in trade was exempt.

Plaintiff undertakes to distinguish that case from the case at bar by the fact that the business was unlawful

from the beginning, whereas in the case before us the business was lawful at the commencement, and plaintiff thereby acquired a legal status as a saloon-keeper, and bases his right to recover upon such status. The distinction is not a valid one. The business was as unlawful in the one case as in the other. The exemption applies to the business which is actually being carried on with the property at the time it is claimed, and, if that business is unlawful, the exemption does not attach. In the present case the plaintiff had been carrying on a business for over three months which the law denounced as criminal, and the fact that he had theretofore obeyed the law cannot afford him any protection or immunities over other violators of the law, whose violations may have been more extensive than his.

The judgment is affirmed.

Moore, C. J., and McAlvay, Grant and Ostrander, JJ., concurred.

The Right to Claim the Benefit of the Exemption laws may be lost by estoppel or waiver: See *Dowling v. Wood*, 125 Iowa, 244, 106 Am. St. Rep. 301; *State v. Gardner*, 32 Wash. 550, 98 Am. St. Rep. 858.

WHITE STAR LINE v. STAR LINE OF STEAMERS.

[141 Mich. 604, 105 N. W. 135.]

PARTNERSHIP.—Corporations cannot Enter into Copartnerships with each other. (p. 556.)

PARTNERSHIP.—An Agreement Between Corporations, which operate distinct lines of steamers plying between the same ports, to pool their earnings, and, after the payment of ordinary running expenses and specified extraordinary expenses, to divide the net earnings in stated proportions, does not create a partnership. (p. 556.)

JUDGMENT.—Who not Bound as Privies.—Where an action for damages for personal injuries is brought against one corporation member of a pool, a notice from that corporation to its associates of the bringing of the action and the day set for the trial will not make them privies to any judgment recovered. (p. 556.)

UNLAWFUL CONTRACT.—Accounting on Quantum Meruit.—Where an accounting or a recovery is allowed under an unlawful contract, it is not based on the contract, but upon a quantum meruit, disaffirming the contract and holding the defendant liable for the value of the benefits actually received. (p. 557.)

MONOPOLIES.—A Combination Between Corporations engaged in carrying freight and passengers by steamer between points in dif-

ferent states, whereby the net earnings are pooled and divided in certain proportions, and whereby a monopoly in the traffic is created, is unlawful and invalid under the Sherman act. (p. 557.)

Gray & Gray and Elliott G. Stevenson, for the complainant.

F. C. Harvey and John J. Speed, for the defendants.

605 McALVAY, J. Complainant, a Michigan corporation, seeks of the three defendants, who are also Michigan corporations, by bill in chancery, contribution toward the expense of defending the claim and paying the judgment **606** of one Nellie Young against the complainant company upon a liability which accrued at a time when complainant and defendants were engaged together under a contract in operating a line of steamers.

The contract entered into by the four corporations is as follows:

"Memorandum of agreement between the Star Line of Steamers, Red Star Line, the Darius Cole Transportation Company, and White Star Line, . . . for the purpose of forming and operating a line of steamers on the route between Toledo, Detroit, and Port Huron during the seasons of 1897, 1898, and 1899, three years:

"*First.* The steamers forming the line shall be the Greyhound, Darius Cole, Arundell, and City of Toledo.

"*Second.* Each boat shall be fitted out in the spring ready for service and laid up in the fall of the year at the expense of the respective owners; and the owner or owners of each boat agree to assume its own marine and fire risks.

"*Third.* The owners or managers of each boat will hire their own captains and engineers.

"*Fourth.* The steamers forming this line shall be run on the route between Toledo, Detroit, and Port Huron as deemed best for the interest of all concerned.

"*Fifth.* It is understood and agreed that the Arundell may be taken away not earlier than May 15th and returned not later than October 15th for the season of 1897, and the Idlewild substituted for that portion of the intervening time that she may be required by this pool.

"It is further agreed that if the Idlewild is cut in two and shortened, that this same arrangement may apply for the seasons of 1898 and 1899. If she is not so shortened,

the Arundell is to fill the entire seasons of 1898 and 1899 for the pool.

"Sixth. The said steamers will run from the docks at the foot of Griswold street, Detroit, and pay four thousand dollars (\$4,000) per year dock rent to the Star Dockage & Warehouse Company, Limited, for the years from February 1, 1897, to February 1, 1900; this said dock includes the front of the Williams dock on west side of Griswold street; the said steamers also to pay six hundred and thirty-five dollars (\$635) to the city of Detroit for repairs at foot of Griswold street this year.

"The Star Island dock and Tashmoo Park and dock 607 *will also be used for all the steamers to this agreement, but any repairs to all said docks shall be borne by their respective owners.*

"Said steamers to run from the docks at Toledo and Port Huron and intermediate ports, to be agreed upon by the managers of these steamers.

"Seventh. Mr. C. F. Bielman shall be traffic manager of the lines of steamers named, to carry out the purpose of this agreement, and shall act as treasurer at Detroit, and have full charge of clerks and stewards on board of said steamers and of all the help necessary to do the shore business subject to the approval of the managers.

"Eighth. The traffic manager shall receive all the earnings from each steamer and shall deposit these earnings in bank each week day to the credit of the Star-Cole and Red and White Star Lines steamers, and shall only be checked out by him on this company's checks signed by him.

"Ninth. The traffic manager shall pay from the gross earnings of the steamers all ordinary running expenses of the said steamers while running in this route incurred during the three years of 1897, 1898, 1899, and all the shore expenses for the years of 1897, 1898, 1899; and extraordinary expenses, such as breakdowns and accidents not exceeding five hundred (\$500) dollars at any one time; the excess over that amount will be met by the steamer involved or causing the accident.

"Tenth. All expenses shall be paid under this agreement at the end of each month, as far as possible.

"Eleventh. The traffic manager shall pay to the Red and White Star Lines fifty-four (54) per cent and to the

Star-Cole Lines forty-six (46) per cent of the net earnings of all the steamers while running on this route, after their ordinary running expenses and all of the shore expenses have been paid; divisions to be made at the end of each month as far as possible.

"Twelfth. The masters and crews of these boats in the line will receive and obey instructions from the traffic manager as to matters appertaining to traffic and affected by this agreement.

"Thirteenth. In all advertising matter or official paper of any kind issued by the traffic manager, the identity of the Star-Cole Lines be maintained and be equally prominent with that of the Red and White Star Lines.

"Fourteenth. All the running and operating expenses ~~cos~~ mentioned in this agreement, it is understood and agreed, shall apply only while running on the route between Toledo, Detroit, and Port Huron for the pool.

"Fifteenth. If matters should arise under this agreement involving dispute or misunderstanding that cannot be adjusted by the presidents of these lines, they shall appoint an uninterested party, the decision of a majority of them shall be final and binding upon the parties to this agreement.

"STAR LINE OF STEAMERS,

"By A. R. LEE, Prest.

"RED STAR LINE,

"By A. A. PARKER, Prest.

"THE DARIUS COLE TRANSPORTATION CO.,

"By A. R. LEE, Prest.

"WHITE STAR LINE,

"By A. A. PARKER, Prest."

For the seasons of 1897, 1898, and 1899 the parties operated under this contract according to its terms, made and distributed large net earnings, and at the termination thereof paid all known claims and practically closed up the business. On June 5, 1900, after this business had been substantially closed, a claim for damages was by letter presented by her attorneys in behalf of said Nellie Young, on account of injuries received by her in falling through Smith's dock at Algonac, where she had gone to meet a friend expected to arrive by the steamer "City of Toledo" on

September 15, 1897. This letter was addressed to the Star-Cole Line, and was delivered to Mr. Lee and by him delivered to Mr. Bielman. The steamer "City of Toledo" was the property of complainant furnished and used by it in performing the contract herein set forth. The Star-Cole line consisted of the defendants' Star Line of Steamers and the Darius Cole Transportation Company, of each of which Mr. Lee was president. Mr. Bielman was secretary and traffic manager of complainant company, and under the contract was traffic manager and treasurer of the combination. The Smith dock at Algonac was the dock used by the steamers of the four companies while operating under the contract. The letter was ⁶⁰⁰ given by Lee to Bielman for investigation. He could obtain no information relative to the matter and wrote to the attorneys for Mrs. Young, June 11, 1900, requesting an interview which was afterward had, when all liability on the part of any of the companies was denied. Suit was commenced against complainant and the owner of the dock in September, 1900. The case was tried in the winter of 1902 and resulted in a verdict of fifteen thousand dollars against complainant and the dock owner. After appealing the case to this court it was settled for eight thousand dollars, each defendant paying four thousand dollars. Complainant contends that the defendants were equally liable with it under the contract, and were notified of the bringing of the suit, and were requested to defend the same; that they were also notified when the case was to be tried; and that they took no steps to participate in the trial. Defendants were not consulted with reference to the settlement and had no knowledge relative to it.

It further appears from the bill of complaint that the complainant in 1900 entered into an agreement with defendant Darius Cole Transportation Company to operate certain of its steamers, and under said agreement has in its hands and is obligated to pay said defendant three thousand two hundred and fifty dollars, which it prays may be applied on the amount found due upon an accounting between the parties to this suit.

Complainant's right to recover is based upon the contract of February 23, 1897, above set forth, and complainant prays contribution from these defendants upon Mrs. Young's judgment and expenses of litigation paid by com-

plainant, according to the proportion named in said agreement for the division of net earnings. Defendants insist that the agreement was not a partnership agreement, but was to create a monopoly, and was therefore contrary to public policy and the laws of the United States; that such agreement between these corporations, if construed to create a partnership, was *ultra vires*. Defendants also deny that there was any liability on the part of complainant ⁶¹⁰ to Mrs. Young, and deny they had sufficient notice to her suit to become bound by the judgment recovered by her.

The law appears well settled that corporations cannot enter into copartnerships with each other. From the agreement itself and the testimony in the case it does not appear that a copartnership was contemplated. It was a combination, designated in the writing as a pool, and by its terms did not, and could not, under the law create a copartnership.

Complainant claims that, by reason of their relations under this agreement, whether creating a copartnership or combination, their liability upon the Young judgment was mutual, and that the claimed notice of the suit was sufficient to require defendant to appear and defend the same. If it should be conceded that complainant's contention upon this branch of the case is right, we are satisfied from the record that the holding of the learned circuit judge was correct, and that no sufficient notice was given of the pendency of the suit to make these defendants privies to that judgment, and no notice whatever was given of the abandonment of the appeal to this court, and of the settlement and payment, which also included all claim of the husband.

If this agreement should be held by this court to be *ultra vires*, and therefore illegal, it is claimed by complainant that the case comes within that line of decisions where, when the unlawful contract has been fully or partially performed by one party, equity will decree a proper accounting. Courts at law and in equity have attempted to do justice in these cases between parties so far as could be done consistently with adherence to law by permitting an accounting to be made, or that property or money parted with on the faith of the unlawful contract be recovered, or compensation be made for it. Such recovery,

however, has not been maintained upon the unlawful contract, but upon an implied contract to make good, and in all cases without exception, in so far as such contracts ⁶¹¹ have been executed and not executory, upon the equitable principle of holding a party to an accountability for benefits received. From an examination of these cases it appears that the recovery allowed was not based upon the unlawful contract, but upon a quantum meruit, disaffirming the contract and holding defendant liable for the value of benefit actually received.

In *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628, this court sustained this doctrine, and allowed a recovery upon a quantum meruit for goods actually furnished under a contract *ultra vires*, but denied a recoupment by defendant under the contract which could not be enforced.

These parties were engaged in a public employment of carrying freight and passengers between Toledo, Ohio, and Port Huron, Michigan. From the testimony of the principal witnesses for both parties, as appears in the record, we find that the purpose of combination or pool between these four corporations was to create a monopoly to control this traffic between these points in different states. As such it is clearly within the prohibition of the federal statute entitled "An act to protect trade and commerce against unlawful restraints and monopolies," known as the "Sherman act," and is therefore unlawful and invalid (26 U. S. Stats. 209, c. 647). It was not an agreement the execution of which incidentally restrained trade and prevented competition, and which might therefore be held to be in reasonable restraint of trade. Its purpose in its inception was to monopolize and control this traffic between these points. It cannot be held that, because this contract might possibly in some cases and under some conditions be held good as to traffic between points in the state of Michigan, it should be held in this case not contravening the federal statute. For the purposes of this case we must construe the agreement in its entirety.

The decree of the circuit court is affirmed, with costs.

Grant, Blair, Montgomery and Ostrander, JJ., concurred.

Unlawful Monopolies and Combinations in Trade are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St.

Rep. 235-273, and in the recent case of *Hunt v. Riverside Co-operative Club*, 140 Mich. 538, 112 Am. St. Rep. 420. Any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting production, or suppressing competition, in such a way as to create a monopoly, is contrary to public policy and void. An agreement tending to prevent competition and create a monopoly is void as against public policy: *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936, and see the cases cited in the cross-reference note thereto.

BREEN v. KEHOE.

[142 Mich. 58, 105 N. W. 28.]

EXECUTORS AND ADMINISTRATORS—Nonresidents—Qualification.—Under statutes providing that when a will shall have been duly proved and allowed, the probate court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, and shall accept the trust and give bond, and that if an executor shall reside out of the state, or shall neglect to render his account, or perform any decree of the court, or abscond, or become otherwise incapable or unsuitable to discharge the trust, the probate court may remove him, a nonresident alien is not absolutely disqualified from serving as an executor, but his nonresidence is ground for the exercise of a discretion in the probate judge in the matter of appointing him an executor or in revoking his letters. (p. 561.)

EXECUTORS AND ADMINISTRATORS—Appointment.—The appointment of an executor must ordinarily be made in accordance with the will of the testator, unless such executor is ineligible, or a statutory discretion, express or implied, to refuse it is lodged in the court. (p. 562.)

EXECUTORS AND ADMINISTRATORS—Qualifications.—Indebtedness to Testator does not of itself disqualify a person to act as his executor. (p. 562.)

J. W. Shine, for the appellant.

Sharpe & Handy, for the appellee.

⁵⁸ HOOKER, J. James Breen died on July 26, 1904, a resident of Sault Ste. Marie, Michigan, where he had lived from 1902. Previous to that time he had lived in Ontario. He left a large estate in both countries. A will made in Ontario some years before his death named his widow, ⁵⁹ Annie Breen, John J. Kehoe, his solicitor, and David Lynn, a friend, as executors. A codicil made shortly before his death made no change in this regard. Mrs. Breen petitioned for the probate of the will, and objected to the appointment of Kehoe and Lynn as executors, on the

grounds, first, that they were nonresidents and aliens; second, that Kehoe was indebted to the estate. This indebtedness was amply secured by real estate mortgage upon property in Ontario. The probate court confirmed the appointment of the three executors, and on appeal to the circuit this order was affirmed. Mrs. Breen has brought the case to this court by writ of error.

The cause was tried at circuit before a jury, and a verdict was directed. No question is raised over the propriety of the trial by jury. The deceased left a widow and several children surviving him, all of whom reside in Michigan. Lynn has filed his refusal to act as executor. The will contains a provision authorizing the acting executor to remove such other executors as reside abroad or become incapable to act. Annie Breen filed her bond as executrix letters testamentary were issued to her, and she is administering the estate, which administration is now nearly completed, and the estate in shape to be carried on by her as sole executrix.

Counsel seem to agree that the question in the case is whether it was within the authority and discretion of the probate judge to appoint two nonresident aliens, one of whom was indebted to the estate, to the office of executor. We will therefore consider no other question. 3 Compiled Laws, section 9310, provides: "(9310) Section 1. When a will shall have been duly proved and allowed the probate court shall issue letters testamentary thereon, to the person named executor therein, if he is legally competent, and shall accept the trust, and give bond as required by law."

This section appears to leave no discretion in the probate judge. If the person named is legally competent, and will accept and give the bond, he must be appointed. ⁶⁰ That a nonresident and even an alien might be named and appointed executor under the common law is clear: See *Smith's Appeal*, 61 Conn. 420, 24 Atl. 273, 16 L. R. A. 538; 18 Cyc. 77, and cases cited in note 30; *McGregor v. McGregor*, 3 Abb. Dec. (N. Y.) 95; 1 *Williams on Executors*, 7th Am. ed., p. 269; *Cutler v. Howard*, 9 Wis. 309; *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515, note.

If a nonresident alien is not eligible in Michigan, it must be by reason of 3 Compiled Laws, section 9317, which provides that: "(9317) Sec. 9. If an executor shall reside out of this state, or shall neglect, after due notice given by

the judge of probate, to render his account and settle the estate according to law, or to perform any decree of the court, or shall abscond or become insane, or otherwise incapable or unsuitable to discharge the trust, the probate court may remove such executor."

If we construe the word "may" in this section in accordance with the common understanding of the word (see 1 Comp. Laws, sec. 50, subd. 1), it should be said that this section was designed merely to permit removal, not to compel it, and perhaps refusal to appoint one not a resident of the state. It is suggested, however, that the word has acquired a peculiar meaning, appropriate to the purpose of its use, and should be held to mean "shall." To give force to this claim, counsel cites cases where, under similar statutes in relation to administrators, it has been held that the courts may refuse to appoint a nonresident administrator in the first instance. Thus in Gary's Probate Law, third edition, section 267, it is said that: "Removal from the state being ground for revocation of letters of administration, it would seem that a nonresident, otherwise entitled, should not [not cannot] be appointed."

The authority cited in support of this statement is Radford v. Radford, 5 Dana (Ky.), 156. In that case a woman abandoned her husband and went to another state ⁶¹ two years before his death, at which time, and when she applied for letters at his domicile, she still resided there. Under these circumstances, the county court refused to appoint her. What kind of a statute, if any, was in force, does not appear; but it is probable that there was a statute authorizing her rejection, in view of the discussion in the later case of Berry v. Hamilton, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515, which seems to recognize the general features of the common-law rule. We must therefore conclude that she was disqualified by the statute. For such a case, see *In re Ulhorn*, 12 Ohio C. C. 766. Also, *In re Sargent's Estate*, 62 Wis. 130, 22 N. W. 131.

Mr. Croswell, a text-writer, interprets our statute (section 9317) as follows: "In Michigan and Vermont no provision of statute touches the point, except that if executors or administrators reside out of the state, they may be removed from office; from which it would seem that they are incompetent to be originally appointed": Croswell on Executors and Administrators, sec. 94.

Mr. Woerner is more guarded. He contents himself with saying (somewhat inaccurately, perhaps) that "in Maine, Michigan, and Ohio nonresident executors who fail to account and settle in the probate court when required, are to be removed": 1 Woerner's American Law of Administration, 505. In *Wiley v. Brainerd*, 11 Vt. 107, revocation of letters testamentary was refused. What the statute was does not appear, but the result would indicate that there was a statute, and the quotation from Gary indicates that it may have been a statute similar to ours. In any event, the case goes no further than to hold that her rejection was within the discretion of the county court, and we should perhaps be disposed to follow the case to that extent in the construction of our statute. It is entirely consistent with the interpretation of the word "may" in accordance with common understanding, and falls short of holding that such an appointment was prohibited. There are cases which hold ⁶² that where a statute provides that, "if an administrator moves out of the state, his letters shall be revoked," a nonresident cannot be appointed as an administrator, since such an appointment is forbidden by implication: See *Burkhim v. Piukhussohn*, 58 S. C. 469, 36 S. E. 908. It is so in Illinois, where the statute makes it the duty of the court to remove an administrator who has removed from the state: See *Child v. Gratiot*, 41 Ill. 359. In Pennsylvania the statute prohibits the appointment of a nonresident: See *Sarkie's Appeal*, 2 Pa. 157; *Frick's Appeal*, 114 Pa. 29, 6 Alt. 363.

The foregoing discussion of the authorities satisfies us that our statute was not intended to absolutely disqualify or prohibit the appointment of nonresidents to the office of executor, but to make the nonresidence ground for the exercise of a discretion both in appointment and revocation. There is a wide difference between an administrator and an executor. The latter's appointment must ordinarily be made in accordance with the will of the testator, unless he is ineligible, or a statutory discretion, express or by implication, to refuse it, is lodged with the court: See note to *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515, and other cases hereinbefore cited. For a case closely in point, see *Cutler v. Howard*, 9 Wis. 309.

It is said that Kehoe's indebtedness to the estate disqualifies him. The authorities cited are in point upon this question. When the statute has not intervened, indebtedness to the testator does not disqualify. The exact point was decided in *Kidd v. Bates*, 120 Ala. 79, 74 Am. St. Rep. 17, 23 South. 735, 41 L. R. A. 154.

The order of the circuit court is affirmed.

McAlvay, Grant, Blair and Montgomery, JJ., concurred.

RIGHT OF NONRESIDENT TO ACT AS EXECUTOR OR ADMINISTRATOR.

I. Executors, 562.

II. Revocation of Letters or Removal, 563.

III. Administrators.

a. Statutory Provisions, 564.

IV. Removal and Revocation of Letters, 565.

I. Executors.

At common law, and independent of statute to the contrary, non-residence does not disqualify, or render a person incompetent to be appointed and to act as an executor: *Bradley v. Harden*, 73 Ala. 70; *Fulgham v. Fulgham*, 119 Ala. 403, 24 South. 851; *Kidd v. Bates*, 120 Ala. 79, 74 Am. St. Rep. 17, 23 South. 735, 41 L. R. A. 154. By the common law, and in the absence of an express statute to the contrary, an executor may be an alien, or born and reside outside the state: *Cutler v. Howard*, 9 Wis. 309. But under a statute declaring incompetent to act as an executor a person who is a nonresident alien, such person should not have letters testamentary issued to him: *Estate of Taylor*, 3 Redf. Surr. 259. Such statute applies to such persons only as are neither citizens of the United States nor residents within the state: *McGregor v. McGregor*, 3 Abb. Dec. 92; and under such statute it is no objection to the issue of letters testamentary to one appointed executor by a will that he has removed from the state: *McGregor v. McGregor*, 3 Abb. Dec. 92.

A nonresident of the state in which a will is admitted to probate, who is named in the will as executor, may qualify and act as such, unless otherwise provided by statute: *In re Acker's Will* (N. J.), 62 Atl. 556; *Hammond v. Wood*, 15 R. I. 566, 10 Atl. 623; *Hecht v. Carey*, 13 Wyo. 154, 110 Am. St. Rep. 981, 78 Pac. 705; *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828.

The statute in California (Code Civ. Proc., sec. 1369) declares that no person is competent or entitled to serve as administrator who is not a bona fide resident of the state, but it makes no mention of executors. Hence a nonresident may, through an attorney, apply for and receive letters testamentary in that state, and is constructively present, through such attorney, though actually out

of the state when the application and order for the issuance of letters is made; but he must come into the state within a reasonable time, and personally submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate: *In re Brown*, 80 Cal. 381, 22 Pac. 233.

If a statute making nonresidence a disqualification is repealed after an application for letters has been denied on the ground of such nonresidence of the applicant, his application may be renewed and letters granted to him: *In re Connor*, 16 Mont. 465, 41 Pac. 271.

II. Revocation of Letters or Removal.

In the absence of statute to the contrary and of opposition, letters testamentary may properly be issued to an executor who is a non-resident of the state without the giving of a bond, and when they have been so issued, they cannot be revoked because of his continued nonresidence, nor can any bond be for that cause required of him: *Estate of Sterling*, 9 Civ. Proc. Rep. 448. The nonresidence of an executor does not furnish ground for his removal: *Bradley v. Harden*, 73 Ala. 70; nor for the revocation of his letters: *Walker v. Torrence*, 12 Ga. 604. The removal of an executor from the state does not of itself revoke or vacate his letters testamentary in the absence of a statute to that effect: *Haynes v. Semmes*, 39 Ark. 399.

III. Administrators.

At common law nonresidence does not disqualify or render a person incompetent to be appointed and to qualify and serve as an administrator, and when there is no statute changing the rule he may act as such: *Bradley v. Harden*, 73 Ala. 70; *Fulgham v. Fulgham*, 119 Ala. 403, 24 South. 851; *Kidd v. Bates*, 120 Ala. 79, 74 Am. St. Rep. 17, 23 South. 735, 41 L. R. A. 154; *Walker v. Torrence*, 12 Ga. 604. The nonresidence of a person otherwise entitled does not of itself constitute disqualification for the office of administrator: *Ehlen v. Ehlen*, 64 Md. 360, 1 Atl. 880; *Estate of Sterling*, 9 Civ. Proc. Rep. 448; *Jones v. Jones*, 12 Rich. 623; *Ex parte Barker*, 2 Leigh, 719. A husband, though not a resident within the state, is entitled to administration of his deceased wife's estate: *Weaver v. Chace*, 5 R. I. 356.

If a nonresident entitled to priority to act as an administrator is not cited in opposition to an applicant for such office, but appears before the issue of letters and presents his claim and stands upon his right, he is entitled to letters of administration: *Libbey v. Mason*, 112 N. Y. 525, 20 N. E. 355, 2 L. R. A. 795, reversing *Libbey v. Mason*, 42 Hun, 470, 11 Civ. Proc. Rep. 250. And to the same effect is *Matter of Williams*, 44 Hun, 67.

Nonresidence alone does not disqualify one so that he cannot lawfully be appointed an administrator of an estate, but ordinarily, in the absence of circumstances requiring the appointment of a nonresident, it should not be made: *Chicago etc. Ry. Co. v. Gould*, 64

Iowa, 343, 20 N. W. 464; *Foley v. Cudahy Packing Co.*, 119 Iowa, 246, 93 N. W. 284. "The fact of nonresidence is to be considered simply in connection with the ability, character for integrity, etc., of the proposed appointee, the magnitude and character of the estate, and the extent of personal attention the same will probably require": *Foley v. Cudahy Packing Co.*, 119 Iowa, 246, 93 N. W. 284. The policy of the law is to discourage the appointment of nonresidents as administrators, and even where the person entitled to preference in the selection of an administrator nominates a nonresident, his choice may be disregarded in favor of a resident: *Estate of O'Brien*, 63 Iowa, 622, 19 N. W. 797; *Estate of Sargent*, 62 Wis. 130, 22 N. W. 131. To the same effect *Bosley v. Taylor*, 5 Dana, 157, 30 Am. Dec. 677. And while nonresidence does not amount to an absolute disqualification, yet the court in the exercise of a sound discretion should not appoint a nonresident distributee administrator, so long as other distributees competent to act and willing to assume the trust are within the jurisdiction of the court: *Bridgman v. Bridgman*, 30 W. Va. 212, 3 S. E. 580.

a. Statutory Provisions.—In some states the statute provides that no person is competent or entitled to serve as an administrator who is not a bona fide resident of the state: *Estate of Beech*, 63 Cal. 458; *In re Donovan*, 104 Cal. 623, 38 Pac. 456; *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113. In other states it is maintained that a nonresident cannot be legally appointed an administrator when the statute provides for the removal from office of an administrator who removes from the state. The reason given is that if a nonresident were appointed he would under statute be subject to removal from office: *Child v. Gratiot*, 41 Ill. 357; *Estate of Ulhorn*, 12 Ohio C. C. 765.

Under statutes prohibiting anyone but bona fide residents of the state from becoming administrators therein, a person who leaves his family in the state of his former residence and comes into the state where the estate is situated to look after his interests therein, and applies for letters of administration thereon, fails to show that he is a bona fide resident of the state by simply stating as a fact, three days after his arrival, that he has become such resident. Such person is not entitled to letters of administration: *In re Donovan*, 104 Cal. 623, 38 Pac. 456. But the residence of the widow in the state will be sustained in favor of a grant of letters of administration to her if the court finds the fact of such residence, and of her intention to remain within the state and make it her future home, although she testified that she came to the state because her husband left an estate therein, and that she would not have come if he had not left such estate: *Estate of Newman*, 124 Cal. 688, 57 Pac. 686, 45 L. R. A. 780. The same determination was reached on a similar state of facts in *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113.

In Georgia a nonresident is by statute disqualified from becoming an administrator with the single exception that if a nonresident has a certain given interest in the estate of a deceased citizen of the state he may be appointed administrator under certain conditions: *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134.

IV. Removal and Revocation of Letters.

In those states where a nonresident is capable of being appointed and of acting as an administrator—in other words, where there is no statute creating a disability, the fact that he is a nonresident is not ground for his removal or the revocation of his letters, after his appointment: *Bradley v. Harden*, 73 Ala. 70; *Walker v. Torrence*, 12 Ga. 604; *Estate of Sterling*, 9 Civ. Proc. Rep. 448. In such cases the removal of an administrator from the state does not eo instanti vacate his letters, even if it is admitted that such removal is cause for a revocation. To revoke them some action of the court, on motion or otherwise, must be taken: *McCreary v. Taylor*, 38 Ark. 393; *Haynes v. Semmes*, 39 Ark. 399; *Brown v. Strickland*, 28 Ga. 387. In such case the removal of an administrator from the state does not vacate his letters, nor deprive the court of jurisdiction to allow claims against the estate when he was duly served before his removal with notice of the presentation of the claim to the court for allowance: *Haynes v. Semmes*, 39 Ark. 399.

In some states letters of an administrator are revoked by the fact of his becoming a nonresident, under statutory provisions, and in such case he cannot afterward be made a party to a suit in his administrative capacity: *Chouteau's Exr. v. Burlando*, 20 Mo. 482.

If the statute expressly or by implication disqualifies a nonresident from becoming an administrator, and he is nevertheless appointed, it is the duty of the probate court to revoke the appointment on application being made: *Child v. Gratiot*, 41 Ill. 357; *In re Estate of Ulhorn*, 12 Ohio C. C. 765.

In a New York case it is held that a foreign corporation is incapable of becoming an executor or administrator of an estate within the state, and the fact that the distributees of the estate did not oppose the appointment of such corporation is no defense to an application to revoke its letters testamentary: *Matter of Avery*, 45 Misc. Rep. 529, 92 N. Y. Supp. 974.

**DELANEY FORGE AND IRON COMPANY v. THE WIN-
NEBAGO.**

[142 Mich. 84, 105 N. W. 527.]

MARITIME LIENS.—Contracts for Building Ships or for Furnishing Materials for their construction are nonmaritime contracts, not within the jurisdiction of admiralty courts, and liens arising under state laws out of such contracts may be enforced in the state courts. (p. 569.)

CONSTITUTIONAL LAW—Maritime Liens.—A state statute creating a lien for materials furnished for the original construction of a vessel, and providing for the enforcement of such lien, is valid, and not in violation of the provisions of the national constitution in relation to cases of admiralty or maritime jurisdiction. (p. 570.)

MARITIME LIENS—Materials for Construction of Vessel.—Materials furnished for the original construction of a vessel before and after she is launched, entitles the furnisher to a statutory lien, provided the materials are furnished before the vessel is entirely completed, enrolled and licensed. (p. 570.)

MARITIME LIENS—Statutory Lien—Application—Interstate Commerce.—A statute creating a lien for materials furnished for the original construction of a vessel which is used, or intended to be used, in navigating the waters of the state does not limit the lien to vessels intended to be used exclusively in navigating the waters of the state, and applies to vessels built within the state and navigating the waters of that as well as other states, and as to which there is no national admiralty jurisdiction. (p. 571.)

MARITIME LIENS—Subcontractors.—If a vessel is constructed under a contract with individuals who are to form a corporation to which the vessel is to be transferred when completed, the title to the vessel until thus transferred remains in the builder, and one furnishing material to be used in its construction under contract with the builder is not a subcontractor, and is entitled to enforce a statutory lien for such material furnished. (p. 571.)

MARITIME LIENS—Statutory Lien.—If material is furnished for the construction of a vessel under contract with the builder, a statutory lien may attach to the vessel therefor, as an incident to the contract, regardless of the fact that such materials were charged to the builder of the vessel and not to the vessel itself. (p. 572.)

MARITIME LIENS—Notes as Payment.—If materials are furnished for the construction of a vessel for which the materialman has a statutory lien, the fact that the builder's note for a portion of the amount due on a general account for materials furnished is accepted by the materialman, but not paid, does not constitute payment precluding the enforcement of such lien. (p. 572.)

MARITIME LIENS—Enforcement—Interstate Commerce.—Proceedings to enforce a statutory lien for materials furnished and used in the construction of a vessel may be commenced after the vessel has been enrolled, licensed, and has engaged in interstate commerce, without contravening national jurisdiction in admiralty. (p. 573.)

J. C. Shaw, H. K. Oaks, C. B. Warren, W. B. Cady and J. G. Hamblen, Jr., for the complainants.

C. E. Kremer and Gray & Gray, for the defendants.

⁸⁶ McALVAY, J. The Delaney Forge and Iron Company, of Buffalo, New York, brought this proceeding under section 10,789 of 3 Compiled Laws, against the steamer "Winnebago," claiming a lien for materials furnished for use in and about the construction of the said steamer. George W. Edwards and others are intervening complainants, claiming a similar lien. The Iroquois Transportation Company, an Indiana corporation, is owner and claimant of the vessel.

This steamer was constructed and built by the Columbia Iron Works in their shipyard at St. Clair, Michigan, under a contract dated March 8, 1902. The contract price was ninety-five thousand dollars, and the Columbia Iron Works was to furnish all material and labor necessary to completely construct said steamer, and deliver the same at Port Huron, Michigan, on or before October 1, 1902. Of the contract price thirty-one thousand dollars was to be paid in cash from time to time. This contract was made with John J. Boland and Thomas J. Prindiville, and contained a provision that they, with other stockholders, would organize a corporation to be known as the "Iroquois Transportation Company," which, for the balance of the purchase price, would execute its notes to the amount of sixteen thousand dollars, and issue bonds for forty-eight thousand dollars, to be secured by mortgage upon its property. The corporation was duly organized, and the notes, bonds and mortgage executed and delivered as agreed. It was understood that this corporation would ultimately be the owner of the steamer. Boland and Prindiville assigned the contract to this corporation April 5, 1902. Under the contract the Columbia Iron Works proceeded with the construction of the steamer. It was launched March 21, 1903, and after it was in the water the work under contract continued. On July 18, 1903, it was inspected, measured, enrolled, and licensed to be employed in domestic and foreign trade. ⁸⁷ Said enrollment and license were issued to Columbia Iron Works, as owner. The same date an agreement was made, giving conditional possession to claimant corporation, the Iroquois Transportation Company: "For the pur-

pose of completing and finishing up those things still remaining undone upon said steamer, and required to be done by said Iron Works by the terms of the contract for the construction of said steamer; . . . it being the sole intent and purpose of this agreement to enable the Iroquois Transportation Company to obtain immediate possession of this steamer, and without intending either to limit the extent of the obligation of said Columbia Iron Works under the original specifications."

Final cash payment on the contract was made July 19, 1903, when the Columbia Iron Works had received the full contract price in cash, bonds, and mortgage, less three thousand five hundred dollars, deducted as penalty provided in the contract for noncompletion of the boat within the time stipulated. On this last date a bill of sale of the steamer was made by the Columbia Iron Works to the Iroquois Transportation Company.

The claims for which liens are here sought by complainant to be enforced are for materials furnished to enter into and be used in the original construction and building of said steamer "Winnebago." The materials furnished by complainant were steel forgings supplied according to the specifications and drawings furnished, between November 24, 1902, and July 16, 1903, as from time to time ordered by the Columbia Iron Works, upon the purchase price of which a balance of nineteen hundred and ninety-nine dollars and ninety cents is claimed. The complaint was filed October 6, 1903, in the circuit court for Wayne county. The Iroquois Transportation Company filed a bond, entered an appearance, and answered. The cause was heard, and a judgment rendered in favor of complainant for the full amount and costs against the Iroquois Transportation Company, claimant and owner of said steamer, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, its surety upon the bond furnished ⁸⁸ as provided by statute. Both parties against whom said judgment was rendered have appealed to this court, and by stipulation the cause is heard upon the testimony taken in the circuit court and returned to this court.

The first question to determine is whether the Michigan statute under which this proceeding was brought is in contravention of the constitution of the United States. If the case is one within the admiralty and maritime jurisdic-

tion, there is no question but that a federal court would alone have jurisdiction, notwithstanding the fact that the state statute in terms provided a remedy. By the constitution the judicial powers of the United States extend to all causes of admiralty or maritime jurisdiction. The judiciary act of 1789 (U. S. Rev. Stats., sec. 563, subd. 8) saves to suitors in all such cases the right of a common-law remedy, where the common law is competent to give it, and declares that with this exception the federal jurisdiction is exclusive. This, then, would give the federal courts exclusive jurisdiction as to the enforcement of all liens in respect to maritime contracts or maritime torts. If the lien sought to be enforced arises under a nonmaritime contract, and is created by a state statute, the authorities hold that the state courts have jurisdiction. Contracts for the building of ships, or for furnishing materials for their construction, are held by the federal courts to be nonmaritime contracts, and therefore not within the jurisdiction of admiralty courts; and liens arising under state laws out of such contracts may be enforced in the state courts: *Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. Rep. 254, 30 L. ed. 447; *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. Rep. 824, 44 L. ed. 921; *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. Rep. 8, 48 L. ed. 73; *The John B. Ketcham*, 2d, 97 Fed. 872, 38 C. C. A. 518; *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393, 15 L. ed. 961; *Roach v. Chapman*, 22 How. (U. S.) 129, 16 L. ed. 291; *Edwards v. Elliott*, 21 Wall. (U. S.) 532, 22 L. ed. 487. It will be observed that, while the authorities are uniform in holding that the jurisdiction of the federal courts is exclusive in proceedings in rem arising under maritime contracts, the decisions of the state and federal courts are just as uniform ⁸⁹ in holding that such proceedings provided for by state statutes, arising under nonmaritime contracts, are within the jurisdiction of the state courts.

We find from proofs in the case at bar that the materials furnished were for the steamer "Winnebago," and actually went into the construction of the same, as contemplated by the original plans and specifications. The Michigan statute, in so far as it creates a lien for materials so furnished, and provides for the enforcement of such lien, does not contravene the constitution of the United States.

All the decisions make a clear distinction between those cases where the lien is for the materials furnished for the building and construction of a vessel, and where the same are furnished for repairs to a vessel.

The record shows that of these materials furnished by complainant all but four items were furnished before the date of the launching, March 21, 1903, and that these four items, one quadrant, three steel valve stems, three steel connecting rod caps, and one tiller, were furnished April 30 and July 16, 1903. These named items, from their description and the evidence, were necessary in the construction of the steamer. As is customary, the vessel was put into the water before its construction was entirely completed, and the work continued at least until July 18, 1903. The items were all furnished before the steamer was completed, and before she was enrolled and licensed, and were properly included in complainant's claim.

The claim is made that the statute applies only to vessels intended to be used exclusively in navigating the waters of the state. One provision of section 10,789 of 3 Compiled Laws is: "Every water craft of above five tons burthen, used, or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon: First, for all debts contracted by the owner or part owner, master, clerk, agent, or steward of such craft, on account of . . . materials furnished . . . in or about the building of such craft."

⁹⁰ The steamer "Winnebago" was built in the state of Michigan. The materials furnished in this case were furnished in its construction before enrollment and license. The vessel was licensed July 18, 1903, "to carry on the coasting and foreign trade on the northern, northeastern, and northwestern frontier, otherwise than by sea, for one year." From the license itself it appears that the steamer was intended to be used as well in the waters of this state as other states. From the proofs it appears that the steamer was actually engaged in navigating the waters of this state, although also engaged in interstate commerce and trading with Canadian ports, as under the license was permissible. This court has passed upon this question and construed this statute in this regard in *The City of Erie v. Canfield*, 27 Mich. 479, in an opinion written by Judge Cooley, holding: "The fact that the brig was upon a voyage from a port outside the state seems to me unimportant,

except as it may bear upon the question of admiralty jurisdiction. The act referred to was unquestionably intended to give a remedy in all cases coming within its provisions in other particulars, where the vessel was at the time navigating the waters of the state, and where no remedy could be had in admiralty. The act is not confined to the water craft used or intended to be used exclusively in navigating the waters of this state, and the brig in question was in this particular strictly within the terms of the act, and, if there is no admiralty jurisdiction, is within the reason for its enactment, notwithstanding a part of its voyage was upon the waters of another state."

The claim is made that under the statute the complainant, being a subcontractor, cannot recover, for the reason that nothing was due from the owner when notice was given. Under the facts in the case this contention cannot be sustained. Complainant was not a subcontractor. The materials were furnished to the Columbia Iron Works, owner of the steamer "Winnebago." This ownership continued until delivery of the vessel to the Iroquois Transportation Company: *The John B. Ketcham*, 2d, 97 Fed. 872, 38 C. C. A. 518.

⁹¹ During the time these materials were furnished by complainant for the steamer "Winnebago" the Columbia Iron Works was engaged in building several vessels at its yards, and complainant was furnishing a large amount of material for the construction of these vessels; the aggregate value of such materials, in June, 1903, being about nine thousand dollars. The items were all charged in the account of the Columbia Iron Works, the entries showing to which vessel each item applied. A separate account was not kept with each vessel. A note of five thousand dollars was sent to complainant by Columbia Iron Works June 23, 1903. It was received by complainant. Before it became due, the Columbia Iron Works made an assignment, and the note was not paid. The claim is made that the materials were not furnished with reference to a statutory lien upon the vessel, but upon the credit of the Columbia Iron Works, and that the five thousand dollar note was accepted in payment of the claim now sought to be enforced.

The distinction between maritime and nonmaritime liens must not be overlooked in this case. It cannot with accuracy be said that materials, furnished, as in this case,

where a statute of a state gives a nonmaritime lien, are furnished upon the credit of the vessel. Such language is only exact where reference is had to a maritime lien. The statutory lien attaches by operation of law, where the materials furnished are within the provisions of the statute. The lien attaches as an incident to the contract, and, unless such lien is waived, the provisions of the statute may be invoked for its enforcement.

It is well settled that the giving of a promissory note is no payment of an indebtedness unless it is agreed that it is so accepted, and the evidence to establish payment must be positive and satisfactory. The facts with reference to the taking of the note in this case do not show any such agreement or understanding between the parties. The acceptance of the note was, therefore, not a payment of the claim: *Gardner v. Gorham*, 1 Doug. (Mich.) 507; *Peter v. Beverly*, 10 Pet. (U. S.) 532, 9 L. ed. 522; *Sarmiento v. The Catherine C.*, 110 Mich. 120, 67 N. W. 1085.

⁹² The remaining question to consider is whether the proceedings are void and in conflict with the federal constitution and statutes because commenced after the vessel was enrolled and licensed, and engaged in interstate commerce; it being claimed that no seizure could be made while so engaged, although within state jurisdiction. It will not be disputed that the federal courts do not assume jurisdiction in admiralty in disputes arising from nonmaritime contracts, nor will it be disputed that contracts for building ships are not maritime contracts, and cannot be the subject of litigation in admiralty. It is not sought in the case at bar to enforce payment for any material other than that which went into the building of this steamer, nor which was contracted for or furnished after the vessel was enrolled and licensed. The state is not usurping the federal authority in enacting laws relative to matters entirely without the jurisdiction of the federal courts, nor will the enforcement of such laws be an interference with the exclusive jurisdiction of such courts over all admiralty and maritime causes. If it is true that because a vessel is enrolled and licensed, and may be engaged in commerce between states, it cannot be reached in proceedings brought to enforce liens lawfully created by the state authority, then the enforcement of rights under such authority is practically denied. The question to be determined in each case is

whether the state had the power to make the law under which the proceeding is instituted. If such power existed, vessels of the United States may be subjected to process issued from state courts to enforce a valid lien in proceedings under such law. In this respect the law of the state is valid, and the proceedings taken under it regular.

Our conclusion and judgment, under the evidence submitted upon this hearing, is that complainant recover judgment in the same amount recovered in the court below. The cases of complainant and interveners were submitted together, as the same questions were involved.

Since writing the foregoing opinion a case involving the ⁹³ same questions under this statute, brought in the Wayne county circuit court to recover for materials furnished in constructing the steamer "Winnebago," and removed to the United States court, has been decided in the United States circuit court of appeals for the sixth circuit, to which reference is had as further authority for the conclusions herein expressed: Iroquois Transp. Co. v. A. Harvey's Sons Mfg. Co., 141 Fed. 945.

The judgments of the circuit court are affirmed in these cases against both appellants, with costs of both courts, and this order will be certified to the said court, where judgments will be entered accordingly against such appellants, and against all principals and sureties in any bond or bonds filed by them in said causes, as provided by law.

Moore, C. J., and Montgomery, Ostrander and Hooker, JJ., concurred.

A Contract for Building a Ship or supplying engines, timber or other material for its construction is not a maritime contract: The Victorian, 24 Or. 121, 41 Am. St. Rep. 838. Maritime contracts have reference to navigation upon the sea, and in some way to vessels actually being used in commerce or navigation: Olsen v. Birch, 133 Cal. 479, 85 Am. St. Rep. 215.

A State Statute Giving a Lien against steamers, vessels, and boats is valid, though no action can be brought thereon in the state courts: Olsen v. Birch, 133 Cal. 479, 85 Am. St. Rep. 215, and see the cases cited in the cross-reference note thereto.

MARVIN v. BOWLBY.

[142 Mich. 245, 105 N. W. 751.]

DESCENT AND DISTRIBUTION—Liability of Heirs for Debts of Ancestor.—Real estate of an intestate decedent descends directly to his heirs, subject, however, to the payment of the ancestor's debts and expenses of administration. (p. 576.)

DESCENT AND DISTRIBUTION—Payment of Debts of Ancestor—Order of Subjection.—An intestate's personal estate must first be subjected to the payment of his debts, after which so much of his real estate as is necessary may be subjected to that purpose. (p. 576.)

DESCENT AND DISTRIBUTION—Subjection of Ancestor's Property to Payment of Debts.—After the personalty of an ancestor is exhausted, so much of his real estate as is necessary may be subjected to the payment of his debts, and a grantee or mortgagee of the heir of his interest in such real estate acquires no greater rights than those possessed by the heir. (pp. 576, 577.)

DESCENT AND DISTRIBUTION—Distributive Shares due an heir from the personal estate of his ancestor may be applied by the administrator in payment of a debt due the estate by the heir. (p. 577.)

DESCENT AND DISTRIBUTION—Liability of Heir to Estate.—The distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof in the hands of the administrator. Such indebtedness must be collected by proceedings brought the same as for collecting any other indebtedness due the estate. (p. 584.)

F. R. Everett and Dooling & Kelley, for the complainant.

Lyon & Moinet and A. G. Shepard, in pro. per. for the defendants.

246 McALVAY, J. Complainant, as administrator of the estate of Jacob Bowlby, deceased, filed his bill of complaint against defendants, setting forth that said decedent died in Clinton county, this state, seised and possessed of real estate located in Shiawassee county, and also personal estate of the value of nineteen hundred dollars; that he was indebted in a large amount to creditors, and also as indorser or guarantor upon obligations due and owing by Elmer Bowlby to various creditors; that he, in the exercise of his duties as such administrator, after the allowance of claims, proceeded to pay said creditors, selling the personal property, paying all but a certain mortgage of the State Savings Bank of Ovid, leaving in his hands, after paying his fees and expenses, the sum of fifty-seven dollars and five cents; that all of the heirs by agreement

joined in a deed to one Theodore May of the land covered by the said mortgage to the savings bank, subject to said mortgage; that all the other lands of said estate have remained in his possession as said administrator; that defendant Elmer Bowlby was indebted to the said estate for which complainant brought suit and recovered judgment in Shiawassee circuit court, and recovered judgment from said defendant for three thousand three hundred and sixty-two dollars and sixty-two cents, and costs taxed at fifty-seven dollars and seventy cents, which judgment was afterward affirmed by this court (*Marvin v. Bowlby*, 135 Mich. 640, 98 N. W. 399), with costs taxed at sixty-one dollars, which judgment, with costs and interest, is still owing to said estate by said defendant Bowlby; that said defendant, as an heir at law of said deceased Jacob Bowlby, is entitled to a distributive share of the estate; that said defendant and his wife have given a mortgage to defendant Almond G. Shepard for six hundred dollars upon their interest in part of the real estate of said decedent to secure attorney's fees and expenses of litigation, with full knowledge of the fact of defendant Bowlby's indebtedness to said estate, and was given and received for the purpose of hindering and delaying said complainant in collecting said indebtedness, and that, with the same intent and for the same purpose, said Bowlby and wife gave another mortgage for eleven hundred dollars to ²⁴⁷ William T. Reed, trustee, upon their interest in certain other lands of said estate; that there are no funds to pay the expenses complainant incurred in such litigation, and that, the personal estate being exhausted, to pay debts it will be necessary to sell the real estate, and said mortgages are a cloud upon the title thereto; that defendant Bowlby is insolvent and has no property to satisfy the said judgments; and that it will be necessary to apply his distributive share in said real estate upon the same. The complainant prays that the aforesaid mortgages be set aside as clouds upon his title and as hindering and delaying the sale of said lands; that the distributive share of said defendant Bowlby in said lands be applied on said judgments, and, if necessary to ascertain the value of such share, said lands may be sold.

Defendant Bowlby and wife demurred to said bill, as did also defendant Shepard, alleging as grounds of demurrer that, as a judgment creditor's bill or as a bill in

aid of execution, it does not comply with the necessary requirements of law and practice; that it appears that a probate court and not a court of chancery has jurisdiction; that no case is made by the bill entitling the complainant to relief in equity. From an order overruling these demurrers, these defendants have appealed.

The bill of complaint does not on its face purport to be either a judgment creditor's bill or in aid of execution. The prayer of the bill based upon its allegations is that certain mortgages be set aside as a cloud upon complainant's title; and that the share of defendant Bowlby, as heir in the real estate of complainant's decedent, be applied upon the judgment in favor of the estate against him, and if necessary, the real estate be sold for that purpose, the share not being otherwise ascertainable.

All the questions raised upon these demurrers depend upon the main proposition—whether a court of chancery will assume jurisdiction to authorize the application of a judgment obtained by an administrator in favor of an estate against an insolvent heir at law, against the distributive ²⁴⁸ share of such heir in real estate, and order sale of the real estate for that purpose. This contention is not without force, especially as it is based upon the claim that it is the only way, under circumstances similar to these in this case, that all the heirs of an estate may share equally in the estate of their intestate ancestor. It is also supported by some authority. It is well settled that real estate of the intestate decedent descends directly to the heirs, subject, however, to the payment of debts and expenses of administration. The heir does not take an absolute title to such share of the real estate, for the reason that all of the estate is subject to the debts of the decedent. The personal estate must first be exhausted, and then so much of the real estate as may be necessary to satisfy such debts, and the title of the lands which descended to the heir may be completely divested. A mortgagee or grantee of an heir of his interest in such real estate will acquire no greater rights than those possessed by the heir.

It is a recognized doctrine that the distributive share due an heir from personal estate may be applied by the administrator in payment of a debt due the estate by the heir. The case of *Fiscus v. Moore*, 121 Ind. 547, 23 N. E.

362, 7 L. R. A. 235, is cited in support of complainant's contention in this case, that the same rule extends to the real estate of an heir. In that case all the real estate had been regularly sold by the administrator to pay debts owing by the intestate, and a surplus over remained in his hands for distribution. One of the heirs was indebted to the estate for much more than his distributive share. Moore, the mortgagee of this heir's interest in the real estate, secured an order requiring the administrator to pay him the amount of the mortgage debt out of this heir's share of such proceeds. The majority of the court held that, when land was converted into money, it became, by operation of law, money assets, subject to all the incidents of other assets, regardless of the source from which they arise; that the claim of the mortgagee was not a claim to an interest in the assets of the estate; that the mortgagee had no greater ²⁴⁹ rights than the heir, and that the administrator had the right to apply this heir's interest in this fund upon his indebtedness to the estate; that to hold otherwise would deprive the other heirs of their right to an equal participation in the estate.

Koons v. Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231, was a case where the funds arising from the sale of real estate according to the terms of a will were in the hands of the administrator, and the same court by a majority opinion held as in the case of *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. It will be noted that these cases were not in accord with the previous decisions of that court: See *Milligan v. Poole*, 35 Ind. 64; *Spray v. Rodman*, 43 Ind. 225; *Wilson's Exr. v. Rudd*, 19 Ind. 101; *Simonds v. Harris*, 92 Ind. 505; *Ballenger v. Drook*, 101 Ind. 172.

In the majority opinion in the first case above cited the court distinguished between cases where the proceeding was to compel the payment of a distributive share from the cash proceeds of the real estate in the hands of an administrator, where the heir is indebted to the estate, and an attempt by a direct proceeding to charge a lien upon the real estate which had descended to the heir: *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

The case of *New v. New*, 127 Ind. 576, 27 N. E. 154, followed the two cases above discussed, and is claimed as an authority supporting the contention of complainant in the

case at bar. An extract from the opinion will show what was decided. We quote from page 586 et seq.: "In the case of *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235, it was held by a majority of this court, and is now the settled law of the state, that a debt due an estate of an intestate from an heir may be retained out of his distributive share of the surplus proceeds of real estate which has been regularly sold in order to make assets to pay debts, as against one who took a mortgage pending the settlement of the estate, with knowledge of the indebtedness. If an administrator has the right to apply money due the heir for his share of the real estate, which accidentally comes into his hands by reason of the indivisibility of real estate, so that only a ²⁵⁰ sufficient amount can be sold to pay the debts of the estate, by reason of which indivisibility the administrator is compelled to sell all the land, thereby reserving a surplus from the sale of the real estate for the payment of a debt due the estate, then the administrator certainly has the right in equity, in case no sale is made of the real estate by which a surplus comes into his hands, to have the interest of the heir applied to the payment of the debt due the estate. In that case it is said: 'The right of heirs to participate equally in the estate of their ancestor is superior to that of a lienholder with notice.'

"This recognizes the doctrine that there exists a right to have an equal distribution of the estate between heirs, devisees, and legatees, and for that purpose there exist, in equity, a lien and right to have such a portion of an estate, whether real or personal, as goes to the heirs applied to the payment of a debt due from the heir to the estate. In the case at bar and in like cases, the estate vested subject to the rights of the widow, and the testator contemplated an equal distribution of such portion of his estate as remained at the death of the widow between the legatees, share and share alike.

"In this case the widow had full power to use such portion of the estate as necessary to supply her wants during her life, and at her death provision was made for an equal distribution of the estate remaining between the three children; before her death one obtains a portion of the funds constituting a part of the estate and executes his note for the same, which becomes a part of the assets of

the estate. The portion of the real estate which George W. took by the will was subject to the payment of the judgment taken for the portion of the personal estate which he had obtained, and the executor had the right to have it subjected to sale to pay the debt, or, in the partition of the real estate, the other devisees had the right to have it treated as an advancement, so that the debtor had no interest in the real estate except the amount remaining in excess of the amount of the judgment. The executor having the right to subject the land to the payment of the judgment, the assignee also had the same rights."

The assignee in this instance was one of the heirs who, by order of the proper court, took this judgment as part of his distributive share of the estate. Although the doctrine contended for is laid down in the opinion above ²⁵¹ quoted without qualification as a logical sequence to the decision in the case of *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235, yet the decision seems to be based upon the right of the executor to subject the land to the payment of the judgment and also the right of the other heirs in a partition of the real estate to have this debt treated as an advancement. In Indiana by statute, a judgment duly entered becomes a lien upon the real estate of the debtor.

In *Streety v. McCurdy*, 104 Ala. 493, 16 South. 686, it is held that the heirs of an estate have an equitable lien upon the distributive share in real estate of an heir who is indebted to an estate, and this lien is superior in equity to all liens of grantees or creditors of said heir, and may be enforced in equity by the other heirs, or the administrator. That court says: "This view is apparently at war with the current authority in the other states."

In *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98, the court recognizes also the conflict among authorities upon the proposition. This case was for the partition of community property owned by plaintiff and his deceased wife, against his children, and asking to offset the indebtedness of a son to said community estate against his interest therein. It was held that the distributive share of an insolvent debtor heir in the real estate could be applied upon his indebtedness to the estate. The court said: "Under our statutes, the real and personal estate of an intestate descend alike to the heirs, charged with the pay-

ment of debts and subject to administration for that purpose. Both the real and personal property, when administered, are subject to distribution among the heirs in one proceeding. The debt of one of the heirs to the estate is a part of the general mass of property subject to distribution, and, if such heir fail to pay it, if more than his share, so much of it as amounts to the value of his share should be set apart to him; if less than his share, it should be taken by him in satisfaction of that share as far as it will go. This principle was applied in *Re Akerman*, L. R. 48 Ch. D. 212."

In this case the court, in answer to the argument that ²⁵² the rule would not apply to real estate of a debtor heir which had not been converted into money, said: "We apprehend that this makes no difference in principle, for the reason that the equity of requiring the debtor distributee is the same whether the mass to be distributed consists of property or money; and it is within the power of the courts of equity to enforce the equity as well in one case as in the other. . . . Under our statutes in relation to the estates of deceased persons, a conversion of the property, both real and personal, may become necessary upon either of two contingencies: 1. For the payment of debts; and 2. In order to bring about equality in the final distribution. In principle we see no sound distinction between the two cases."

Donaldson's Estate, 158 Pa. 292, 27 Atl. 959, was an appeal from a decree dismissing exceptions to an auditor's report in partition of an estate. The court held that the equity of payment of an heir's debt to an estate runs with the land, and the amount of the heir's indebtedness may be charged upon his share as against an execution creditor with notice that the same would be charged against said share as for an advancement. In *Gosnell v. Flack*, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158, where a trustee of an insolvent heir claimed the distributive share by right of his deed of trust, it was held that: "The right to a distributive share is subordinate from the beginning to the distributee's indebtedness to the estate. If he is charged with the indebtedness, as he should be, he can only receive in the way of a distributive share what remains after deducting the indebtedness; in other words, his right to claim any portion of the estate is limited to that portion, if any, which is in

excess of what he owes to the estate, . . . and that the trustee was entitled to no greater rights than his grantor."

In this case the proceeds of this estate were in the administrator's hands for distribution.

The foregoing are the leading authorities to which our attention has been called, or which we have been able to find, supporting, or tending to support, complainant's contention. The leading cases holding the contrary doctrine are:

253 *La Foy v. La Foy*, 43 N. J. Eq. 206, 3 Am. St. Rep. 302, 10 Atl. 266, which holds that the debt of a devisee is not a charge on lands devised to him by the testator in the absence of language in the will making such debt a charge. The court says: "The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary on the part of the executor to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the estate out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised, it would be necessary for the executor to establish it by proceedings in which he is the actor. After diligent search, we have been unable to find a case in which the attempt has been made to charge a devisee of lands with a debt due from the devisee to the testator in the absence of language in the testator's will manifesting the purpose of the testator to do so. . . . In the absence of language in the testator's will to that effect, there is no authority for charging the devisee's debt upon land devised to him."

In *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533, real estate had been sold to carry out the valid provisions of a will, and funds were in the hands of the executor. The creditors and assignees of an heir who was indebted to the estate, and who had acquired rights in the land before sale, claimed the distributive share of such debtor heir in such fund. After indorsing the well-settled doctrine that as to legacies the distributive share of a legatee debtor to the estate in the hands of an executor may be applied upon his indebtedness, the learned chancellor said: "But in relation to the proceeds of that portion of the estate which

descended to J. C. as one of the heirs at law of his father, this principle of the equitable retainer does not apply. That fund was not placed in the hands of the executor by the will of the testator, as personal estate, but its conversion was merely accidental. . . . It is, in equity, therefore, still to be considered real estate and as in no way connected with the fund which came to the hand of the complainant for the purposes of the will."

²⁵⁴ The same rule has always obtained in Massachusetts. A leading case is *Dearborn v. Preston*, 7 Allen (Mass.), 192, where an ancestor devised his real estate equally to his three sons. One of these sons afterward conveyed his interest to the other two, and one of these conveyed his interest to a third party, who thereby became owner of an undivided one-half interest in said real estate and by petition asked partition thereof. The son who held the other one-half interest claimed that his brother, when he conveyed to petitioner, did not own a one-half interest, that the interest devised to him was chargeable with an indebtedness he owed his ancestor at the time of his decease. The court says: "The rule of law upon the subject is so well known and established that there can be no doubt of the legal right of a devisee of real estate to take and hold it absolutely, free from any lien or charge or encumbrance as security for anything which he owed to the testator and may still owe to his legal representatives. It was very early determined that, in the division among the heirs of the real estate of a person who died intestate, no deduction would be made from the share of any one of them for or on account of any debt due from him to the intestate; and that there was no lien or charge in any form subsisting upon such share as security for such debt or which could in any way be enforced toward the payment of it: *Procter v. Newhall*, 17 Mass. 81. The judgment of this court in the case of *Hancock v. Hubbard*, 19 Pick. (Mass.) 167, declared and reaffirmed the same doctrine. And these decisions have never been doubted or brought into question, but ever since they were promulgated have been uniformly received and recognized as true and undoubted expositions of the law. The rights of the devisees to real estate, or to any share or interest therein specifically devised to them, depend, and are obviously to be determined, upon the same principle. . . . The testator may prescribe at his own

pleasure the terms of his gift, and if he desires and intends to do so, he may charge and encumber the estate devised with the duty and obligation of paying any debt which shall remain due from the devisee to the testator at the time of his decease. His omission to impose any such condition unequivocally evinces an intention to make his gift absolute and unconditional. And it is a plain and ²⁵⁵ unavoidable consequence of an unrestricted and absolute devise, that the estate devised comes to the devisee entirely free from any encumbrance, or liability to be in any part appropriated to the payment or discharge of any debt which was due from him to the testator."

The doctrine that such indebtedness is no lien or charge upon the real estate of the debtor heir is applied in Tennessee; but, in order to make it a lien, the administrator must become an actor in a proper proceeding: *Mann v. Mann*, 12 Heisk. (Tenn.) 245; *Towles v. Towles*, 1 Head (Tenn.), 601. See, also, *Sartor v. Beaty*, 25 S. C. 293.

It is a recognized doctrine that the distributive share derived from personal property of an heir indebted to an estate may be retained by the administrator in payment of such debt. This same doctrine has also been applied to a debtor legatee by an unbroken line of authorities from the earliest English decisions to the present time. The doctrine is founded upon principle as well as upon authority. It is, in fact, the collection of a debt due the estate. Personal estate is assets in the hands of the administrator. He is required by law to convert personal property into money; to collect all debts due the estate from all debtors, including heirs. The heir has no title or claim to personal estate except a distributive share in the surplus after payment of debts and expenses of administration.

No such doctrine has prevailed as to real estate. The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient personal estate for that purpose. This statutory contingency is a modification of the common law, and no sale of real estate to pay debts of the estate could be made before this modification. It has been held repeatedly, not only that no

sale of real estate can be made except for this purpose, but also that only so much of the real estate can be sold as may be necessary for that purpose, ²⁵⁶ and that, where because of the indivisibility of real estate the whole must be sold, the surplus by the doctrine of equitable conversion is considered as real estate, and as such goes to the heirs. There is one recognized exception to the general rule above stated. Indebtedness of the heir to the estate which may be held as an advancement may be considered in the division of real estate among heirs. The recent cases cited as supporting complainant's contention are not based upon authority. The case of *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98, is the only one which goes to the full extent claimed by complainant, and that case is based upon the argument in the case of *In re Akerman*, wherein the court expressly stated: "I am not deciding a case where there is a mere gift of real estate. . . . But here I am dealing with a case such as I have mentioned, with a general fund made up of proceeds of sale of real estate, and proceeds of conversion of personal estate."

The other cases relied upon are where surplus from the real estate has been in the hands of the personal representative for distribution, and the doctrine of equitable conversion has not been recognized, or where some statutory provision has influenced the decision. The great weight of the authorities holds the contrary doctrine. We therefore hold that the distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof in the hands of the administrator; that such indebtedness is to be collected by proceedings brought the same as for collecting any other indebtedness due the estate.

The demurrers were well taken, and the order overruling the same is set aside, and a decree will be entered in this court sustaining the demurrers and dismissing complainant's bill for want of equity, with costs to defendants of both courts.

Moore, C. J., and Carpenter, Blair and Hooker, JJ., concurred.

The Liability of Heirs or Devises for the debts of their ancestor is the subject of a recent monographic note to *Crawford v. Turner*, 112 Am. St. Rep. 1017-1027.

DAVIS v. McMILLAN.

[142 Mich. 391, 105 N. W. 862.]

MALICIOUS PROSECUTION—Excessive Damages.—In an action for malicious prosecution for obtaining money under false pretenses, if it is shown that the plaintiff retains property which he obtained from the defendant by means of a representation which, though not proven false, has led the defendant to believe a falsehood, and to permit the plaintiff to retain the property, a verdict of four thousand dollars, most of which is for mortification suffered and for wounded feelings, is excessive. (pp. 586, 587.)

MALICIOUS PROSECUTION.—To Make Advice of Counsel a defense to an action for malicious prosecution, it must be shown that the advice was sought and acted upon in good faith after a full disclosure of all of the material facts. If the defendant did not state to counsel fully, accurately and truly the pretense that was made, the advice of counsel is no defense. (p. 587.)

MALICIOUS PROSECUTION.—Burden of Proving Want of Probable Cause in malicious prosecution cases is upon the plaintiff. (p. 587.)

MALICIOUS PROSECUTION—Want of Probable Cause.—Discharge of one accused of crime has not of itself any tendency to show want of probable cause for instituting the prosecution. (p. 594.)

MALICIOUS PROSECUTION—Probable Cause—Question for Jury.—If plaintiff, in an action for malicious prosecution, shows his arrest and discharge, the failure of the defendant to accurately state the pretense to his counsel, and the relations theretofore sustained by the parties, the question of probable cause is for the jury to determine. (p. 594.)

MALICIOUS PROSECUTION—Malice—Want of Probable Cause—Proof.—Malice, as well as probable cause, must be shown in an action for malicious prosecution; but malice may be deducible from the facts and circumstances surrounding the transaction, and is inferable from want of probable cause. (p. 595.)

MALICIOUS PROSECUTION — Malice — Probable Cause.—In an action for malicious prosecution, evidence that one of the defendants urged his brother to cause the arrest of the plaintiff presents a question for the jury to determine his connection with the transaction. (p. 595.)

D. C. Rexford, for the appellants.

J. C. Smith and O. Kirchner, for the appellee.

392 **HOOKER, J.** The plaintiff's declaration charges a malicious prosecution. Upon the trial of the cause he recovered a verdict of four thousand dollars damages. Judgment followed, and the defendants have appealed.

The action is based upon plaintiff's arrest on a charge of false pretenses, wherein it was claimed that he had falsely represented to Michael McMillan, secretary, that Kirby,

president of the Detroit Boat Works, had authorized plaintiff's brother to take certain tools and stock of said boat works away, thereby obtaining the same with intent to cheat and defraud. Upon the examination the pretense proven was, not that Kirby had told plaintiff's brother to take the articles, but that plaintiff's brother had told plaintiff that Kirby had given such permission. Being unable to show that plaintiff's brother had not so told plaintiff, the prosecuting attorney advised plaintiff's discharge, which the justice ordered. There was apparently no dispute that the property was obtained by this ³⁹³ representation and removed from the state; and it is proved, and not disputed by evidence, that Kirby did not give such permission, and it is a case where apparently the plaintiff has, by (unintentionally or otherwise) leading McMillan to believe an untruth, obtained and keeps valuable property worth upward of two thousand dollars not belonging to him, and has also recovered a verdict and judgment for four thousand dollars and costs by way of damages for malicious prosecution. A former verdict for two thousand eight hundred dollars was set aside upon two grounds, one of which was that the damages were excessive. A motion for a similar order upon the same grounds was denied after this trial, the court stating that he was not prepared to say that the verdict was one to shock the judicial conscience. In this we do not concur. There was evidence in the case that the complaint was made upon the advice of counsel, and with the approval of the public magistrate. It is true that the pretense as stated to counsel, and alleged in the complaint and warrant, was not technically correct, perhaps it should be said not substantially correct, yet the fact remains that, so far as this record shows, it justifies the belief that the plaintiff secured property by leading the defendant Michael McMillan to believe a falsehood, and that while asserting innocence he is retaining the fruits of his representation. Hence, though technically the prosecution for the particular pretense may have been without probable cause, it is inferable that there was a substantial reason for believing that the plaintiff had unjustly and deceitfully obtained the property with intent to cheat and defraud. Under these circumstances, the liberality of the jury is remarkable, especially as most of the damages must have been for mortification and wounded feelings. This liber-

ality may perhaps be accounted for, in a measure at least, by the fact that this was a second trial, and the proneness of juries to make such fact an element of damages (which they have no right to do) and, second, to the conduct of the case.

Was there a question for the jury in the matter of probable ³⁹⁴ cause? Defendants' counsel say that there was not, for the reason that they acted upon the advice of counsel, which is a complete justification. To take such a complete defense, it is necessary that the advice be sought and acted upon in good faith, and that a full disclosure of all material facts be made to counsel. In this case the point is made that defendants did not state truly, fully and accurately the pretense that was made. The pretense actually made was that plaintiff's brother told him that Kirby had assented to the project. That stated to counsel was that plaintiff had stated that Kirby had done so. To justify the conclusion that the latter statement was false, it was sufficient to show that Kirby did not assent, but that showing would not necessarily indicate that the former representation was false, and the court could not therefore properly say that counsel's advice was based upon a full and accurate statement of the material facts, although satisfied that the omission or misstatement was an innocent and unintentional one, and notwithstanding a conviction that the plaintiff's act was criminal in fact. It was, therefore, not the duty of the court to take the case from the jury upon that ground in defendants' favor. It does not necessarily follow from this alone that the court should not have directed the jury to find a verdict for the defendants.

The burden of proving want of probable cause in malicious prosecution cases is upon the plaintiff. Hence, it is ordinarily necessary for the plaintiff to show circumstances from which it may be legitimately inferable. The gist of the offense charged in this instance was that the plaintiff by falsely and deceitfully causing defendants to believe that Kirby had authorized or consented to the removal of this property, which they had no other right to remove, fraudulently obtained the same with intent to cheat and defraud the Detroit Boat Works. If it can be said that the facts reasonably justified the defendants in the honest belief that the plaintiff had committed the offense

of obtaining said property by a false and deceitful ³⁹⁵ statement of his authority, they cannot be said to have made the complaint without probable cause, and this would be so notwithstanding the fact that the papers when drawn did not accurately state the pretense, and the further fact that the failure to correctly set up the pretense was or may have been due to Michael McMillan's inaccuracy of statement. It has been frequently held that an acquittal does not necessarily show want of probable cause. It is doubtful if the converse has ever been held; for, if it were, it would seldom be safe to institute criminal proceedings, as conviction must always be an uncertainty under the rule of reasonable doubt, and the proceeding, being for the avowed purpose of ascertaining whether a person is guilty or not, necessarily implies a degree of uncertainty in the institution of the proceedings. In 19 American and English Encyclopedia of Law, second edition, page 665, the author of the subject states that some cases hold that acquittal is not alone *prima facie* or *per se* sufficient evidence of want of probable cause, and expresses the opinion that the better doctrine is that it is (alone) no evidence whatever of want of probable cause.

We have two cases from which it may have been inferred that the Michigan rule is that a discharge by the magistrate is *prima facie* proof of want of probable cause, but neither of them is conclusive of the point. In *Perry v. Sulier*, 92 Mich. 72, 52 N. W. 801, Mr. Justice Grant said: "The fact of discharge upon the examination is not of itself conclusive evidence of want of probable cause."

In *Rankin v. Crane*, 104 Mich. 6, 61 N. W. 1007, he again stated: "A *prima facie* case may be made by showing a plaintiff's discharge, but it is not conclusive."

There was no occasion to determine whether the discharge was *prima facie* evidence and the gist of the holding was that it was not only conclusive, but that even if it were *prima facie* evidence that the evidence conclusively showed the want of probable cause, and it is therefore at least open to doubt if the court intended to ³⁹⁶ do more than imply a possibility that it might be the rule without denying it. While it is pretty generally held that acquittal upon the merits is not evidence of probable cause, the court would doubtless have discussed the cases upon the subject, had it been considered a crucial question in

the case. We are therefore warranted in considering it an open question. There is some inharmony in the decisions elsewhere as to whether a discharge by an examining magistrate is *prima facie* evidence of a want of probable cause; a distinction being drawn between the two upon the ground that the question of probable cause is the very question to be determined by the magistrate, while the decision in the trial court does not turn on that question. That is suggested by the West Virginia court in the case of *Vinal v. Core*, 18 W. Va. 1. It is there recognized to be but slight evidence, and the rule seems to have been approved upon the somewhat doubtful ground that it is incumbent on the plaintiff to prove a negative. A more rational rule is that an act, not that of the defendant, cannot be evidence to bind him. He is not a party to the criminal proceeding, can offer no evidence to influence the magisterial conclusion or decision, and the rule laid down in the case of *Apgar v. Woolston*, 43 N. J. L. 57, commends itself to us, viz., that a discharge not brought about by the procurement of the defendant, nor attended by circumstances involving the conduct of the defendant which of themselves indicate a want of probable cause, is no evidence of a want of probable cause. Even in such instances it is obvious that it is the attendant circumstances, rather than the fact of the discharge, that tend to prove the point.

Of course, the fact of discharge is admissible for another purpose, viz., to show the termination of the prosecution, which is usually a necessary condition precedent to a suit for malicious prosecution: *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664; *Phillips v. Village of Kalamazoo*, 53 Mich. 33, 18 N. W. 547. We think it can safely be said that the weight of authority denies the rule that discharge by a magistrate upon request of the prosecuting attorney is *prima facie* evidence of want of probable cause.

397 The case upon which the contrary doctrine appears to rest is *Nicholson v. Coghill*, 6 Dowl. & R. 13, 4 Barn. & C. 21, decided in the king's bench in the time of George IV, A. D. 1825, in which Holroyd, J., makes the statement as supporting his view in that case: "It has been long held in actions for malicious prosecutions that evidence of the grand jury, having thrown out the bill, justifies the inference of the want of probable cause, and that it is for

the prosecutor to rebut that inference by contrary proof on his part."

No such point was involved, for the reason that the suit was based upon a civil action, which was voluntarily withdrawn by the prosecutor, who had absolute control of the matter, thus bringing the case within the exception mentioned in the New Jersey case hereinbefore cited. Moreover, the decision was not unanimous. Two early American cases are supposed to have followed the Nicholson case (6 Dowl. & R. 13; 4 Barn. & P. 21). These are *Secor v. Babcock*, 2 Johns. (N. Y.) 203, which, when examined, will be found to fall short of stating such a principle, and the case of *Johnston v. Martin*, 3 Murph. (N. C.) 248. There it is said: "Whether there be probable cause for the prosecution must depend on all the circumstances of the case, but that which indicates its absence most strongly is the discharge by the magistrates, after a full and fair examination of the evidence."

Thus a discharge upon a hearing of the merits is apparently given much greater effect than that of *prima facie* evidence, a doctrine that is believed to be generally disapproved to-day. These two cases seem to have "blazed a trail" for others to follow. Thus, in 1829, the supreme court of Tennessee followed the Carolina case, citing no other authority: *Williams v. Norwood*, 2 Yerg. (Tenn.) 329. In 1881 the case of *Vinal v. Core*, 18 W. Va. 1, was decided. This case rests upon the Nicholson Case (6 Dowl. & R. 13, 4 Barn. & P. 21), the Carolina case re-enforced by three later Carolina cases, viz., *Plummer v. Gheen*, 3 Hawks (N. C.), 66, 14 Am. Dec. 572, *Bostick v. Rutherford*, 4 Hawks (N. C.), 83, and *Johnson v. Chambers*, 32 N. C. 287, and the case from Tennessee above stated.

It is noticeable that in *Bostwick v. Rutherford*, 4 Hawks (N. C.), 83, the correctness of the doctrine of the earlier cases was questioned, Hall, J., saying: "I am not disposed to disturb the case of *Johnston v. Martin*, 3 Murph. (N. C.) 248." It was questioned later by the same court, which said of it: "The correctness of this position is questionable, the innocence of the plaintiff does not prove the absence of probable cause, and the decision conflicts with English authorities, as appears from *Purcell v. Macnamara*, 9 East, 361": *McRae v. Oneal*, 2 Dev. (N. C.) 166.

This was severe treatment by the court which made the decision. On the other hand, a case in Massachusetts decided in 1831 lays down the following: "The want of probable cause is the essential ground of this action. Other things may be inferred from this; but this cannot be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the onus probandi is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no ground for commencing the prosecution: See the above citations; also *Purcell v. Macnamara*, 1 Camp. 199, 9 East, 361; *Sykes v. Dunbar*, 1 Camp. 202, note; *Inledon v. Berry*, 1 Camp. 203, note; *Wallis v. Alpine*, 1 Camp. 204, note; *Shock v. McChesney*, 4 Yeates (Pa.), 507, 2 Am. Dec. 415''; *Stone v. Crocker*, 24 Pick. (Mass.) 81.

The case of *Apgar v. Woolston*, 43 N. J. L. 57, has been cited. It is there said: "In the treatises on evidence the rule is laid down without qualification that, in order to show that the criminal prosecution was groundless and without probable cause, it is not sufficient to show that the bill being preferred was thrown out by the grand jury: 2 Starkie on Evidence, 494; 3 Phillips on Evidence, 571; 2 Greenleaf on Evidence, sec. 455. In *Nicholson v. Coghill*, 6 Dowl. & R. 13, 4 Barn. & C. 21, Holroyd, J., is reported to have said that it had ³⁹⁹ been held that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause. This remark was made in an action for malicious arrest in a civil suit, where the defendant was himself an actor in discontinuing the action, and which was expressly distinguished by Abbott, C. J., on that circumstance, from cases where the prosecution was on a criminal charge. I have not been able to find any case in the English courts in which such a decision was made, or in which any observation to that effect was made by any other English judge. I am aware that there are cases in the courts of this country entitled to the greatest respect in which it has been held that the failure of the grand jury to indict is *prima facie* evidence of the want of probable cause. But there are also decisions of the courts of our sister states, en-

titled to equal respect, holding the contrary; and I think the doctrine laid down by Starkie, Phillips and Greenleaf is founded on sound principles of law, and is consistent with public policy."

In the case of *Israel v. Brooks*, 23 Ill. 575, Breese, J., said of a charge: "As the onus of proving a negative—the absence of probable cause—is thrown upon the plaintiff, slight evidence will usually suffice for such purpose. But the evidence of a uniform good character up to the time of the charge is something more than slight evidence, and the plaintiff should have the benefit of it. If known to the prosecutor, what single fact is better calculated to weaken a belief, he being a prudent and cautious man, in the guilt of the suspected party? On the other hand, his bad character may be shown by the defense, as good ground for augmenting a suspicion against him. We know, in no actions save criminal prosecutions and actions for defamation can the character of the party, as a general rule, be inquired into, but in such a case as this, there seems to be great propriety in permitting it, for the reasons here given.

"We do not consider it necessary to pass upon all the instructions given by the court for the plaintiff, or refused, as asked by the defendant. Those on the part of the plaintiff, with some inaccuracies in their frame, stated the law. The second instruction did not state the law, and, in our judgment, announces a principle of the most dangerous character. It is this: ⁴⁰⁰ 'That the discharge of the plaintiff by the examining magistrate is prima facie evidence of the want of probable cause, and sufficient to throw upon the defendant the burden of proving the contrary.'

"As stated on the argument, this instruction is copied verbatim from 2 Greenleaf on Evidence, section 455. He cites *Secor v. Babcock*, 2 Johns. (N. Y.) 203. That case decides no such principle. It is a per curiam opinion, and is as follows: 'The justice had power, on examination of a charge of suspicion of felony, or of having stolen goods, to dismiss the plaintiff below, if he was satisfied there was no ground for the suspicion. The acquittal was lawful, and there was sufficient ground for a suit for a malicious prosecution. The judgment below must be affirmed.'

"The court does not presume to say that by the discharge of the accused, by the examining magistrate, a sufficient ground for a malicious prosecution was established

as showing a want of probable cause. The court does not say that by reason of the discharge a want of probable cause is to be inferred, nor anything like it. Greenleaf also refers to *Johnston v. Martin*, 3 Murph. (N. C.) 248, and *Bostick v. Rutherford*, 4 Hawks (N. C.), 83, where the doctrine is there distinctly stated in the language of this instruction. No authority or good reasoning is adduced to support it, and these cases stand alone, justifying such a principle.

"To what does it amount? Why, to this—that every man who appears before a magistrate to give information of a criminal offense incurs the hazard of a prosecution against himself, should the magistrate happen to be ignorant, prejudiced, or corrupt. How many magistrates are there in obscure localities who are as little capable of determining what is probable cause for a criminal accusation as they are of explaining any of the phenomena of nature? How many do we find prejudiced against a public accuser, how many in sympathy with the accused? The decisions of such an official, on intricate questions of law or fact, should not weigh against the accused, and they do not practically; for, if he is committed, the grand jury pay no attention to the finding of the magistrate. It is not *prima facie* evidence of his guilt, and how preposterous it is to say the discharge of the criminal is *prima facie* evidence of want of probable cause. It is not so, and should never be so regarded. The fact may go to the jury that he was discharged by the magistrate, but no such ⁴⁰¹ inference unfavorable to the accuser should be drawn from it": See, also, *Thorpe v. Balliett*, 25 Ill. 339.

In *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 16 Atl. 554, the court said of the three essentials: "The acquittal of the plaintiff proves the first [i. e., discharge of the plaintiff], but it has no tendency to prove the second or third [i. e., want of probable cause or malice]."

In *Heldt v. Webster*, 60 Tex. 207, the following charge was held to be erroneous: "If the plaintiff was discharged from the prosecution by the examining magistrate who examined the case, then the presumption of law is that there was no probable cause; but if the evidence further shows that the defendant had reasonable cause to believe, and did believe, that the facts stated in the complaint were true, then he would have such probable cause as the law con-

templated,' because (1) the discharge of the defendant in a criminal prosecution does not raise a presumption of probable cause": See, also, *Flinkinger v. Wagner*, 46 Md. 580.

In *Barbour v. Gettings*, 26 U. C. Q. B. 544, the court held: "In an action for malicious prosecution, want of reasonable and probable cause must be shown by the plaintiff. Slight evidence may be sufficient, for it is the proof of a negative, but there must be some proof; and in this case where it was shown only that the defendant laid the information on which the plaintiff was arrested, and that the magistrates after hearing the parties dismissed the charge"—and that a verdict was properly directed for defendant.

In *Cole v. Curtis*, 16 Minn. 182, it was held: "Where, in a preliminary examination upon a criminal charge before a magistrate, witnesses for the defense (including the defendant himself) may be examined, if the facts upon which the prosecution is founded are not within the personal knowledge of the prosecutor, the discharge of the accused upon the hearing by the magistrate is not prima facie evidence of want of probable cause in an action by the accused against the prosecutor for a malicious prosecution."

⁴⁰² Our own case of *Wakeley v. Johnson*, 115 Mich. 285, 73 N. W. 238, is analogous, but the question there is not identical with that in the present case. It follows that we must hold that the court erred in modifying defendant's request that a dismissal at the request of the prosecuting attorney is not sufficient evidence of want of probable cause, by adding, at the suggestion of plaintiff's counsel, the following:

"Mr. Kirchner.—Standing by itself it is sufficient. Your honor means it is not conclusive.

"The Court.—It is not conclusive evidence of want of probable cause—the fact that it was dismissed.

"Mr. Kirchner.—That is all right."

We feel warranted in saying that the discharge of the defendant in this case has not in itself any tendency to show a want of probable cause, but we are also of the opinion that it was proper to submit to the jury the question of probable cause. The only proof that the plaintiff offered to show want of probable cause was the fact of the arrest and discharge, the failure to accurately state the pretense, and the relations theretofore sustained by the parties. If from these the jury might conclude that an

ordinarily fair and careful business man would be likely to believe in plaintiff's guilt, they should find probable cause and acquit the defendants. But that is essentially a question for the jury where there is room for two opinions; and there may be here. Therefore the court could not properly take the cause from the jury upon the ground that want of probable cause had not been shown. Want of probable cause alone is not sufficient to base a verdict upon. Proof of malice is also essential. That, too, may be deducible from the facts and circumstances surrounding the transaction, and is inferable from absence of probable cause.

It is said by counsel: "Plaintiff and the court apparently relied on the dismissal of the complaint for evidence of want of probable ⁴⁰³ cause. As it did not tend to prove it, there was no evidence of want of probable cause."

We have already expressed the opinion that there was other evidence pertinent to the question, and we think that the court's charge is not open to the above criticism. It is contended that there was no evidence upon which Neil McMillan could lawfully be convicted. We think otherwise. Two witnesses testify that he urged his brother to cause the arrest; and, although counsel say that this occurred after the complaint was made, it was before the arrest and subsequent proceedings. His connection with the transaction was a question for the jury, and we think there was testimony from which it might be inferred.

Counsel complain that the court failed to sufficiently instruct the jury as to the facts which would justify a finding of want of probable cause. This should have been called to the attention of the trial court: See *Peterson v. Toner*, 80 Mich. 350, 45 N. W. 346. We find it unnecessary to make the decision turn upon this question, however.

The judgment is reversed, and a new trial ordered.

Moore, C. J., and McAlvay, Montgomery and Ostrander, JJ., concurred.

The Malicious Prosecution of civil actions is the subject of a monographic note to *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 454-474; and the malicious prosecution of criminal actions is the subject of a monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 127-164. In an action for malicious prosecution it devolves upon the plaintiff to show affirmatively that there was both malice and want of probable cause on the part of the defendant in instituting the prosecution complained of: *Kansas etc. Coal Co. v. Gal-*

loway, 71 Ark. 351, 100 Am. St. Rep. 79; Abbott v. Thorne, 34 Wash. 692, 101 Am. St. Rep. 1021. As to what constitutes probable cause, and as to the effect of the advice of counsel as a defense, see Kansas etc. Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79, and cases cited in the cross-reference note thereto. Actual malevolence or corrupt design is not necessary to constitute legal malice: Kolka v. Jones, 6 N. Dak. 461, 66 Am. St. Rep. 615.

SUPREME LODGE ORDER OF MUTUAL PROTECTION v. DEWEY.

[142 Mich. 666, 106 N. W. 140.]

BENEFIT SOCIETIES—Beneficiaries—Member of "Family."

A stepfather, not a member of his stepdaughter's household at the time of her death, though previous thereto he had boarded with her for a time, is not a member of her "family" within the meaning of a benefit certificate of insurance issued to her and permitting the payment of her death benefit to a member of her family. (p. 601.)

BENEFIT SOCIETIES—Beneficiaries.—If an insurance benefit certificate provides that the rights of the beneficiary shall be determined by the laws of the order in force at the time of the death of the member, and at that time the laws of the society provide that, if the designated beneficiary proves to be an unlawful one, the wife or husband of the member shall be recognized as the first lawful claimant for the benefit, and the policy names as beneficiary the member's stepfather, who cannot take because not a member of her family, her husband has a direct interest in the contract and is entitled to enforce it, although the society is willing to pay the benefit to such stepfather. (p. 602.)

Cross, Lovelace & Ross, for the appellant.

W. Carpenter, for the appellee.

667 BLAIR, J. Complainant, a fraternal benefit society, organized under the laws of Illinois, filed its bill of interpleader against the defendants to determine the proper party to receive the amount, conceded to be due, of a benefit certificate issued to Myrtle M. Ducheney, who, at the time of her death, was the wife of defendant Ducheney.

The defendant Dewey was stepfather to Mrs. Ducheney, having married her mother in November, 1894. At the time of her marriage, Mrs. Dewey owned a home on Apple street in the city of Muskegon, where she, her husband, and her daughter Myrtle lived together as a family till some time in 1897, when Myrtle married a Mr. Folsgraf and removed with him to a house on Williams street in the

same city, where they resided till the death of Mrs. Dewey in October, 1900. After the death of Mrs. Dewey, Mrs. Folsgraf and her husband moved into the Apple street home and Dewey boarded with them for about a month, when he moved into rooms in the Landreth block in said city. Mr. and Mrs. Folsgraf continued to reside in the house on Apple street till the death of Folsgraf, March 11, 1902, when Mrs. Folsgraf also moved into rooms in the Landreth block, where she remained for about two months, when she married the defendant Ducheney and removed with him to Chicago, where she remained until she died. The relations between defendant ⁶⁶⁸ Dewey and his stepdaughter were very affectionate, as much so as though they were father and daughter, and she visited him very frequently after leaving his home, and, while living in the block, they went out to their meals together and she took a large part of the care of his rooms.

On July 13, 1900, Mrs. Folsgraf presented to Muskegon Lodge of complainant an application containing, among other things, the following:

"I hereby apply for a \$1,000.00 Benefit Certificate, to be made payable to

Name of Beneficiary.	Age	Relationship.	Amount of Benefit.
William A. Folsgraf	28	Husband	\$500.00
Theodore B. Dewey	37	Stepfather	500.00

[Signed]

"MYRTLE M. FOLSGRAF,
"Applicant.

"Signature witnessed by R. G. CAVANAUGH,

"Medical Examiner.

"Residence of applicant, 159 Apple St.

"No. 17,813. Accepted as a beneficiary member, July 31, 1900."

On April 5, 1902, Mrs. Folsgraf presented a request for a change of the certificate, as follows:

"Application to be signed by every member who for any cause desires new certificate issued, including for a change of occupation or residence.

"To the Supreme Lodge, Order of Mutual Protection:

"I, the undersigned, to whom Benefit Certificate No. 17,813 was issued, do hereby cancel the same and request that a

new one be issued to me for the sum of one thousand dollars and payable to

Full name of Beneficiary	Age	Relationship to Member.	Amount.
Theodore B. Dewey	30	Father	\$1,000.00
"Witness my hand and seal this 5th day of April, 1902.			
"MYRTLE M. FOLSGRAF.			

"I hereby certify to the signature and that the required fee was paid.

"———, Secretary of Lodge No. ——."

669 A policy was issued, the material portions of which are as follows:

"That upon satisfactory proof of the death of the within named member (Myrtle M. Folsgraf) being made to the order and in the manner required by its laws, provided he was on the date of his death in good standing and had while a member complied in every particular with the law of the order, there would be paid, subject to all conditions, provisions and restrictions of the laws of said order in force on the date of said death to her father, Theodore B. Dewey, one assessment upon the membership not exceeding the sum of one thousand dollars.

"The express conditions upon which this certificate is issued are:

"1. That the rights of the above-named beneficiary or beneficiaries shall be determined by the laws of the order in force on the day of the death of the member, and it is agreed that the order shall have the right to enact, amend, or repeal any of the laws of the order, and that the rights and benefits of said member and of his beneficiary shall be subject in all respects to any and all enactments, amendments or repeals of said laws hereinafter made, even though said rights or benefits, as they are now or may hereinafter be, are thereby affected."

On February 11, 1903, Mrs. Ducheney wrote to Mr. Dewey from Chicago. The following are extracts from her letter:

"Chicago, Ill., Feb. 11, 1903.

"Dear Dewey: I received your letter and am glad to hear from you and to know you are better. You don't know how I worried, for if anything should happen you I don't know what I would do, for you are all I have left to stand by me now, and I know you always will, let come what will, and the day may not be so far away that I might

need you. You don't know what I would give to be home once more. It is just eleven months ago to-day that Will died and I have cried all day. Oh, you don't know what I would give if I had him back. Dewey, life is almost unbearable to me. I have worried until I look as old as Aunt Hat. How I would like to see you and you must come as soon as the boats begin to run. . . . Say, Dewey, about that policy, I went down with it Tuesday and they told me there wasn't anything to do to it ⁶⁷⁰ unless I wanted it changed in some one else's name, and I don't. I will keep it up in your name, and Dewey, if anything should happen me promise that no matter where I am you will come and get me and have me buried with the rest. There will be enough to do that and have some left, and if you outlive me, there is more besides that, for when I am through with my home, it is yours, and when I come home this summer, I will have it fixed so I know you will get it after me; it belongs to you. And now about paying the insurance; there isn't any use in me sending the money over there every month as long as Ella has it from the rent, so you go up there and take out what you want to. You can take one month at a time or two or three, just to suit yourself. I will write her about it so she will know it is all right, so let me know what to do with the policy, whether I shall send it back to you or not. . . . Well, guess I have wrote all I can for this time, so I close, hoping to hear from you soon. I remain as ever your loving

“MYRTIE.

“Now don't forget to tell me about that policy.

“1053 Robey and Fifteenth Street.”

Defendant Dewey paid all of the premiums on this policy except two after Folsgraf's death; before that event he had paid one-half and Folsgraf the other half.

The benefit certificate was executed and issued in the state of Illinois. The provision of the Illinois statute applicable to this case is section 1 of chapter 73 of Hurd's Revised Statutes of 1903, and reads as follows: “Payment of death indemnities shall only be paid to the families, heirs, blood relations, affianced husband or affianced wife of, or persons dependent upon the member; provided that a member having no wife or children living may, with the consent of the society, make a charitable institution his beneficiary.”

The by-laws of the complainant applicable to this case are as follows:

"Sec. 191. Each certificate shall be made payable for the benefit of such member or members of the applicant's family or for such person or persons dependent upon him, as he may designate by name.

671 "Sec. 192. Should a member die without designating a beneficiary, or should the designated beneficiary die or prove to be an unlawful one, or should more than one person claim the same benefit, then the claimants for the benefit shall be recognized in the following order and no other: 1. Wife or husband; 2. Children; 3. Mother; 4. Father; 5. Brothers and sisters who are minors; and 6. Brothers and sisters who are of age."

The benefit certificate provides that all the laws of the order are made a part of the certificate, and that the rights of the beneficiary shall be determined by the laws of the order in force on the day of the death of the member.

The lower court, after hearing the proofs and arguments of counsel, made a decree determining that the defendant Ducheney was entitled to the entire fund; and, the defendant Dewey having died, his administrator prosecutes this appeal to this court.

The law is well settled that no person who is not of the class for whose benefit the association was authorized can be a beneficiary. The defendant Dewey, therefore, although named as the beneficiary in the benefit certificate, was not entitled to receive the fund, unless he belonged to the authorized class. His counsel claim that he did belong to such class, because he was a member of the applicant's family, and cite in support of their contention: *Carmichael v. Northwestern Benefit Assn.*, 51 Mich. 494, 16 N. W. 871; *Simcoke v. Grand Lodge A. O. U. W.*, 84 Iowa, 383, 51 N. W. 8, 15 L. R. A. 114; *Spear v. Robinson*, 29 Me. 531; *Klotz v. Klotz*, 15 Ky. Law Rep. 183, 22 S. W. 551; *Folmer's Appeal*, 87 Pa. 133; *Danielson v. Wilson*, 73 Ill. App. 287; *Carpenter v. United States L. Ins. Co.*, 161 Pa. 9, 41 Am. St. Rep. 880, 28 Atl. 943, 23 L. R. A. 571. These authorities hold that the term "family," in such statutes as the one under consideration, is an expression of great flexibility. "It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives or any group constituting

a distinct domestic or social body": Carmichael v. Northwestern Ben. Assn., 51 Mich. 494, 16 N. W. 871.

⁶⁷² It may apply to blood relatives, even though living apart from the applicant and having families of their own. It may apply to those who are neither relatives by consanguinity or affinity, provided they are of the household of the applicant and maintaining the relations usual in families united by the ties of blood. Such was the Carmichael case (51 Mich. 494, 15 N. W. 871) above cited. It may well be held that blood relationship makes one a member of the family having the common blood, regardless of his actual relations to the family and whether a member of the particular domestic circle or not, although there is high authority to the contrary: Elsey v. Odd Fellows' Mut. Relief Assn., 142 Mass. 224, 7 N. E. 844. But it would be going to an unwarrantable extreme to hold that a relative by marriage becomes a member of the family when not a member of the household or maintaining the usual family relations. The Carmichael case (51 Mich. 494, 16 N. W. 871), is not authority for such a holding. Other decisions of this court are opposed to it: Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44, 26 N. W. 826; Michigan Mut. Ben. Assn. v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Cowin v. Hurst, 124 Mich. 545, 83 Am. St. Rep. 344, 83 N. W. 274. At no time after the marriage of his step-daughter in 1897 down to the time of her death was the defendant Dewey a member of the same household, except in 1902 when, according to his own testimony: "I continued to live at 166 Apple street until Mrs. Dewey died. I remained there and boarded with Folsgraf and his wife about a month after she died, and then took rooms in the Landreth block."

Under such circumstances, we think the court below correctly held that Mr. Dewey was not a member of Mrs. Folsgraf's family when either of the certificates was issued.

Counsel for appellant further contends that the association admitted its liability and was willing to pay the fund to Dewey, and that Duchenev had no such legal interest in the fund as to authorize his interference, since only the company can complain of a want of insurable interest; citing Standard Life etc. Ins. Co. v. Catlin, 106 Mich. 138, 63 N. W. 897; Hosmer v. Welch, 107 Mich. 470, 65 W. 280, 67 N. W. 504; Cowin ⁶⁷³ v. Hurst, 124 Mich. 545, 83 Am.

St. Rep. 344, 83 N. W. 274; Supreme Tent K. O. T. M. v. McAllister, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770; Johnson v. Van Epps, 110 Ill. 551; John Hancock Mut. Life Ins. Co. v. Lawder, 22 R. I. 416, 48 Atl. 383. If the contract in question were void as a wager policy, and when construed with the laws of the association simply provided for payment to the beneficiary named in the policy and no one else, we should concur in the proposition that the defendant Ducheney had no standing in the case, and that, if the company was willing to pay under its agreement, no one else could complain. But by the express provisions of this policy: "The rights of the above-named beneficiary or beneficiaries shall be determined by the laws of the order in force on the day of the death of the member," etc. The laws of the order in force at the time of Mrs. Ducheney's death provided, amongst other things, as follows: "Sec. 192. Should a member die without designating a beneficiary, or should the designated beneficiary die or prove to be an unlawful one, or should more than one person claim the same benefit, then the claimants for the benefit shall be recognized in the following order and no other: 1. Wife or husband; 2. Children; 3. Mother," etc.

This by-law was a part of the contract of insurance as much as though its terms were written into the certificate. The policy provided in legal effect that the sum of one thousand dollars should be paid to Theodore B. Dewey; but in case it should be determined that the money could not lawfully be paid to him, then it should be paid to Joseph Ducheney, her husband. The defendant Ducheney has a direct interest in this contract, which he is entitled to enforce.

The decree is affirmed.

Carpenter, C. J., and McAlvay, Grant and Moore, JJ., concurred.

A Person not of the Class for whose benefit a mutual benefit association is organized cannot be a beneficiary: Warner v. Modern Woodmen, 67 Neb. 233, 108 Am. St. Rep. 634; note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 559-561. As to who is a "member of the family" of the insured person, who can be designated as his beneficiary, see the note to Bankers' etc. Assn. v. Stapp, 19 Am. St. Rep. 787.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**EMERSON v. PACIFIC COAST AND NORWAY PACK-
ING COMPANY.**

[96 Minn. 1, 104 N. W. 573.]

CORPORATIONS, Seal of as Evidence.—If a contract purporting to be signed by a corporation is under its corporate seal, such contract is admissible in evidence. (p. 605.)

CONTRACT for the Sale of Goods on Commission, When not Unilateral.—A contract between a corporation engaged in the business of packing fish and a firm of brokers, whereby the latter are constituted sole agents of the former for the sale of eighty-five per cent of its pack of fish for the period of two years, at a selling price to be agreed upon between the parties, upon a brokerage of five per cent, is not unilateral, and the brokers may recover for a breach thereof without cause. (p. 605.)

DAMAGES, Future Profits as a Basis of.—An agent selling on commission, on breach of the contract by his employer without just cause, is entitled to the profits, past and future, he would have realized if the defendant had performed his contract, and evidence of sales made by the defendant within the unexpired period is admissible and should be considered by the jury, upon proper caution by the court to avoid excess in speculation, to show the proper extent of the plaintiff's recovery. (p. 608.)

BROKERAGE, Evidence of Sales made Through Other Agents After Breach of Contract of.—If a contract whereby brokers are allowed a commission on all sales made by them for their employers within a time specified is broken by the employers without fault of the brokers, and the latter sue for a breach of the contract, evidence of sales made by the employers through another agency within the time covered by the contract is admissible. (p. 611.)

DAMAGES are not Discretionary with the Jury.—It is a rule of this court that damages are not a mere matter of discretion of the jury. Therefore, on the breach of a contract to allow brokers to sell upon a stipulated commission for a period of years a specified part of the product of their employers, the latter are liable in damages for such breach to reimburse the brokers for the loss of profits occasioned thereby. (p. 611.)

Action to recover damages, including loss of prospective profits, for the breach of a contract whereby the plaintiffs were appointed agents of the defendant for a definite term to sell its products of fish. The jury returned a verdict in favor of the plaintiff for three thousand dollars. The defendant moved for a new trial and upon the denial of its motion, appealed.

Gjertsen, Rand & Lund, John Lind and A. Ueland, for the appellant.

Welch, Hayne & Hubachek, for the respondents.

2 JÄGGÄRD, J. The plaintiffs and respondents were brokers in groceries, operating between the producers or manufacturers and the wholesale grocers. They had offices at various places, in this state and elsewhere, from which they sold goods, both by personal solicitation and correspondence. The defendant and appellant, a Minnesota corporation, with its principal office in Minneapolis, had just engaged in the business of catching and packing fish, especially salmon, on the coast of Alaska, and shipping the same into the United States to be sold. This product was handled exclusively by the grocery trade. The packers sold to the wholesale grocers solely, through the medium of brokers, in advance of the catch and subject to pack. According to the contention of the plaintiffs, they entered into a written contract with the defendant, whereby they constituted its sole agents for the sale of at least eighty-five per cent of its entire pack of fish of all kinds, upon a brokerage of five per cent for a period of two years, at a selling price to be agreed upon between the parties. Thereafter plaintiffs designed labels, advertised the merchandise, and proceeded with the execution of the contract. At the end of the first year of defendant's experience, the plaintiffs had sold a considerable quantity of fish, but not the entire pack. Thereupon the defendant repudiated the contract, and before the end of another year sold a large quantity of fish through a broker in Chicago. This action was brought to recover damages for the alleged breach of contract, including future profits. The jury returned a verdict of three thousand dollars for plaintiffs.

1. Whether or not the defendant ever entered into the contract with the plaintiffs for the breach of which this action was brought was **3** fairly a question for the jury

upon the testimony. The written agreement produced in evidence was under the corporate seal of the defendant, and was therefore *prima facie* its contract: *Emerson v. Pacific Coast etc. Packing Co.*, 92 Minn. 523, 100 N. W. 365. Moreover, the record discloses conflict in the testimony as to whether or not its execution was in fact without previous authority by its board of directors; and there was considerable evidence as to the ratification of the agreement by the defendant. Upon the record the trial court also properly submitted to the jury the question of the breach of contract by the defendant.

2. The contract was so peculiar in its nature as to deprive the plaintiff of all damages upon proof of its breach. The facts in this case do not bring it within the rule that where a contract is optional on one side, and not mutual, it wants of sufficient consideration and is not binding: *Bailey v. Austrian*, 19 Minn. 465 (535); *Tarbox v. Gotzian*, 20 Minn. 122 (139); *Stensgaard v. Smith*, 43 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669. The contract at bar was not, properly speaking, unilateral. It was signed by both parties. Defendant agreed to pay a commission to the plaintiffs on sales. The plaintiffs accepted the contract and obligated themselves, during the whole period named, to use their best efforts to sell defendant's merchandise, and actually performed services in introducing and vending defendant's stock, and incurred and defrayed expenses thereunder. The promises were, therefore, not all on one side; there was mutuality of obligation; and an action for damages would lie upon its breach without cause: *Ames-Brooks Co. v. Aetna Ins. Co.*, 83 Minn. 346, 86 N. W. 344; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015. The cases which will be hereinafter referred to also fully sustain the trial court on this point.

3. The real question in this case concerns the rulings of the trial court upon profits as damages. The defendant's principal contentions in this connection are: 1. That profits are not recoverable as damages upon a breach of a contract to sell upon commission; and 2. That evidence of sales made by the principal after the breach of the contract by its repudiation or the discharge of the salesman is not admissible to show the extent of gains prevented.

The subject of profits as damages is a vexed and confused one in the current law. The decisions and text-books abound

in loose generalizations, ⁴ that as a rule future profits are not proper basis for a judgment in damages for an admitted legal wrong, but that in certain cases there are exceptions to the rule and profits may be recovered as damages. Even a casual examination of the authorities as a whole satisfies that it is exceedingly difficult to determine, as between the allowance and denial of profits as damages, which is the rule and which is the exception. Nor is it especially significant which conclusion on this point be reached. No presumption for or against the award has been established. It is also doubtful whether the current general formula of the courts is not too indefinite and uncertain to be of much practical avail. A frequently quoted statement of the rule is that of Justice Lamar, in *Howard v. Stillwell-Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. Rep. 500, 35 L. ed. 147: "Profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

Four principal considerations have been recognized and applied by the courts in determining when future profits are to be allowed as damages and when they are to be denied, namely: 1. How far the contract under consideration specifically provides for the award of damages for prevented gains upon its breach or reasonably implies such an award as a necessary effect of a natural construction of its terms; 2. The degree of certainty with which the harm can be traced to the wrongful conduct complained of as its legal cause; 3. The extent to which the inherent difficulties and uncertainties of calculation of amount of prevented gains renders the measure of damages speculative and untrustworthy; 4. The possibility of applying to the controversy some more satisfactory standard of compensation. In the light of these considerations, the courts have weighed the evidence adduced in fact and possible in the nature of things to be proved.

A fruitful source of at least apparent inconsistency on this subject is the failure to note and apply the obvious distinction between ⁵ cases of torts and cases of contracts. In

the former the damages are not the results of a violation of an agreement. They are, logically, irrespective of any actual or of any implied contemplation of the parties. In the latter they are in a measure based upon mutual consent, expressed or implied. Moreover, there is often a radical difference in the remedies which are available to parties to an agreement, as distinguished from parties to a tort. There may be instances in which the actual damages may be substantially the same in both cases: *Cincinnati etc. Gas Co. v. Western S. L. Co.*, 152 U. S. 200, 14 Sup. Ct. Rep. 523, 38 L. ed. 411.

But the difficulty is as conspicuous as it is important in legal effect, when profits are the very object of the contract itself and are clearly within the necessary purview of the parties making the agreement. A number of the cases cited by appellant denying the right to recover profits involve such actions *ex delicto* as to have little bearing on the present controversy. It would be naturally consistent to allow damages for prevented gains in this case, as the trial court has done here, and deny them, as this court did, in cases of wrongful seizure by an attachment (*Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; *Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. 406), or by replevin (*Williams v. Wood*, 55 Minn. 323, 56 N. W. 1066), or in cases of conversion generally (*Cushing v. Seymour, Sabin & Co.*, 30 Minn. 301, 15 N. W. 249), or in cases of actionable negligence (*Simmer v. City of St. Paul*, 23 Minn. 408).

Confusion has arisen also because in the early discussions of the subject, before the multiplication of authorities upon particular classes of cases, decisions just as applied to the state of facts presented by the respective records became unjust when distorted by application to different circumstances involving different issues and considerations. Adjudications that no sufficient evidence of profits was in point of fact adduced have been treated as cases holding that there could be no recovery upon any state of proof. In view of the superabundance of specific cases applying admitted general principles to particular and similar states of facts, it would seem to be a work of supererogation, as well as a source of misconception, to undertake to consider or reconcile or deduce much from the enormous number of cases on the general subject of profits as damages. An excellent collocation and ⁶ classification of authorities on the general sub-

ject will be found in a note to *Wells v. National Life Assn.*, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33.

The leading cases denying the right to recover as damages profits on sales made after the discharge of an agent selling upon commission, or after repudiation of the contract and before expiration of the term of employment, are to be found in the Alabama Reports. In *Union v. Barton*, 77 Ala. 148, Stone, C. J., said: "In fact, the success of such enterprise [the sale of refined cotton-seed oil] depends on so many contingencies that we can conceive of no means of making the necessary proof on which to found a verdict. No rule for such ascertainment can be predicated. Past success in the same or a similar enterprise will not do. Conditions may not always remain the same." And see *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Beck v. West*, 87 Ala. 213, 6 South. 70; *Hair v. Barnes*, 26 Ill. App. 580; *Stern v. Rosenheim*, 67 Md. 503, 10 Atl. 221, 307. And there is authority to the effect that where the employer discontinues his business, and thereby loses his agent profit of sales upon commission, there can be no recovery, because it was within the contemplation of the parties that "the employé took the chances of his employer finding his business profitable and carrying it on": In re *English & Scottish Marine Ins. Co.*, 5 Ch. App. 737; *Pellet v. Manufacturers' & Merchants' Ins. Co.*, 104 Fed. 502, 43 C. C. A. 669. But see In re *Patent Floor Cloth*, Claim of *Dean & Gilbert*, 41 L. J. Eq. 476.

There can be no doubt, however, that the trend of authority and the weight of reason have established that an agent selling on commission upon breach of his contract by his employer without just cause is entitled to the profits, past and future, he would have realized if the defendant had performed his contract, and that evidence of sales made by the defendant within the unexpired period is admissible and should be considered by the jury, upon proper caution by the court to avoid excess or speculation to show the proper extent of plaintiff's recovery.

The transition of opinion on this subject from the Alabama and some of the earlier cases in other courts to the present rule is well illustrated in Iowa. In *Howe M. Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735, the measure of damages was determined to be, not the loss of profits, but

the loss of time. The majority of the court held that few cases could be found in which profits have been disallowed as speculative in which the uncertainty ⁷ is greater than in such a case. There were, however, two dissenting opinions. In *Hichhorn v. Bradley*, 117 Iowa. 130, 90 N. W. 592, a manufacturer revoked a contract of a jobber which had been appointed its agent for the introduction of a particular brand of cigars in certain territory before the expiration of the contract term. In course of a learned review of the specific and related authorities, McClain, J., said: "If the question considered in *Howe Machine Co. v. Bryson*, 44 Iowa, 159, 24 Am. Rep. 735, . . . were now before us for the first time, we might, in view of the later authorities, incline to the view expressed in the dissenting opinion." It was accordingly held that there was no other measure of damages than the loss of profits, and that the evidence of the amount of sales of such cigars made after the breach was not objectionable on the ground that it authorized uncertain and speculative damages.

In *New York (Washburn v. Hubbard)*, 6 Lans. 11) estimates of probable sales during the unexpired term were held inadmissible as evidence of future profits. The case did not lay down the rule, as seems to have been thought in *Union R. Co. v. Barton*, 77 Ala. 148, that under no circumstances could future profits be recovered. The leading case of *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264, held that the gains prevented by sales on commission are proper elements of damage, and that sales made by the employer after breach of contract to sell on commission are admissible in evidence as evidence of the damages recoverable. And see *Beeman v. Banta*, 118 N. Y. 538, 16 Am. St. Rep. 779, 23 N. E. 887; *Warren C. & M. Co. v. Holbrook*, 118 N. Y. 586, 16 Am. St. Rep. 788, 23 N. E. 908; *Bannatyne v. Florence M. & M. Co.*, 77 Hun, 289, 28 N. Y. Supp. 334.

The rule in the federal court corresponds. In *Wells v. National Life Assn.*, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33, it was held that a life insurance agent, discharged before the expiration of his term without just cause, was entitled to have the jury consider as an element of his damages his commissions upon the amount of new business written by the defendant within his period through a new agent for the unexpired term. And see *Taylor Mfg. Co. v.*

Hatcher (C. C.), 39 Fed. 440, 3 L. R. A. 587; Moore v. Lawrence (C. C.), 16 Fed. 87; Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. Rep. 876, 38 L. ed. 814.

The letter and spirit of many other authorities are to the same effect: Mueller v. Bethesda, 88 Mich. 390, 50 N. W. 319; Loud v. Campbell, 26 Mich. 239; Leonard v. Beaudry, 68 Mich. 312, 36 N. W. 88; Pittsburg ⁸ v. Ashton V. Co., 184 Pa. 36, 39 Atl. 223; Dennis v. Maxfield, 10 Allen, 138; Blair v. Laffin, 127 Mass. 518; Martin v. Minnekahta State Bank, 7 S. Dak. 263, 64 N. W. 127; Haven v. Hudson, 12 La. Ann. 660; Stevenson v. Morris, 69 Miss. 232, 13 South. 834; Green v. Cole, 127 Mo. 587, 30 S. W. 135; Russell v. Horn etc. Mfg. Co., 41 Neb. 567, 59 N. W. 901 (approving Mueller v. Bethesda, 88 Mich. 390, 50 N. W. 319); Wiley v. California H. Co. (Cal.), 32 Pac. 522; Treat v. Hiles, 81 Wis. 280, 50 N. W. 896; Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785. This rule, allowing future profits upon proper proof, accords alike with the general spirit of the earlier decisions in this state: Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191. And see Goebel v. Hough, 26 Minn. 252, 2 N. W. 847, and the express holding of this court on the former appeal of this case in 92 Minn. 523, 100 N. W. 365.

The reasoning by which this conclusion is reached is sound. The measure of damages must have relation to the contract itself. Such a contract as the one here under consideration furnishes the measure of damages, namely, profits. Profits were necessarily within the actual contemplation of the parties. They are, therefore, proper basis for the award of damages: 8 Am. & Eng. Ency. of Law, 2d ed., 622, subd. "b." No question has been raised, nor, it would seem, could well be raised, as to the connection of the loss of profits as the proximate result of defendant's breach. The principal contention of the defendant is that the damages are conjectural and speculative. The uncertainty does not reside in the nature of the business. Deep-sea fishing is not more speculative than mining, for breach of contract with respect to which future profits have been allowed as damages: Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. Rep. 876, 38 L. ed. 814. And see Dennis v. Maxfield, 10 Allen, 138. Nor is there any uncertainty as to the existence, but only as to the extent, of the profits: See Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415, and brief of counsel in Treat v. Hiles, 81 Wis. 280, 50 N. W. 896. It is no

exoneration to defendant that his misconduct, which has made inquiry as to the quantum of harm necessary, renders that inquiry difficult: *Simpson v. London*, 1 Q. B. D. 274; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291. The best the law can do is to award approximate compensation. Its failure to do even and exact justice in such cases is not more conspicuous than in many others. No other remedy is available. To allow only for loss of time and expenses would put a premium upon breaking contracts and deny substantial justice.

⁹ The precise question as to the admissibility of evidence of sales made by the defendant through another agent subsequent to the breach of the contract and within the period covered by agreement with the plaintiffs has not been before fully decided by this court. It is the rule of this court that the damages are not a mere matter of discretion to the jury: *Emerson v. Pacific Coast etc. Packing Co.*, 92 Minn. 523, 100 N. W. 365. The decisions of other courts, which have been discussed, determine that evidence of such sales should be received and considered by the jury. In this case the trial court very properly cautioned the jury to avoid speculation and excess, and to be careful not to give undue weight to the conjectural features of the case. When the jury was put in possession of all the facts as to the business transacted before and after the breach and within the term of the contract it was given the best and natural means of forming as sound a judgment as could be predicated under the very difficult conditions. The plaintiff was entitled to the profit he would have made on his contract, had he been permitted to perform the same, including the profits both before and after the breach.

4. There were other assignments of error in the admission of evidence, the merits of which it is unnecessary to determine. We do not regard them as being of sufficient importance to invalidate the verdict, if it be conceded that they involve erroneous rulings.

Order appealed from is affirmed.

For Recent Authorities on the right to recover future or prospective profits in an action for the breach of a contract, see *Kelley v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378; *American Express Co. v. Jennings*, 86 Miss. 329, 109 Am. St. Rep. 708; *Traywick v. Southern Ry. Co.*, 71 S. C. 82, 110 Am. St. Rep. 563; *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. Rep. 84.

STATE v. BATES.

[96 Minn. 110, 104 N. W. 790.]

STATUTES.—Neither Bad Grammar nor Bad English will Viti-
ate a Statute if the meaning of the legislature can be clearly dis-
covered. Awkward, slovenly, or ungrammatical phrases and sen-
tences may yet convey a definite meaning, and if they do so, the
courts, must accept it as the meaning of the law-makers. (p. 614.)

STATUTES, Interpretation in Favor of Validity of.—A stat-
ute must be given the benefit of every reasonable inference. An in-
terpretation which renders a statute null and void cannot be admitted.
It ought to be interpreted in such a manner as that it may have effect,
and not be found vain and nugatory. (p. 614.)

STATUTES, Omitting Words for the Purpose of Interpreting.—
The court may, in interpreting a statute, omit a word to render the
statute intelligible, if, as it stands, it is devoid of sensible meaning.
(p. 614.)

**STATUTES, Rule with Respect to Conflicting Provisions—In-
tent First Expressed, When to Control.**—The rule that what appears
last in a statute is the last expression of the legislative will should
not be applied where the provision standing first in the act is more
in harmony with other statutes in *pari materia*, and especially when
it is in harmony with the unquestionable general purpose of the stat-
ute to be interpreted. (p. 615.)

**CONSTITUTIONAL LAW—Delegation to One Department of
the Government of Duties Committed by the Constitution to Another.**
While, as a general rule, the legislature cannot delegate legislative
powers to the judiciary, still where the duties are of an ambiguous
character and are imposed upon a judicial officer, every doubt will
be resolved in favor of the validity of the statute, and the powers
conferred will be held to be judicial. (pp. 617, 618.)

**CONSTITUTIONAL LAW, Classification of Departments of
Government.**—There may be a case where a particular power cannot
be affirmed to be either executive, legislative or judicial, and if such
power is not by the constitution unequivocally intrusted to either
the executive or judicial departments, the mode of its exercise and
the agency must necessarily be determined by the legislature. (p.
620.)

**CONSTITUTIONAL LAW—Statutes Respecting Sale of Intoxi-
cating Liquor.**—Chapter 346 of the statutes of Minnesota of 1905,
respecting the sale of intoxicating liquors, is not unconstitutional
because of its committing to judicial officers powers not judicial in
character, nor for any other reason. (p. 621.)

Baldwin, Baldwin & Dancer, for the appellant.

Edward T. Young, attorney general, George T. Simpson,
assistant attorney general, and John M. McClintock, county
attorney, for the respondent.

¹¹⁰ ELLIOTT, J. The relator was charged with soliciting
parties to purchase intoxicating liquors in quantities of less
than five gallons in violation of the provisions of chapter 346,
page 626, of the Laws of 1905. He was arrested and brought be-
fore the municipal court of the city of Duluth, and after

hearing was held to await the action of the grand jury, and in default of bail was committed to the custody of the sheriff. Thereafter he caused ¹¹¹ a writ of habeas corpus to issue out of the district court, and after a hearing thereon an order was entered refusing to release the petitioner and remanding him to the custody of the sheriff. From this order an appeal was taken to this court under the provisions of chapter 327, page 734, of the Laws of 1895.

We are not embarrassed by any controversy about the facts. It is admitted that the relator was legally convicted in the municipal court, and the writ of habeas corpus properly discharged, if chapter 346, page 626, of the Laws of 1905 is constitutional and effective. This is the only question presented by the record. It is contended by the appellant that the statute is invalid, for the reason (1) that its several parts are so inconsistent and contradictory that the legislative intention cannot be ascertained and (2) that it violates section 1, article 3 of the constitution of the state. The statute is entitled, "An act prohibiting the sale of intoxicating liquors, and for the granting of license for the sale of spirituous and vinous liquors, and providing for a penalty for the violation thereof."

Section 1 provides: "That whoever on his own behalf or as an agent for others, without having a license so to do as provided for in this act, shall solicit any person or persons, firm or corporation or association not having a license to keep a dramshop or saloon under the laws of this state or to a licensed physician or druggist to buy or contract for the future delivery or to make order for any spirituous or vinous liquors in any less quantity than five gallons, or either on his own behalf or as said agent, or as an agent for the purchaser make an order contracting for the future delivery of any such liquors to any said person, persons, firm, corporation or association shall be subject to a fine, etc."

Section 2 provides that "the board of county commissioners may grant license to persons to act on their own behalf or as agents for others in the sale of spirituous or vinous liquors for future delivery in quantities not ¹¹² less than five gallons to others than those duly licensed to keep a dramshop or saloon under the laws of the state in their respective counties as they think for the public good requires."

To say that the act is drawn with reasonable skill and accuracy would be to use the language of flattery. It is crude in construction and awkward in phraseology, and it is doubtful whether so brief a legislative enactment ever contained more bad grammar or a greater number of verbal inaccuracies. But such defects are not necessarily fatal to the statute, so long as the court, according to well-known rules of construction, is able to discover the intention of the legislature. "Neither bad grammar nor bad English will vitiate a statute, if the meaning of the legislature can be clearly discovered. Awkward, slovenly, or ungrammatical phrases and sentences may yet convey a definite meaning, and, if they do, the courts must accept it as the meaning of the lawmakers": Black's Interpretation of Law, sec. 34; Kelly's Heirs v. McGuire, 15 Ark. 555; Murray v. State, 21 Tex. App. 620, 57 Am. Rep. 623, 2 S. W. 757; Lane v. Schomp, 20 N. J. Eq. 82. The statute must be given the benefit of every reasonable inference. An interpretation which renders a statute null and ineffective cannot be admitted. It is an absurdity to suppose that after it is reduced to terms it means nothing. It ought to be interpreted in such a manner as that it may have effect, and not be found vain and nugatory: Vattel on Law of Nations, 253; State v. Chicago etc. Ry. Co., 38 Minn. 281, 37 N. W. 782; State v. Board of County Commrs. of Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

In order to render the statute consistent and intelligible, it is only necessary to omit the word "not" from the clause "quantities not less than five gallons" in the second section. There is no doubt of the power and right of courts to thus omit a word, when necessary to render a statute intelligible which as it stands is devoid of sensible meaning. The books are full of cases in which words have been omitted, supplied, or transposed: Moody v. Stephenson, 1 Minn. 289 (401); Woodruff v. Town of Glendale, 26 Minn. 78, 1 N. W. 581; Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381; McGee v. Board of County Commrs., 84 Minn. 472, 88 N. W. 6; Chapman v. State, 16 Tex. App. 76; Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. 950; Bird v. Board of Commrs., 95 Ky. 195, 24 S. W. 118; Paxton etc. Ins. Co. v. Farmers' etc. Ins. Co., 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. ¹¹³ 343, 29 L. R. A. 853; Lancaster County v. Frey, 123 Pa. 593, 18 Atl. 478; Lancaster County v. Lan-

caster City, 160 Pa. 411, 28 Atl. 854; Black's Interpretation of Law, sec. 37.

But it is contended by counsel that there is no more reason why the court should by construction omit the word "not" from the clause in the second section than supply it in the first section, which would make the section consistent and the statute valid, but render it entirely inapplicable as far as the defendant in this case is concerned. The rule that the part of the act which is later in position in the statute is to be deemed a later expression of the legislative will, and thus repeal a contradictory earlier provision, is usually, although not universally, accepted, but does not rest upon a very satisfactory foundation. It has been criticised by Bishop upon the very substantial ground that, as all the provisions of an act are adopted at the same time, there can be no priority in point of time on account of their relative position: Bishop on Written Law, secs. 62-65. If any inference is to be drawn from mere position, it would seem but reasonable to give the preference to what appears first in order. The draftsman would ordinarily express the dominant idea in his mind in the opening paragraph or section, and what follows would naturally and logically agree with what precedes. "For it is to be presumed," says Vattel, "that the authors of a deed had a uniform and steady train of thinking." But it is not necessary to invoke such a presumption in the present instance, as the rule of construction which presumes that what appears last in the act is the latest expression of the legislative will should not be applied where the provision standing first in the act is more in harmony with the other statutes in *pari materia*.

This exception to the rule was applied by this court in *McCormick v. Village of West Duluth*, 47 Minn. 272, 50 N. W. 128. The statute there under consideration contained independent provisions in respect to the character of certain improvement bonds which were authorized by the act. By the first clause the bonds were to be made payable in five annual installments, the first maturing one year from date, while the second clause provided that the bonds should be made payable at the option of the village after five years, and absolutely at the expiration of seven years, from their date. It was claimed that either the word

“shall” appearing in each clause should be read “may,” which would harmonize the two clauses and permit the municipal authorities ¹¹⁴ to exercise discretion, or the clause last in order should be upheld as the later expression of the legislative will. The court said: “The rules of construction invoked by defendants’ counsel in support of their demurrer are well recognized, but the true rule to be applied here is that, where the first clause of a section conforms to the obvious policy and intent of the legislature, it is not rendered inoperative by a later inconsistent clause which does not conform to this policy and intent. In such cases the later clause is nugatory and must be disregarded.” This principle was recognized and applied in *Dickerson v. Nelson*, 4 Ind. 280, *State v. Williams*, 8 Ind. 191, and *Sams v. King*, 18 Fla. 557. In *Kansas P. Ry. Co. v. County Commrs.*, 16 Kan. 587, Justice Brewer said that where there is no way of reconciling conflicting clauses, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject.

The omission of the word “not” in the second section renders the statute consistent and intelligible, and in harmony with the general policy of the state as expressed in judicial decisions and general legislation upon the subject matter of intoxicating liquors.

No attempt has heretofore been made in this state to license and control the wholesale liquor trade. Prior to 1887, said Chief Justice Gilfillan, in *State v. Orth*, 38 Minn. 150, 36 N. W. 103, “the policy of the state has always been, as we believe it has been in most of the states, to require licenses only for the sale in small quantities, usually for consumption by the purchaser at the place where sold, to control and regulate drinking and drinking places. Nearly all the provisions of the present law (other than the section now before us) for licensing and regulating the business of selling intoxicating liquors indicate the same purpose and are inapplicable to the business of selling at wholesale.” After noting the detailed provisions of the various sections and their apparent inapplicability to the sale of liquors at wholesale, the chief justice continues: “All the provisions of the law in regard to procuring the license, the contents of the license, and the regulating the business

point unequivocally to the retail trade, making sales in small quantities to consumers as the business for which a license is required; and, taking the law as a whole, we conclude the legislature ¹¹⁵ did not intend to depart from the former policy of the state and require licenses for any but the retail trade."

The act of 1887, with its various amendments (Gen. Stats. 1895, secs. 1990-1993) applies only to the sale of intoxicating liquors in quantities of less than five gallons—that is, to the retail liquor business; and an examination of the subsequent legislation discloses nothing which leads us to think that there has been any change of policy. The evident object of the statute under consideration is to prohibit sales in small quantities, and this intention is expressed in the first section of the act. By disregarding the word "not" in section 2 the provisions are thus made consistent, and the entire statute is brought into harmony with the general policy of the state.

The other ground assigned for reversal is that the act is unconstitutional, in that it is in conflict with section 1, article 3 of the state constitution, which reads as follows: "The powers of the government shall be divided into three distinct departments—legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution."

The construction and application of this provision of the constitution has been frequently before this court: *Sanborn v. Commissioners of Rice County*, 9 Minn. 258 (273); *In re Application of Senate*, 10 Minn. 56 (78); *Home Ins. Co. v. Flint*, 13 Minn. 228, (244); *Rice v. Austin*, 19 Minn. 74 (103), 18 Am. Rep. 330; *State v. Young*, 29 Minn. 474, 9 N. W. 737; *State v. Ueland*, 30 Minn. 29, 14 N. W. 58; *State v. Simons*, 32 Minn. 540, 21 N. W. 750; *Foreman v. Board of County Commrs.*, 64 Minn. 371, 67 N. W. 207; *McGee v. Board of County Commrs.*, 84 Minn. 472, 86 N. W. 6; *State v. Crosby*, 92 Minn. 176, 99 N. W. 636. As a general proposition of law the legislature cannot delegate legislative powers to the judiciary or require the judges of the various courts of the state to do any acts which are not in their nature judicial: *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377, and cases there cited; *Case of Super-*

visors of Election, 114 Mass. 247, 19 Am. Rep. 341; *State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222, 89 N. W. 204, 57 L. R. A. 244.

¹¹⁶ But it is not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions, and when duties of an ambiguous character are imposed upon a judicial officer, any doubt will be resolved in favor of the validity of the statute, and the powers held to be judicial: *Foreman v. Board of County Commrs.*, 64 Minn. 371, 67 N. W. 207. In many instances the acts which are to be done require the performance of functions, some of which are judicial and others legislative or executive, and these are often so interwoven and connected that they cannot readily be separated and distinguished. When this is the case the court will not attempt to unravel the combination, but will sustain the act as against the constitutional objection: *McGee v. Board of County Commrs.*, 84 Minn. 472, 86 N. W. 6; *State v. Crosby*, 92 Minn. 176, 99 N. W. 636.

In *State v. Crosby*, 92 Minn. 176, 99 N. W. 636, where the constitutionality of the ditch law was sustained, Justice Brown said: "The authorities are numerous sustaining statutes which impose upon the courts powers involving the exercise of both judicial and legislative functions, such as the condemnation of land for public purposes, the appointment of commissioners of election in proceedings for adding territory to municipal corporations, and laying out and establishing highways. The proceedings provided for by the statute under consideration involve the exercise of both legislative and judicial powers. The question of the propriety or necessity of public ditches to drain marshy or overflowed lands is one of legislative character. The condemnation of land through which such ditches may be constructed, the assessment of damages, and the determination of the legal rights to parties affected, are judicial. The exercise of all these powers is involved in proceedings under this statute."

Some confusion in the authorities has resulted from the unwarranted assumption that all the functions of government must necessarily be either executive, legislative, or judicial in their nature, and therefore referred by the constitutional provision to one or the other of the three departments of government. It may very well be true that the

duty imposed by a statute such as the one under consideration is neither the one nor the other. The constitution has referred legislative power to the legislature, executive power to the executive, and judicial power to the judiciary; but it has nowhere declared that all the powers which are necessary for the proper government of the commonwealth are included ¹¹⁷ in this classification. Analyzing the constitutional provision, we find it consists of (1) a distributive clause, "The powers of government shall be divided into three departments, legislative, executive and judicial"; (2) a prohibitive clause, "No person or persons belonging to, or constituting one of these departments shall exercise any of the power properly belonging to either of the others"; and (3) an exception clause, "Except in the instances expressly provided in this constitution." The constitution does not attempt to make an abstract distribution of governmental functions. It merely assigns such as are of recognized character to the departments which are created by it for their convenient and effective exercise.

The theory of the distribution of governmental functions is certainly as old as Aristotle (*Politics*, bk. 6, c. 11, sec. 1), and has been a controlling principle and accepted doctrine of political science since it was elaborated by Montesquieu in his *Spirit of Laws*. The belief in its importance was never stronger than during the latter part of the century, when our national constitution was formed and the government established: See 1 Blackstone's *Commentaries*, 146, 154 (Hammond's ed., pp. 362, 371); 2 Woolsey, *Pol. Sci.*, p. 259; Maine's *Popular Government*, 219; Montesquieu on *Spirit of Laws* (Nugent's Trans.), b. 11, c. 6; *The Federalist*, Nos. 47, 48, 51. But the founders were too intensely practical to be controlled by any political theory, and, while they recognized the principle in constructing the framework of the government, they violated it in practice and so distributed the powers as to create a system of checks and balances: See Mason on Veto Power. The principle formulated by Montesquieu still lies at the base of most political organizations of the present day, but during the last century the tendency of political science has been to discard it in its extreme form, because, as said by Goodnow, "It is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization. The

flaw in Montesquieu's reasoning and in that of his followers was in the assumption that the expressions of the governmental power by different authorities were different powers": Goodnow, *Adm. Law*, 20, 21. The recent tendency of legislatures and courts is commented on by Justice Brown in *State v. Crosby*, 92 Minn. 176, 99 N. W. 636. The present attitude of the courts toward questions arising under this constitutional provision is well expressed by the supreme ¹¹⁸ court of North Carolina: "While . . . the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one. Therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering on the domains of each": *Brown v. Turner*, 70 N. C. 93.

It is well to recognize the fact that "there are a multitude of governmental duties which have never been, and cannot possibly be, performed either by the legislature or by the governor, and which are certainly not prescribed by the constitution to the judiciary": *Paul v. Gloucester County*, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; Bluntschli on *Theory of the State*, c. 7. The constitutional provision has no application to acts of this character. It applies only to the powers which because of their nature are assigned by the constitution itself to one of the departments exclusively: *Ross v. Board of Freeholders*, 69 N. J. L. 291, 55 Atl. 310; *Eckert v. Perth Amboy etc. R. Co.*, 66 N. J. Eq. 437, 57 Atl. 438. The powers not thus assigned remain properly under the control of the legislature. As said by Black: "There may be cases in which a particular power cannot be said to be either executive, legislative or judicial; and if such a power is not by the constitution unequivocally intrusted to either the executive or judicial departments of the government, the mode of its exercise and the agency must necessarily be determined by law—that is, by the legislature": *Black's Constitutional Law*, 74. See, also, *Cooley's Constitutional Limitations*, 2d ed., 42, 43; *McClain's Constitutional Law in United States*, sec. 24; *Bridges v. Shallcross*, 6 W. Va. 562; *Field v. People*, 2 Seam. 79; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

An examination of the authorities in this country suggests the thought that in some instances the courts have assumed that the separation of the powers of government into three classes results from the application of a natural, instead of a conventional, rule. Such a theory leads to strained and artificial reasoning, and induces a system of construction which denies proper force and effect to the constitutional provision. If the powers which are conferred upon the judge of the district court and the chairman of the board of county commissioners by ¹¹⁹ the act under consideration are neither necessarily executive, legislative, nor judicial, the act is not in violation of section 1, article 3, of the constitution of the state. The same conclusion follows, under the previous decisions of this court, if the acts to be performed are of an ambiguous character, or are in part judicial and in part executive or legislative. We therefore hold that chapter 346, page 626, of the Laws of 1905 is effective and constitutional.

The order appealed from is affirmed, and it is ordered that the relator be remanded to the custody of the respondent.

The Questions Involved in the Principal Case were presented to the same court in *State v. Braun*, 96 Minn. 521, 105 N. W. 975, which, in rendering its decision, so far as the same points were involved, approved and followed the principal case.

In the Construction of Statutes a word which evidently is an interpolation and which is without sensible meaning may be disregarded: *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585. As to which of two conflicting provisions in a statute, the first or the last, should be given effect, see *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 83 Am. St. Rep. 17.

On the Delegation of Nonjudicial Duties to the courts, see *Miller v. Enterprise Canal etc. Co.*, 142 Cal. 208, 100 Am. St. Rep. 115; *State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222; *State v. George*, 22 Or. 142, 29 Am. St. Rep. 586; *Carter v. State*, 42 La. Ann. 927, 21 Am. St. Rep. 404. It has been held that a statute providing that when as many voters of a county as represent one-half of the votes cast at the last election for governor shall petition the circuit court to submit the question of granting liquor licenses at the next congressional election, the court shall issue an order to the sheriff for an election on that question, requires the court to perform nonjudicial duties: *Board of Supervisors v. Todd*, 97 Md. 247, 99 Am. St. Rep. 438.

BRADY v. GILMAN.

[96 Minn. 234, 104 N. W. 897.]

REDEMPTION Under Supposed Lien, When Premature.—If by statute a party is entitled to redeem from foreclosure sale only by giving notice of his intention when he has a lien on the premises, a notice given of an intention to redeem under the lien of a judgment is entirely ineffective if the judgment is not docketed until some hours afterward. (pp. 623, 624.)

JUDGMENT, Docketing, Presumption of Time of.—When a clerk, in docketing a judgment, specifies that it was docketed at an hour designated, he is presumed to have done his duty, and no inference can be indulged that the docketing was earlier. (p. 624.)

REDEMPTION, Validity of, When May be Questioned.—Though the amount paid for redemption is all that can be lawfully exacted, the validity of the redemption can be objected to where its effect is to subrogate the redemptioner to the rights of the purchaser at the foreclosure sale, and to thereby transmit an absolute title to the premises unless further redemption is made within the time specified by law. (p. 624.)

TIME, Fractions of a Day, When Will be Considered.—The legal fiction that there are no fractions of a day has no application to a case when the statute, to avoid confusion, expressly requires that notice shall be taken of the precise time an official act is done and that a record thereof be made. (p. 625.)

Charles E. Bond and M. C. Brady, for the appellant.

A. C. Middelstadt, for the respondent.

235 START, C. J. Action of ejectment. Trial by the court without a jury. The district court of the county of Hennepin, in which the action was pending, as a conclusion of law based upon its findings of fact, directed judgment on the merits for the defendant. It was so entered, and the plaintiff appealed from the judgment.

The question for our decision is whether the conclusion of law and judgment are supported by the findings of fact. The short facts found by the court are these: On October 7, 1903, the premises in question were duly sold on the foreclosure by advertisement of a mortgage, which was the first lien thereon, to Nathan M. Barnes, a mortgagee. On October 1, 1904, another mortgage on the premises, which was the second lien thereof, was duly made to the defendant herein, and duly recorded on October 5, 1904. On the next day the defendant filed a notice in due form and substance of his intention to redeem as such mortgagee the premises from the sale on the foreclosure of the first mortgage.

No redemption was made by the mortgagors, and on October 12, 1904, the defendant as such junior mortgagee redeemed the premises from the foreclosure sale. The usual certificate of redemption was issued to him and duly recorded on the same day. On October 6, 1904, the plaintiff secured from one of the mortgagors in the first mortgage a confession of judgment in his favor in the sum of twenty-five dollars, and in the afternoon of that day, and before 12:20 o'clock, delivered it to the clerk of the district court and requested him to enter and docket it forthwith, which the clerk promised to do. There is no showing at what hour of the day last named the judgment was entered in the judgment-book in the clerk's office; but the judgment docket does show that the plaintiff's judgment was not docketed until the hour of 5 o'clock of that day. On the same day, and at the hour of 1 o'clock P. M., the plaintiff filed in the office of the register of deeds a notice in proper form stating his intention as a judgment creditor to redeem the premises from the foreclosure sale. On the following October 17th the plaintiff attempted to redeem the premises as such judgment creditor, and did all things necessary to make a valid redemption, save and except that the only notice of his intention to redeem was one filed four hours before his judgment was docketed. Thereupon the usual certificate of redemption was made and delivered to the plaintiff, which ²³⁶ was recorded the next day. On March 15th following, on application of the plaintiff and consent of the judgment debtor, the district court of the county of Hennepin ordered the clerk to amend the docket entry so as to show that plaintiff's judgment was docketed at 12:30 o'clock P. M., October 6, 1904, and, further, that the judgment, after such change is made in the record, shall have the same force and effect as if it had been docketed at 12:30 o'clock P. M., provided that the rights of third persons shall not be affected by the order.

Was the plaintiff's attempted redemption of the premises valid? This is the sole question presented by the record, and we answer it in the negative. The attempted amendment of the docketing of the plaintiff's judgment is not relevant here, for the rights of the defendant were not affected by the action of the court to which he was not a party. Every clerk of the district court is required to keep a docket, in which he shall enter alphabetically the name

of each judgment debtor, the amount of the judgment, and the precise time of his entry: Gen. Stats. 1894, sec. 861. The judgment becomes a lien on the unexempted land of the judgment debtor only from the time of so docketing it: Gen. Stats. 1894, sec. 5425. A creditor having a junior lien, legal or equitable, on mortgaged premises, may redeem from a foreclosure sale thereof, provided he files notice of his intention to do so within the year allowed for redemption: Gen. Stats. 1894, sec. 6044. It is a condition precedent to the exercise of the right of such creditor to redeem that he file a notice of his intention to do so, and to entitle him to give the notice he must have a lien on the premises at the time he files his notice. Therefore, a notice of an intention so to redeem, filed by an intended redemptioner before he is in fact a lien creditor, is void, even though by the docketing of his judgment he afterward becomes such creditor before the year to redeem expires: *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139.

The plaintiff contends that the trial court found that there was no evidence showing at what hour the judgment was docketed, and does not find that it was not docketed until the hour of 5 o'clock P. M. What the court did find was that there was no evidence showing at what time the judgment was entered in the judgment-book, but that the docket-book did show that the judgment was not docketed until 5 o'clock P. M. The clerk was required by law to enter the precise ²³⁷ time of the docketing, and he is presumed to have done his duty. The necessary inference from the finding is the ultimate fact that the judgment was not docketed until the hour named.

It is also urged on behalf of the plaintiff that the defendant cannot question the validity of the redemption, for the reason that all he was entitled to was the amount paid by him to redeem from the mortgage foreclosure sale and the amount of his own lien, with interest, all of which was paid by the plaintiff to the sheriff when he attempted to redeem. Such is not the law, for the defendant by his redemption was subrogated to the rights of the purchaser at the foreclosure sale, and thereby obtained the right to acquire the absolute title to the premises, unless redeemed within the time allowed by law by one having the legal right so to do: *Hughes v. Olson*, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42

The last contention of the plaintiff to be considered is that the law does not take notice of fractions or parts of a day; hence the judgment must be deemed to have been docketed at the time the notice of intention to redeem was filed, both acts having been done on the same day. The legal fiction that there are no fractions of a day has no application to cases like this one, where the statute, to avoid confusion, expressly requires that notice shall be taken of the precise time an official act is done, and that a record thereof be made.

Judgment affirmed.

The Computation of Time is the subject of a monographic note to *State v. Michel*, 78 Am. St. Rep. 372-376. The law usually rejects fractions of days, but this rule has its exceptions: See *Tilton v. Sterling Coal etc. Co.*, 28 Utah, 173, 107 Am. St. Rep. 689; *New England Mtg. etc. Co. v. Fry*, 143 Ala. 637, 111 Am. St. Rep. 62.

GRACE v. GRACE.

[96 Minn. 294, 104 N. W. 969.]

HOMESTEAD, Partition of.—Where a husband and wife are tenants in common of a homestead, she cannot, by leaving him, acquire a right to compel partition thereof. (p. 627.)

HOMESTEAD, Holding by Tenancy in Common.—A homestead may be held by a husband and wife as tenants in common. (p. 627.)

HOMESTEAD.—A Conveyance by a Husband to His Wife of the Undivided One-half of the Premises Occupied by Them as a Homestead does not confer on her the power to compel partition thereof by a sale, though it be conceded that his homestead right is restricted to the undivided one-half. (p. 628.)

HOMESTEAD, Partition of at the Suit of a Wife.—The law will not allow a wife to do with respect to her husband's homestead indirectly by a suit for partition by sale what she could not do directly by sale or conveyance. (p. 628.)

C. E. and J. C. Otis, S. E. Day and S. C. Olmstead, for the appellant.

Durment & Moore, for the respondent.

²⁹⁴ JAGGARD, J. Substantially in the language of appellant, the issues and facts in this case are as follows: The action is one for partition of premises described ²⁹⁵ in the complaint by a sale thereof, for the reason that they

could not from their nature be partitioned by allotment in kind. The parties to the action are, and have been for thirty years past, husband and wife. For many years prior to the fall of 1903 they lived together therein and occupied the same as the homestead of the defendant, in whom title stood. In the fall of that year the plaintiff commenced an action against the defendant for a legal separation on the ground of cruel and inhuman treatment. Pursuant to an amicable arrangement, the defendant made over to her certain personal property of the value of two thousand five hundred dollars, and through a third person caused to be conveyed to her title to an undivided one-half interest in the homestead, and the plaintiff took up her abode with her husband on the premises in October, 1903. She there lived with him as his wife until the following August, but left the defendant and abandoned the premises as her home for the alleged reason that the defendant renewed his improper conduct toward her. In November of the same year plaintiff brought this action. After issue joined both parties moved for judgment on the pleadings. The court directed judgment for the defendant. From that order and other proceedings this appeal was taken.

The contention of the plaintiff is that the wife's undivided half interest was held by her free from any present vested and completed right of her husband; that the husband's right in an undivided part of the premises is not paramount, but is subordinate, to the legal title in the plaintiff, owning the other undivided interest; that the wife, having abandoned the premises for homestead purposes, may compel partition in the same manner as a stranger might; that the husband's homestead right is of necessity subject to the rights of the cotenant; and that where a tenant in common has homestead rights, and partition in kind between him and a cotenant is impracticable, a sale of the whole may be had, but the homestead attaches to and protects the proceeds. To that end he cites *Swandale v. Swandale*, 25 S. C. 389; *Jenkins v. Volz*, 54 Tex. 636.

It is true that this court has held that "the right initiate and inchoate which a husband or wife has in a statutory homestead owned by his or her spouse is not easily distinguishable from the right held by him or her in real property belonging to the other and not occupied as a home-

stead. The homestead right or interest is conditional. . . . The interest ²⁹⁶ of a husband in his wife's homestead, while she is living, seems to be less than the right of the wife in his homestead. She may abandon it at will. If she should remove therefrom, we are not advised of any statute which would give the husband the right to remain thereon or assert any claim to the same as a homestead. He would then be compelled to secure a homestead for himself or go without. The rights of the wife in her husband's statutory homestead are recognized by section 5521 of the General Statutes of 1894, by which homestead rights are fixed in this state; but the rights of the husband during the life of his wife in her homestead are not referred to. They seem to be wholly ignored": *Hamilton v. Village of Detroit*, 85 Minn. 83, 88 N. W. 419. It is also true that in many cases it has been held by this court that "the clearly declared policy of the statute in respect to the relation of husband and wife is that the latter can, in her own name and in any form of action, sue the former to enforce any right affecting her property, the same as if he were a stranger": *Gillespie v. Gillespie*, 64 Minn. 381, 67 N. W. 206; *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. Rep. 266, 53 N. E. 398, note; *Spencer v. St. Paul etc. R. Co.*, 22 Minn. 29. It may be conceded for the purposes of this case, but for such purposes only, that a wife owning real estate, as tenant in common with her husband, can maintain partition against him: *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466. But see contra, *Howe v. Blanden*, 21 Vt. 315.

The law and the reason of the law, however, deny the ability of a wife by leaving her husband to acquire the right to compel partition of her husband's homestead, in which she has an undivided half interest and which she occupied with him as a homestead. A homestead can be owned and occupied by husband and wife as tenants in common: *Lozo v. Sutherland*, 38 Mich. 168. There may be a homestead right in an undivided interest in premises: *Kaser v. Haas*, 27 Minn. 406, 7 N. W. 824; 25 Century Digest, sec. 121, cols. 2245, 2246. In this case, accordingly, defendant had at least a homestead interest in his undivided half of the premises (*Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705), although it may well be doubted whether the homestead rights of the hus-

band are limited to that interest: *Ehrek v. Ehrek*, 106 Iowa, 614, 68 Am. St. Rep. 330, 76 N. W. 793; *In re Emerson's Homestead*, 58 Minn. 450, 60 N. W. 23. Neither the husband nor the wife can dispose of his or her right of that character without the express consent of the other: 297 Gen. Stats. 1894, secs. 5521, 5522, 5532; Laws 1905, p. 390, c. 255; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817. And see *Eaton v. Robbins*, 29 Minn. 327, 13 N. W. 143; *Sherrid v. Southwick*, 43 Mich. 515, 5 N. W. 1027; 25 Century Digest, sec. 191, col. 2330.

It is not material to the decision of this case whether it be governed by section 5532, in force when the pleadings were drawn, or by chapter 255, page 390, of Laws of 1905, in force before the order granting the motion, from which this appeal was taken, was made. Section 5532 of the General Statutes of 1894 provides, in part, that: "Any married woman shall be capable of making any contract either by parol or under seal which she might make if unmarried and shall be bound thereby; except that no conveyance or contract for the sale of real estate or of any interest therein by a married woman, other than mortgages on lands to secure the purchase money of such lands and leases for terms not exceeding three years, and instruments releasing dower in lands of a former husband shall be valid, unless her husband shall join with her in such conveyance."

The law of 1905 expressly provides, in part, that every married woman "May make any contract which she could make if unmarried and shall be bound thereby, except that no conveyance or contract for the sale of her homestead or any interest therein shall be valid unless her husband joins with her therein."

The husband and the history of the use of the premises in this case had determined the homestead of the family: *Moss v. Warner*, 10 Cal. 296. Admitting that all the homestead rights there existed were in the husband's undivided half, under neither statute could the wife make a valid sale or conveyance destroying the homestead. The law will not allow her to do indirectly through a suit for partition what she could not do directly by sale or conveyance: *Mitchell v. Mitchell*, 101 Ala. 183, 13 South. 147 (a case essentially similar to the one at bar); *Brooks v. Hotchkiss*, 4 Ill. App. 175; *Holbrook v. Wightman*, 31 Minn. 168, 17 N. W. 280; *Umland v. Holcombe*, 26 Minn. 286, 3 N.

W. 341; *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537; *Trumbly v. Martell*, 61 Kan. 703, 60 Pac. 741. On general principles no waiver of homestead right ²⁹⁸ by the husband or wife can affect the vested interest of the other spouse therein; neither can the abandonment or waiver of such homestead right by the one entitled to enjoy the same injuriously affect the interest of any other entitled thereto: *Sherwood, J.*, in *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705.

This conclusion is in harmony with the well-understood purpose of the homestead laws. The trial court in its carefully considered memorandum has justly remarked: "The homestead, under our public policy and law, is the one sacred place where the strong hand of the law is stayed, and over which only by consent of both husband and wife can its power be exercised. The beneficent idea undoubtedly is to make and preserve for every family the shelter of a home, to be free, as long as husband or wife or a minor child shall live and occupy it, from the common vicissitudes of life. . . . To hold that either husband or wife can, at will, by leaving the common home, destroy its legal character as a homestead, would lead to such disastrous results that it could not for a moment be tolerated. Thus, at the whim of either the homestead could be subjected to judgment lien and sale, the right of shelter denied to the other spouse, and even little children turned out."

The wife is not left without a remedy applicable to such cases. She can terminate the homestead right by an absolute divorce (*Kern v. Field*, 68 Minn. 317, 64 Am. St. Rep. 479, 71 N. W. 393), or, without a divorce, by an application under section 5535, whenever she would be entitled to a divorce. That the legislature has not provided relief for her under such circumstances as would justify her in leaving her husband, though not necessarily entitling her to a divorce (*Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668), does not operate to alter the letter and spirit of the homestead laws. If she elect to take that course, she must abide by its consequences. She does not ipso facto become entitled to thereby destroy the homestead. In *Ehrek v. Ehrek*, 106 Iowa, 614, 68 Am. St. Rep. 330, 76 N. W. 793, it was held that a wife who chooses to live apart from her husband is not entitled to any benefit from the

homestead property set off in lands owned by her, and the husband has the full right during his occupancy to cultivate it.

Judgment affirmed.

An Undivided Interest in Real Estate, accompanied by the requisite occupancy of the owner and his family, will support a homestead claim: *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730; *Wike v. Garner*, 179 Ill. 257, 70 Am. St. Rep. 102; *Lewis v. White*, 69 Miss. 352, 30 Am. St. Rep. 557. But see the note to *McCoy v. Breenan*, 1 Am. St. Rep. 594.

The Right of Wife to Select or Claim a Homestead when she is living apart from her husband is discussed in *Ehreck v. Ehreck*, 105 Iowa, 614, 68 Am. St. Rep. 330; *Watterson v. E. L. Bonner Co.*, 19 Mont. 554, 61 Am. St. Rep. 527; *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28.

STATE v. WEBER.

[96 Minn. 422, 105 N. W. 490.]

PLEADING.—A Sham Answer is One that is false and untrue. (p. 632.)

PLEADING.—A Frivolous Answer is one that does not, in any view of the facts pleaded, present a defense to the action. (p. 632.)

PLEADING, Sham Answers, Power of the Court Over.—The court has the right to strike out a sham answer even though verified, and its power is not limited to cases where bad faith affirmatively appears. The court will not, however, where fair doubts exist as to the truth or falsity of an answer, summarily dispose of the case, but will leave the parties to litigate the issues in the usual way. (p. 632.)

NATURALIZATION, Judgment of, When Sufficient.—The record of a court showing the appearance of a designated person before it, and that he is an alien and native of Germany, and has proved that he made in the court, two years before, the requisite declaration of his intention to become a citizen of the United States, and that he has resided therein for five years last past and in the state for one year, during all of which time he has been well behaved and of good moral character, attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same, and that he further, in open court, made solemn oath that he will support the constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly all allegiance and fidelity to the Emperor of Germany, "whereupon it is ordered by the court that a certificate of naturalization be issued to him on payment of the costs of this application," amounts to a sufficient judgment admitting the applicant to citizenship. (p. 636.)

COURT OF RECORD of Common-law Jurisdiction, What Presumed to be.—A Court of a Sister State having a judge, clerk and seal is a court of record whose jurisdiction is presumed. (p. 637.)

JURISDICTION, Presumption of, When Indulged.—When a Court of Record, Though of a Sister State, assumes to exercise jurisdiction over the subject matter of a controversy and pronounces judgment therein, its jurisdiction will be presumed upon production of a certified copy of the judgment, as required by the act of Congress. (p. 637.)

NATURALIZATION in Sister State, Jurisdiction of Court, When Presumed.—If a court of a sister state having a judge, clerk and seal assumes jurisdiction over naturalization and pronounces a judgment admitting an applicant to citizenship, its jurisdiction will be presumed. (p. 637.)

ELECTIONS—Statute Restricting Right to Vote to Persons Who Have Been Admitted to Citizenship for Three Months.—The provision of the constitution of Minnesota limiting the right of suffrage, as respects naturalized citizens, to those who have been admitted to citizenship three months preceding the election is not in conflict with any provision of the constitution of the United States, and is valid. (p. 638.)

ELECTIONS, Right of Suffrage Under the Fourteenth Amendment.—The fourteenth amendment to the constitution of the United States does not confer the right of suffrage nor affect the power of the states to enact such laws upon the subject of elections as they may deem for the best interests of the public. (p. 638.)

CONSTITUTIONAL LAW.—The Right or Privilege of Holding Office is a Right Under the Constitution and Laws of the Several States, and the citizen's right to vote at elections, whether for officers of the state or of the United States, exists by reason of the fact that he is a citizen of, and entitled to vote under the laws of, the state in which he resides. (p. 638.)

J. D. Sullivan and Calhoun & Bennett, for the appellant.

Bruener & Klasen, for the respondent.

423 BROWN, J. Proceedings in the nature of quo warranto to determine the right to the office of county commissioner of Stearns county. It appears from the record that relator was elected to the office of county commissioner of the third district of Stearns county at the general election of 1900, and duly qualified and entered upon and continued in the discharge of the duties thereof during the following term of four years. Defendant was elected to the office at the general election of 1904, and on January 1, 1905, duly qualified and entered upon the discharge of his duties. Thereafter, on the theory that defendant was not a citizen of the United States qualified to vote or hold office at the time 424 of his election, and that his election was a nullity, relator, claiming the right to hold over by virtue of his prior incumbency (Taylor v. Sullivan, 45 Minn. 309, 22 Am. St. Rep. 729, 11 L. R. A. 272, 47 N. W. 802), commenced this proceeding to oust

him. The writ sets out the citizenship of relator, his prior election and qualification, the fact that defendant was not a citizen, and hence not eligible to the office, and other facts upon which his prayer for relief is founded. Defendant answered, expressly denying the citizenship of relator, and affirmatively alleging that he was not, and never had been, a citizen of the United States, and that by reason thereof he was a usurper in the office, with no lawful right to hold or retain the same. It also alleged that defendant was in fact a citizen, and that he holds and claims to hold the office by virtue of his election thereto in November, 1904. The answer also contains a general denial and was duly verified. Relator moved in the court below, upon affidavits, to strike out the answer as sham and frivolous and for judgment as prayed for in the writ, which motion was granted, and defendant appealed. This statement is sufficient for a general understanding of the issues in the case. Other facts will be mentioned in connection with the discussion of the particular questions presented.

1. The motion to strike out the answer was based upon the claim that it was sham and frivolous, and the question presented in this connection is whether the motion was properly granted on either ground. A sham answer is one that is false and untrue; the word "sham" being construed by the courts as synonymous with "false." A frivolous answer is one that does not, in any view of the facts pleaded, present a defense to the action: 20 Ency. of Pl. & Pr. 11 et seq. The answer in this case is clearly not frivolous, for it in fact presents a complete defense to the action, and we have only to inquire whether it is sham. The right of a court to strike out a sham answer, even though verified, is firmly settled by the decisions of this court: *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388; *Wheaton v. Briggs*, 35 Minn. 470, 29 N. W. 170; *Stevens v. McMillan*, 37 Minn. 509, 35 N. W. 372; *Van Loon v. Griffin*, 34 Minn. 444, 26 N. W. 601. And though many of the cases, in defining a sham answer, state that it is one shown to be false and untrue, and which appears to have been interposed in bad faith or for the purpose of delay, we do not apprehend that the power of the court to strike out such an answer is limited to cases ⁴²⁵ where bad faith affirmatively appears. Our statutes, which provide for striking out sham and frivolous answers, make no reference

to the good or bad faith with which they may have been interposed, but provide for striking the same out upon their falsity being clearly shown. Ordinarily bad faith will be presumed from the fact that the answer is false and untrue. But it is clear that the court has the power to strike out such an answer, even though in fact interposed in the belief of its truth and in good faith, in all cases where the falsity is clearly and unquestionably disclosed. The court will not, however, in any case where a fair doubt exists as to the truth or falsity of the answer, thus summarily dispose of the case, but will leave the parties to litigate the issues in the usual way.

The principal questions of fact presented by the writ and answer in this case are the citizenship of relator and the citizenship of defendant. All other facts necessary to the full determination of the controversy are either admitted or not controverted. There is no dispute respecting the facts going to prove the citizenship of defendant. He was admitted a citizen before the district court of Kandiyohi county, on October 28, 1904, about a week prior to the time of his election and the question whether he was eligible to the office at that time is one of law; so that if the legal conclusion from the undisputed fact just stated be adverse to defendant, and to the effect that because he was not a citizen at least three months prior to the election, he was ineligible to public office, the allegations of his answer that he was a citizen and entitled to vote and hold office at the time of his election are not true. The same may be said with reference to the status of relator. If the affidavits presented on the motion, which are not disputed by defendant, show that he became a citizen in the manner there stated, the allegations of the answer that he is not a citizen are not true. So the question whether the answer was properly stricken out narrows itself down to one of law, to be determined from the undisputed facts presented by the record. The suggestion of counsel for defendant that no opportunity was afforded him to present a counter showing in reference to the citizenship of relator is without special force. If he desired to controvert the affidavits of relator, and the time fixed for the hearing of the motion in the court below did not allow opportunity to produce necessary proof, an application for further time would certainly have ⁴²⁶ been granted by the court be-

low. But it does not appear that any such application was made; on the contrary, it is apparent that the motion was submitted below upon the legal questions raised and in line with the arguments in this court.

2. We come, then, to the question whether the affidavits presented on the motion to strike out clearly show the citizenship of relator. The affidavits state that relator is the son of one Valentine Engelhard, who was by an order of the court of common pleas of Meigs county, Ohio, naturalized as a citizen of the United States on May 28, 1852, at which time relator was of the age of eleven years, by virtue of which relator claims that he then became and has since remained a citizen of the United States, entitled to all the rights, privileges and immunities of such. In support of the affidavit that the relator's father thus became a citizen, a properly authenticated copy of the order admitting him was offered as a part of the moving papers. It is in the following language:

“Court of Common Pleas, Meigs County, Ohio.

“In the Matter of the Naturalization of Valentine Engelhard.

“Pomeroy, Ohio, May Term, 1852.

“Journal, Vol. 8, Page 380.

“Certified Copy of Journal Entry.

“Valentine Engelhard, an alien and native of Germany, a free white person, this day came into court and proved to the satisfaction of the court that he made in this court two years ago the requisite declaration of his intention to become a citizen of the United States, and he has resided in the United States for five years last past, that he has resided one year last past in the state of Ohio, and that during all that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and thereupon the said Valentine Engelhard in open court here made solemn oath that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, ⁴²⁷ and particularly all allegiance and fidelity to Maximillian II, King of Germany, whose subject he was.

“Whereupon it is ordered by the court that a certificate of naturalization be issued to him on payment of the costs of this application.”

Several objections are made to the sufficiency of this record. The first, namely, that relator is not shown to be the son of the Valentine Engelhard who was admitted to citizenship by the Ohio court, is clearly not well taken. The affidavits on this subject are clear and unequivocal, and leave no room for controversy. They sufficiently show that the Valentine Engelhard admitted by the Ohio court was the father of relator. It is also contended that an alien can only be admitted to citizenship by a court of record exercising common-law jurisdiction, and by the formal entry of a judgment of admission; that it does not appear in the case at bar that the court of common pleas of Meigs county, Ohio, possessed the necessary power and authority; and that the certified copy of the record above quoted does not amount to a judgment conferring citizenship upon the applicant.

Section 2165 of the Revised Statutes of the United States of 1878 (U. S. Comp. Stats. 1901, 1329) provides the method and manner by which an alien may become a citizen of the United States. It requires the applicant to appear before a circuit or district court of the United States “or a court of record of any of the states having common-law jurisdiction,” establish his residence and other facts entitling him to admission, and take the oath of allegiance. The act also provides that the proceedings upon such application shall be recorded by the clerk of the court before which they are had. It may be conceded that a judgment of a court admitting an alien to citizenship is essential, and that, if the record relied upon by relator to establish the admission of his father does not show a judgment, respondent’s contention that the record is insufficient must be sustained. But we find no force to this contention. A judgment of a court is the final determination and adjudication of a controversy or proceeding, and may, under the common-law procedure, be formally entered in a so-called judgment-book kept by the clerk, orally announced by the court, or in the form of an order signed by the presiding ⁴²⁸ judge finally disposing of the case: 18 Ency. of Pl. & Pr. 429; 17 Am. & Eng. Ency. of Law, 2d ed., 768.

The record of the court now before us would indicate that the order admitting Engelhard, Sr., to citizenship was orally announced by the presiding judge and the fact recorded by the clerk in the minutes of the court. The record recites all the facts necessary to be shown, certifies that they were shown, and concludes with: "Whereupon it is ordered by the court that a certificate of naturalization be issued to him on payment of the costs of this application." This answers every purpose and amounted to a judgment admitting the applicant to citizenship: *Spratt v. Spratt*, 4 Pet. 393, 7 L. ed. 897; 1 Black on Judgments, 106; *In re Coleman*, 15 Blatchf. 406, Fed. Cas. No. 2980; *Boyd v. Thayer*, 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36 L. ed. 103; *The Acorn*, Fed. Cas. No. 29; *Campbell v. Gordon*, 6 Cranch, 176, 3 L. ed. 190; *State v. Hoeflinger*, 35 Wis. 393. In the last case cited the record of the proceedings admitting the alien to citizenship was substantially like the record in the case at bar, and the court held that it constituted a judgment, importing absolute verity.

3. It is also urged by defendant that it does not appear that the common pleas court of Meigs county, Ohio, had jurisdiction to entertain the proceedings, and that the relator should, in support of the motion to strike out the answer, have produced the constitution and laws of the state of Ohio showing the creation and defining the jurisdiction of that court. Counsel are in error in this contention. The act of Congress providing for the naturalization of aliens confers jurisdiction upon the courts of record of the several states having common-law jurisdiction to hear, determine and grant applications of that kind. A court having common-law jurisdiction is one whose powers are exercised "according to the course of the common law," and the phrase "according to the course of the common law," as interpreted by textwriters and judges, means a judicial determination of a controversy after due notice to the interested parties and an opportunity given to be heard: 2 Words and Phrases, 1331. It is not necessary that the court, to possess common-law jurisdiction, within the meaning of the act of Congress, should be unlimited in power and authority. Indeed, we have few courts in this country where limitations as to jurisdiction do not ⁴²⁹ exist: *Stahl v. Mitchell*, 41 Minn. 325, 43 N. W. 385; 3 Current Law, 145; *In re Dean*, 83 Me. 489, 22 Atl. 385. 13 L. R.

A. 229; *United States v. Power*, 14 Blatchf. 223, Fed. Cas. No. 16,080.

The Ohio court, having a judge, clerk, and seal, was a court of record, and its jurisdiction is presumed. The general rule on this subject is that, when a court of record—that is, a court having a judge, clerk, and seal—has assumed to exercise jurisdiction over the subject matter of a controversy or proceeding, and has pronounced judgment therein, it will be presumed in all courts of other jurisdictions, upon the production of a certified copy of the judgment authenticated as required by the act of Congress, that the court had jurisdiction of the subject matter of the proceeding and authority to render the judgment: 2 Black on Judgments, 896, and cases cited; 13 Am. & Eng. Ency. of Law, 2d ed., 997; *Gunn v. Peakes*, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466; *Mills v. Stewart*, 12 Ala. 90; *Bogan v. Hamilton*, 90 Ala. 454, 8 South. 186; *Coughran v. Gilman*, 81 Iowa, 442, 46 N. W. 1005. This presumption applies in the case at bar, for it appears that the court from which the record in question came was a court of record and presumptively of common-law jurisdiction.

In some of the states the courts have gone beyond the general presumption of jurisdiction and taken judicial notice of the constitution and laws of sister states creating their courts and defining their powers and jurisdiction: *Dodge v. Coffin*, 15 Kan. 277; *Buffum v. Simpson*, 5 Allen, 591, 81 Am. Dec. 767; *Shotwell v. Harrison*, 22 Mich. 410; *Munroe v. Eastman*, 31 Mich. 283; *Jarvis v. Robinson*, 21 Wis. *523, 94 Am. Dec. 560. In New York, the common pleas court of Ohio is presumed to be one of general jurisdiction: *McCulloch v. Norwood*, 36 N. Y. Sup. Ct. 180. And a similar presumption exists in that state as to like courts in the state of Pennsylvania: *Pringle v. Woolworth*, 90 N. Y. 502. See, also, *Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346; *Specklemeyer v. Dailey*, 23 Neb. 101, 8 Am. St. Rep. 119, 36 N. W. 356; *Nunn v. Sturges*, 22 Ark. 389. But we need not adopt that view of the law, for the general presumption above referred to applies to the facts before us, and under it the common pleas court of Meigs county, Ohio, must be deemed a “court of record exercising common-law jurisdiction,” within the meaning of the act of Congress, with full power and authority to admit aliens to citizenship of the United States, and its judg-

ment is conclusive against ⁴³⁰ collateral attack. Of course, the presumption is not conclusive; but the burden to overcome it is upon him who calls the judgment in question. In the case at bar the burden was upon the defendant. He made no effort in that direction, and it becomes conclusive.

4. It is also urged by defendant that, having been admitted to citizenship prior to the time of his election, he was eligible to the office, and that the court below erred in ordering judgment to the contrary. It is insisted in this connection that the provisions of article 7, section 1, of our state constitution, as amended in 1895 (Laws 1895, p. 7, c. 3), limiting the right of suffrage, as respects naturalized citizens, to such as are admitted to citizenship three months preceding the election at which they tender their vote, is in conflict with the fourteenth amendment to the federal constitution, which provides that no state shall enact or enforce any law abridging the privileges or immunities of citizens of the United States, nor any law which shall deprive any citizen of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. We do not concur in this contention.

The federal supreme court, in construing this amendment, has held that it does not confer the right of suffrage, nor affect the power of the states to enact such laws upon the subject of elections as they may deem for the best interests of the public. Whether the federal Congress may, under this or any other provision of the federal constitution, impose restrictions or limitations upon the right of suffrage, is not involved. Congress has never attempted to exercise that power, and the supreme court has uniformly sustained the laws of the several states relating to the subject: 10 Am. & Eng. Ency. of Law, 2d ed., 572; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 146; Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664. The right and privilege of holding office is a right arising under the constitution and the laws of the several states, and the citizen's right to vote at elections, whether for officers of the United States or state, exist by reason of the fact that he is a citizen and entitled to vote under the laws of the state in which he resides: United States v. Anthony, 11 Blatchf.

200, Fed. Cas. No. 14,459; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 431 916; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3230; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357.

From what has been said it necessarily follows that the allegations of defendant's answer, both as respects the citizenship of relator and that of defendant, are in fact untrue, and, though it may have been interposed in good faith, its falsity is clear and undisputed, and was properly stricken out. In view of the facts disclosed, it is apparent that a denial of the motion would merely delay a result unavoidable at the end of the litigation.

Order affirmed.

SHAM PLEADINGS.

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I. What Constitutes Sham Pleading.

A sham pleading is one that, while in good form, is false in fact. The words "false" and "sham" as applied to pleadings are synonymous: *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90; *Goldstein v. Krause*, 2 Idaho, 294, 13 Pac. 232; *Reese v. Walworth*, 61 App. Div. 64, 69 N. Y. Supp. 1115; *Howe v. Elwell*, 57 App. Div. 357, 67 N. Y. Supp. 1108; *Andrea v. Bandler*, 56 N. Y. Supp. 614; *Farnsworth v. Halstead*, 18 Civ. Proc. Rep. 227, 10 N. Y. Supp. 763; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Roome v. Nicholson*, 8 Abb. Pr., N. S., 343; *Winslow v. Ferguson*, 1 Lans. 436; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515. Thus where it appears from the terms of a bill of exchange upon which suit is brought, in which an attorney's

fee is claimed, that "the parties hereto agree to pay all attorney's fees in case of suit on this paper," a defense in the answer filed in such suit that the "attorney's fees in said suit provided for were not due at the time this suit was filed," has been said to be sham: *Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588. This cannot be true, for the answer is not in good form, and for that reason is not false in fact. It is not good in form because it does not deny any material allegation of the complaint. It is not false in fact, for it does not state nor deny any fact. What it says about the fees not being due states a conclusion of law only, and tenders no issue. The answer was therefore wholly insufficient. It might well have been characterized as frivolous but it was not sham. In some decisions it is said that the further quality is involved in a sham pleading of its being interposed in bad faith to impede justice: *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Greenbaum v. Turrill*, 57 Cal. 285; *Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361; *Duffield v. Denver etc. R. Co.*, 5 Colo. App. 35, 36 Pac. 622; *Tucker v. Ladd*, 4 Cow. 47; *Foren v. Dealey*, 4 Or. 92. This statement, however, has been explained on the ground that the imputation of bad faith is only a natural presumption from its falsity: *Pfaender v. Winona etc. R. Co.*, 84 Minn. 244, 87 N. W. 618; *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460. Thus in *Roome v. Nicholson*, 8 Abb. Pr., N. S., 343, the court held that a sham pleading should be stricken out, notwithstanding the defendant may have believed it to be true.

On the other hand, a pleading that is not false is not sham: *Clark v. Jeffersonville etc. R. Co.*, 44 Ind. 248; *Sweetman v. Ramsey*, 22 Mont. 323, 56 Pac. 361; *Randall v. Simmons*, 40 Or. 554, 67 Pac. 513; *Miser v. O'Shea*, 37 Or. 231, 82 Am. St. Rep. 751, 62 Pac. 491. Thus where a defense set up in an answer that at the time of the commencement of the action in which the answer was filed there was pending another action between the same parties wherein the same matter was in issue, is true, even conceding that it does not constitute a defense to the present action without a further averment in the answer that judgment has been rendered in the other action, it is not sham: *Mutual Life Ins. Co. v. Toplitz*, 58 App. Div. 188, 68 N. Y. Supp. 680.

II. Relief Obtainable as Against Sham Pleading.

a. The General Rule.—In most jurisdictions a sham pleading may, in a proper case, be struck out on motion: *Gostorfs v. Taafe*, 18 Cal. 385; *Piercy v. Sabin*, 10 Cal. 22, 29, 70 Am. Dec. 692; *Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361; *Duffield v. Denver etc. R. Co.*, 5 Colo. App. 25, 36 Pac. 622; *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90; *Goldstein v. Krause*, 2 Idaho, 294, 13 Pac. 232; *Pittsburg etc. Ry. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576; *Lowe v. Thompson*, 86 Ind. 503; *Henderson v. Leed* (Ind.), 1 Blackf. 347; *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460; *Coykendall v. Robinson*, 39 N. J. L. 98; *Allen v. Wheeler*, 21 N. J. L.

93; Anonymous, 7 N. J. L. 160; Reese v. Walworth, 61 App. Div. 64, 69 N. Y. Supp. 1115; Jones v. Brown, 29 Misc. Rep. 517, 61 N. Y. Supp. 972; Frey v. Sylvester, 24 Misc. Rep. 167, 53 N. Y. Supp. 527; First Nat. Bank v. Slattery, 4 App. Div. 421, 38 N. Y. Supp. 859; Commercial Bank v. Spencer, 76 N. Y. 155; Roome v. Nicholson, 8 Abb. Pr., N. S., 343; Oakley v. Devoe, 12 Wend. 196; Brewster v. Hall, 6 Cow. 34; Steward v. Hotchkiss, 2 Cow. 634; Randall v. Simmons, 40 Or. 554, 67 Pac. 513; Larson v. Winder, 14 Wash. 647, 45 Pac. 315; Pfister v. Wells, 92 Wis. 171, 65 N. W. 1041. Indeed, in some decisions it is said to be the duty of the court to strike out a sham pleading: Cochrane v. Parker, 5 Colo. App. 527, 39 Pac. 361; Henderson v. Reed, 1 Blackf. 347. So "if an answer is all sham, it may be all stricken out; if it contains several defenses, some of which are good and others sham, the latter may be stricken out": Larco v. Casaneuava, 30 Cal. 560. For where a pleading is sham, it would simply be trifling with justice to require the adverse party to submit to a trial: Gostorfs v. Taafe, 18 Cal. 385; Brewster v. Hall, 6 Cow. 34. Moreover, "it is the policy of the code 'to suppress falsehood and secure truth in the pleadings,' and, as one means of securing such result, authority for striking out sham answers and defenses is given. In counties where the dockets are overburdened with causes, the temptation to interpose sham answers, for the purpose of delay only, is great": Patrick v. McManus, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90.

The power to strike out, however, must be exercised with caution: Patrick v. McManus, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90; Barker v. Foster, 29 Minn. 166, 12 N. W. 460; People v. McCumber, 18 N. Y. 315, 72 Am. Dec. 515. It is a power simply to inquire whether there is in fact any issue of fact to be tried: People v. McCumber, 18 N. Y. 315, 72 Am. Dec. 515. The court must discriminate carefully between its right to determine whether there is a real issue to be tried, and the trial of the issue upon a motion: Barker v. Foster, 29 Minn. 166, 12 N. W. 460.

This power is not derived from statute, but is inherent in the court: Barker v. Foster, 29 Minn. 166, 12 N. W. 460; Wayland v. Tysen, 45 N. Y. 281; Mier v. Cartledge, 8 Barb. 75. And its exercise is not objectionable as infringing the right of trial by jury. For the right of a defendant to a trial by jury depends upon there being any real issue to be tried. The court has power to determine whether there is such an issue and whether the apparent issue is fictitious and sham, though it does not have power to try the issue if there is one in truth as well as in form. "Such an authority over the pleadings is of the same nature with the power to require a verification of the pleadings as a condition of their admissibility. If the court may refuse to allow an answer, unless first verified, it may strike out an answer after it has been made, unless the defendant will verify it. So it may, on apparent proof of the falsity of a verified answer,

strike it out, unless further verified in a more special and particular manner. The exercise of this power, in either case, is not a trial of an issue; nor more so in one case than in the other. It is an indispensable power to the protection and maintenance of the character of the court, and the proper administration of justice": *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515; *Coykendall v. Robinson*, 39 N. J. L. 98. In *Albany County Bank v. Rider*, 74 Hun, 349, 26 N. Y. Supp. 490, the court thought a motion to strike out objectionable on constitutional grounds.

b. Prerequisites to Exercise of Power to Strike Out.—A pleading cannot be stricken out as sham unless the falsity thereof clearly and undisputably appears: *Duffield v. Denver etc. Ry. Co.*, 5 Colo. App. 25, 36 Pac. 622; *Pittsburgh etc. Ry. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576; *White v. Moquist*, 61 Minn. 103, 63 N. W. 255; *McDermott v. Deither*, 40 Minn. 86, 41 N. W. 544; *Thompson v. Erie Co.*, 45 N. Y. 468; *Lockwood v. Sahlenger*, 18 Abb. Pr. 136; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515. As otherwise expressed, to warrant the rejection of a pleading as sham, it must evidently be a mere pretense set up in bad faith and without color of fact: *Wright v. Jewell*, 33 Minn. 505, 24 N. W. 299; *Kelly v. Kelly*, 12 Misc. Rep. 457, 34 N. Y. Supp. 255; *Central Bank v. Thien*, 76 Hun, 571, 28 N. Y. Supp. 232; *Farnsworth v. Halstead*, 18 Civ. Proc. Rep. 227, 10 N. Y. Supp. 763; *Kiefer v. Thomas*, 6 Abb. Pr., N. S., 42. It has also been said that "the court should be satisfied that the object of the pleader is delay, and to trifle with the court, or annoy" the opposing party: *Andreae v. Bandler*, 56 N. Y. Supp. 614. But as a pleading may be sham although the pleader was not cognizant of its falsity (*Roome v. Nicholson*, 8 Abb. Pr., N. S., 343) this would not seem to be true. And in *Commercial Bank v. Spencer*, 76 N. Y. 155, the court of appeals held that where averments contained in an answer are intrinsically improbable, and on motion to strike out their falsity is clearly shown, the motion is properly granted. And in *Frey v. Sylvester*, 24 Misc. Rep. 167, 53 N. Y. Supp. 527, the same conclusion is reached.

It is not, however, enough, that the court should perceive but little prospect of the success of the pleader: *Andreae v. Bandler*, 56 N. Y. Supp. 614. Thus where there is reasonable doubt as to the falsity of a pleading, it will not be stricken out on motion, but the court will leave the parties to litigate the issues in the usual way: *Barker v. Foster*, 29 Minn. 166, 12 N. W. 960; *Wilson, C. J.*, in dissenting opinion in *Hayward v. Grant*, 13 Minn. 165 (Gil. 154), 47 Am. Dec. 228. Where, also, the conclusion that a pleading is false can only be reached by weighing and balancing the probabilities arising from the physical facts of the case, the pleading cannot be rejected as sham: *Pittsburg etc. Ry. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576. And although there is but a slight suggestion of the truth of an averment in a pleading, the pleading will not be stricken

out as sham: *Munn v. Barnum*, 1 Abb. Pr. 281, 12 How. Pr. 563; *Steward v. Hotchkiss*, 2 Cow. 634. An answer cannot be rejected on a mere suspicion of untruth, nor because its averments are contradictory, unless the statements alleged to be contradictory are entirely inconsistent with the truth of the defense that is well pleaded: *Foren v. Dealey*, 4 Or. 92. So where a complaint on a note avers that the defendant had for value agreed to pay the note although not the maker, and the answer is a general denial, and the plaintiff moves to strike it out as sham, and offers in support thereof an affidavit wherein was set forth an agreement from which it appeared that defendant was only contingently bound on the note, and it did not appear whether or not his liability had been fixed, the motion should be denied: *McDermott v. Deither*, 40 Minn. 86, 41 N. W. 544.

c. What Amounts to Clear Case of Sham.—It sometimes appears from the face of a pleading that it is false. Thus where the denials of an answer are so qualified by admissions that the denials are plainly false, the answer may be stricken out as sham: *Hayward v. Grant*, 13 Minn. 165 (Gil. 154), 97 Am. Dec. 228. And in an action to recover possession of certain land, where the defendant in his answer sufficiently pleads his ownership of the land, but also pleads that the land was conveyed to him by the administrator of a certain decedent, and does not aver that said decedent ever owned the land or that his administrator duly or under authority of law conveyed it, the former averment, when qualified by the subsequent averment, amounts to nothing and is sham: *Wythe v. Myers*, 3 Saw. 595, Fed. Cas. No. 18,199. In an action for wrongful death, where the plaintiff avers in his complaint that decedent died in May, 1887, and he swore to the complaint on May 15, 1889, a denial in his reply of defendant's averment that the action was not commenced within twelve months of the decedent's death will be struck out as sham: *Cavanaugh v. Oceanic Steam Nav. Co.*, 58 Hun, 604, 19 Civ. Proc. Rep. 315, 11 N. Y. Supp. 547, rehearing denied 58 Hun, 610, 12 N. Y. Supp. 609.

Moreover, where affidavits are used in support of a motion to strike out a pleading as sham, and counter-affidavits are also produced, the evasive character of the counter-affidavits will be a strong factor in favor of the motion: *Hertz v. Hartmann*, 74 Minn. 320, 77 N. W. 232; *Thul v. Ochsenreiter*, 72 Minn. 111, 75 N. W. 4; *Fletcher v. Byers*, 55 Minn. 419, 57 N. W. 139; *Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372. Thus in an action to foreclose a mechanic's lien, where the only issue made by the answer to strike out which a motion was made was the date of the completion of plaintiff's work, and it appeared from the counter-affidavits with one exception that the work was completed within the statutory period before the filing of the notice of lien, and from such affidavit it only appeared that the last material was delivered more than the statutory period before such filing, the answer is properly struck out: *Hertz v. Hartmann*, 74 Minn. 320, 77 N. W. 232. So in an action for rent, where the answer verified

by defendant's attorney sets up that the plaintiff had been paid "in cash and other personal property, consisting of hay, in the aggregate sum of one hundred and fifteen dollars," whereas the complaint had admitted a cash payment of ninety dollars and no more, a motion to strike out the answer supported by an affidavit that plaintiff had received only ninety dollars in money and had cut certain hay from in front of the demised premises the value of which did not exceed three dollars, and for which he had not agreed to pay defendant anything nor had defendant demanded payment, no counter-affidavits being filed, is properly granted: *White v. Moquist*, 61 Minn. 103, 63 N. W. 255. And in an action on a note, where defendant denies that the note was given for consideration and affirms that it was given for accommodation only, and the moving affidavits show that the note was given in part payment for merchandise, while the only inference to be drawn from the counter-affidavits was that the note was given for value, the motion should be granted: *Jones v. Brown*, 29 Misc. Rep. 517, 61 N. Y. Supp. 972. Likewise in such an action, where the defense of usury is interposed, a motion to strike out as sham based upon affidavits showing specifically that by mistake the plaintiffs claimed more interest than they were entitled to, and contested on affidavits stating the details of the transaction, but not negating the fact of mistake and merely reiterating their conclusion of usury, is properly granted: *Bailey v. Lane*, 13 Abb. Pr. 354.

Furthermore, where an answer contains a denial on information and belief, and it clearly appears from the movant's affidavits that the facts are otherwise than stated in such denial, and the defendant does not show by counter-affidavit the sources of his information or that there is a possibility of its truth, an order striking out has been sustained. This was done in cases where the counter-affidavits merely reiterated the averments of the answer (*Wedderspoon v. Rogers*, 32 Cal. 569; *Corbett v. Eno*, 13 Abb. Pr. 65, 22 How. Pr. 8), in the latter case on the ground that it was incumbent on defendant at least to show the source of his information and that there was a possibility of its truth, as well as in a case where the moving affidavit was uncontested: *Brassington v. Rohrs*, 3 Misc. Rep. 258, 23 Civ. Proc. Rep. 146, 22 N. Y. Supp. 761. In each of the three foregoing cases the matter denied on information and belief was ownership of a note which had passed from the hands of the original holder. In *Howe v. Elwell*, 57 App. Div. 357, 67 N. Y. Supp. 1108, however, the court, in disregard of the foregoing decisions, said: "The court cannot say that a denial on information and belief is untrue, because the party presumably had sufficient knowledge to deny absolutely the allegation if it were not true. . . . This form of denial is permissible in cases where a party would naturally be presumed to have knowledge of the truth or falsity of an allegation. Such a presumption might be erroneous. A defendant may conscientiously doubt whether he has suffi-

cient knowledge to deny absolutely, yet may be in possession of such information as will enable him truthfully to deny on information and belief." The reasoning of this case is more properly applicable to a case of denial of knowledge or information sufficient to form a belief than to one of the affirmance or denial of a fact on information and belief, and it has accordingly been held that a denial of knowledge or information sufficient to form a belief cannot be struck out on motion based on uncontested proof of the truth of the fact so denied, where the defendant is not shown to have possessed such knowledge or information on such subject at the time of such denial: *Reese v. Walworth*, 61 App. Div. 64, 69 N. Y. Supp. 1115; *Zivi v. Einstein*, 2 Misc. Rep. 177, 23 Civ. Proc. Rep. 56, 21 N. Y. Supp. 583, reversing 1 Misc. Rep. 212, 20 N. Y. Supp. 893.

But where the defendant pleads a plurality of defenses, two or more of which are so inconsistent that one or another must be false, there being nothing to show which is false, neither can, according to some decisions, be struck out as sham: *Duffield v. Denver etc. R. Co.*, 5 Colo. App. 25, 36 Pac. 622; *Green v. Hughitt School Tp.*, 5 S. Dak. 452, 59 N. W. 224. In *Oregonian R. Co. v. Oregon Ry. etc. Co.*, 27 Fed. 277, 282, however, the court held that where an averment in a reply denying knowledge of a certain meeting was immediately followed by an averment that the meeting was duly called and held, the effect of these contradictory averments is to make the denial of knowledge of the meeting a sham, or the following averment redundant, as the opposite party may elect.

Ordinarily, where the averments of a pleading attacked as sham are fairly supported, it cannot be said that the falsity of the pleading is clear and indisputable. For a court to assume to say this, unless in very extraordinary circumstances, would, in effect, be to try the controversy between the parties on affidavits, and to deprive the defendant of his right to a regular trial by jury or otherwise with all its manifest advantages: *Wright v. Jewell*, 33 Minn. 505, 24 N. W. 299.

d. The Exceptional Rule.—In a few jurisdictions, the right to strike out a pleading as sham is not recognized, for the reason, as stated in the decisions, that where any issue of fact is raised by the pleadings, it must be determined in the regular mode of trial: *Seofield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412, 2 N. W. 888; *Standard Sewing Machine Co. v. Henry*, 43 S. C. 17, 20 S. E. 790; *Kerr v. Cochran*, 29 S. C. 61, 6 S. E. 905.

III. Relief as Affected by Subject Matter or Form of Pleading.

a. Nature of Pleading in General.—While any pleading of matters of fact may be false, and thus may be susceptible to a motion to strike it out as sham, yet the cases in which this power has been invoked against pleadings other than answers or common-law pleas are exceptional and do not present any questions of law which require to be separately treated.

In one California case the question arose whether a demurrer was a defense within the meaning of the statute permitting sham answers and defenses to be struck out on motion, and the court, Sawyer, J., dissenting, held that it was not, and said: "There is no reason why a demurrer should be disposed of in any other way than the regular mode. It can be done as expeditiously by hearing the demurrer itself as by hearing a motion to strike it out, for the latter can no more be heard out of term than the former. They both raise an issue of law, and one can be reached and disposed of as soon as the other, and at as little expense. There is, therefore, no conceivable reason why a demurrer should be subjected to the rule in question": *Larco v. Casaneuava*, 30 Cal. 560.

b. Verification or not of Answer.—In Minnesota, it is held that the fact that an answer is verified is no objection to striking it out on motion, when its falsity clearly and indisputably appears: *Pfaender v. Winona etc. R. R. Co.*, 84 Minn. 224, 87 N. W. 618; *Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372; *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388; *Conway v. Wharton*, 13 Minn. 158 (Gil. 145). Contra: *Morton v. Jackson*, 2 Minn. 219 (Gil. 180). The same conclusion was also reached in North Dakota in *Gjerstadengen v. Hartzell*, 8 N. Dak. 424, 79 N. W. 872, and in an early New York case (*People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515, Denio and Harris, JJ., dissenting), which was not, however, followed by the later cases. In South Dakota, the court, while intimating that there might be cases in which a verified denial could be rejected as sham, has refused to pass upon the question: *Loranger v. Big Missouri Min. Co.*, 6 S. Dak. 478, 61 N. W. 686. In support of the power to strike out a verified pleading as sham, the court, in *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460, said: "Inasmuch as the answer must be verified if the complaint is, and in practice the great majority are verified, we think no distinction is intended, or ought to be made, between verified and unverified answers, if really shown to be sham. . . . So that the fact of formal verification does not affect the question, save perhaps as to the measure of proof which the court should require. The statute would have but limited practical application if confined to unverified answers." And in *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515, the court added: "If an answer clearly appears to be sham, the spirit of the code in relation to pleadings requires it should be stricken out, notwithstanding it has been verified in the usual form. Cases may and do frequently arise where the proof of the falsity of a verified answer is so strong that the answer should not be allowed to stand, without a special affidavit stating the particular matters relied on in the support of it."

In other jurisdictions, however, where the question has arisen, the right to strike out as sham a verified answer has been denied: *Greenbaum v. Turrill*, 57 Cal. 285; *Samuel Cupples Woodenware Co. v. Jensen*, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193; *Grinnel v. Stayner*,

71 App. Div. 540, 75 N. Y. Supp. 887; *Smith v. Homer*, 15 Misc. Rep. 403, 36 N. Y. Supp. 1089; *Barney v. King*, 59 Hun. 625, 13 N. Y. Supp. 685; *Cavanaugh v. Oceanic Steam Nav. Co.*, 58 Hun. 604, 19 Civ. Proc. Rep. 315, 11 N. Y. Supp. 547, rehearing denied, 58 Hun. 610, 12 N. Y. Supp. 609 (where it was said on motion to strike out a verified reply as sham that it could not be done where the falsity did not appear on the face of the pleadings); *Martin v. Erie Preserving Co.*, 48 Hun. 81; *Wayland v. Tysen*, 45 N. Y. 281; *Gregory v. Wright*, 11 Abb. Pr. 417; *Caswell v. Bushnell*, 14 Barb. 393; *Mier v. Cartledge*, 8 Barb. 75; *Pfister v. Wells*, 92 Wis. 171, 65 N. W. 1041; *Pearson v. Neeves*, 92 Wis. 319, 66 N. W. 357. In support of this ruling, the court, in *Greenbaum v. Turrill*, 57 Cal. 285, said: "The plaintiff moves the court to strike out the answer, and if the motion is denied, he is simply required to pay the costs; but if his motion prevails, the effect is the same as a trial and verdict against the defendant. It is a harsh rule that works so unequally. The defendant in this case set up matters which, if true, constituted a good defense to the plaintiff's action, and he swore that he believed them to be true. We think that he was entitled to have the issues made by him tried by a jury. If there had been a jury trial upon such issues, and a verdict rendered in defendant's favor upon his uncontradicted evidence, this court would not disturb the verdict." Thus in an action to foreclose a mortgage brought by an assignee thereof, where defendant put in a verified answer wherein he averred that he did not have sufficient knowledge or information to form a belief as to the assignment of the mortgage to plaintiff or as to the recordation of such assignment, an affidavit that defendant had paid interest to plaintiff and recognized plaintiff as the holder and owner of the mortgage does not warrant an order striking out the answer as sham: *Ginnel v. Stayner*, 71 App. Div. 540, 75 N. Y. Supp. 887.

c. **Subject Matter of Answer.**—In some jurisdictions the right to strike out answers is made dependent on the subject matter of the answer. We will therefore discuss in order the right to strike out denials, affirmative defenses, and counterclaims.

1. **Denials.**—In some jurisdictions a general or special denial may in a proper case be struck out as sham: *Bardwell-Robinson Co. v. Brown*, 57 Minn. 140, 58 N. W. 872 (general denial); *Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372 (general denial); *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388; *Coykendall v. Robinson*, 39 N. J. L. 98. Contra, *Morton v. Jackson*, 2 Minn. 219 (Gil. 180). In North Carolina, the court has gone to the extreme of holding that a general denial is necessarily sham: *Schehan v. Malone*, 71 N. C. 440; *Flack v. Dawson*, 69 N. C. 42. And while this rule does not now prevail in New York, the right to strike out a denial as sham was supported by some of the earlier decisions: *Elizabethport Mfg. Co. v. Campbell*, 13 Abb. Pr. 86; *Corbett v. Eno*, 13 Abb. Pr. 65, 22 How. Pr. 8; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515,

Denio and Harris, JJ., dissenting; *Mier v. Cartledge*, 8 Barb. 75. In California this power was also supported by an early decision (*Gay v. Winter*, 34 Cal. 153), was afterward denied (*Lybecker v. Murray*, 58 Cal. 186; *Fay v. Cobb*, 51 Cal. 313), but seems to be again sustained by the later decision of *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. In *Loranger v. Big Missouri Min. Co.*, 6 S. Dak. 478, 61 N. W. 686, the South Dakota court, in its syllabus, intimated that in a proper case a denial might be struck out as sham, though in the earlier case of *Green v. Hughitt School Tp.*, 5 S. Dak. 452, 59 N. W. 224, the court held contrariwise. The reason why this power should be sustained has been expressed in *C. N. Nelson Lumber Co. v. Richardson*, 31 Minn. 267, 17 N. W. 388, thus: "An answer containing only denials may be just as false, just as readily interposed in bad faith, and for the mere purpose of delay and obstructing the administration of justice, and therefore just as mischievous and reprehensible in every respect as one setting up new matter." And in *Mier v. Cartledge*, 8 Barb. 75, the court holds that the object of the code was to prevent delay in the administration of justice, and that under the code the defendant is not entitled to put the plaintiff to proof of his demand even where he has no pretense of a defense. The objection that to grant such motion deprives the defendant of his right to trial by jury has always existed, whenever this power was exercised for any purpose. The power is necessary to prevent abuses in the use of the forms of law which would be a reproach to the administration of justice by allowing delay through fraudulent pleading. Thus in an action on a note against three persons as partners liable thereon, where the defense consists of a joint general denial, the plaintiff attacks it as sham and presents affidavits containing strong proof that two of the defendants were partners and delivered the note to plaintiff, and the two defendants presented counter-affidavits merely averring that the third defendant was not a partner of theirs, as to such two defendants the answer was properly struck out as sham: *Bardwell-Robinson Co. v. Brown*, 57 Minn. 140, 58 N. W. 872.

In other jurisdictions a general or special denial which raises a material issue can never be struck out as sham, if pleaded in due form, although affidavits introduced on motion to strike out show beyond question that the answer is false and interposed in bad faith for delay: *Howe v. Elwell*, 57 App. Div. 357, 67 N. Y. Supp. 1108; *Robertson v. Rockland Cemetery Imp. Co.*, 54 App. Div. 191, 66 N. Y. Supp. 632 (general denial); *Fromme v. Schwarzer*, 61 N. Y. Supp. 1108 (special denial); *Barrie v. Yorston*, 35 App. Div. 404, 28 Civ. Proc. Rep. 253, 54 N. Y. Supp. 841 (special denial); *Meurer v. Brinkman*, 25 Misc. Rep. 12, 53 N. Y. Supp. 770; *First Nat. Bank v. Slattery*, 4 App. Div. 421, 38 N. Y. Supp. 859; *Central Bank v. Thein*, 76 Hun, 571, 28 N. Y. Supp. 232 (special denial); *Albany County Bank v. Rider*, 74 Hun, 349, 26 N. Y. Supp. 490 (general denial); *Zivi v. Ein-*

stein, 2 Misc. Rep. 177, 23 Civ. Proc. Rep. 56, 21 N. Y. Supp. 583; Reynolds v. Craus, 62 Hun, 620, 16 N. Y. Supp. 792; Wilson v. Eastman & Mandeville Co., 56 Hun, 194, 18 Civ. Proc. Rep. 267, 9 N. Y. Supp. 189 (general denial); Robert Gere Bank v. Inman, 51 Hun, 97, 5 N. Y. Supp. 457, affirmed without opinion, 115 N. Y. 650, 21 N. E. 1118; Martin v. Erie Preserving Co., 48 Hun, 81 (general denial); Newman v. Board of Supervisors, 45 N. Y. 676; (general denial); Thompson v. Erie Ry. Co., 45 N. Y. 468 (general denial); Wayland v. Tysen, 45 N. Y. 281 (general denial); Miller v. Hughes, 13 Abb. Pr. 93, 21 How. Pr. 442 (general denial); Goedal v. Robinson, 1 Abb. Pr. 116 (general denial); Caswell v. Bushnell, 14 Barb. 393; Brewster v. Hall, 6 Cow. 34 (general issue); Larson v. Winder, 14 Wash. 647, 45 Pac. 315. In the case last cited the court discusses this matter at length, saying: "If it be held that the courts have the right to strike, as sham and frivolous, denials in the answer of material allegations of the complaint, the result will be that they must be often called upon to decide whether such denials are warranted by the facts, preliminary to the trial of the cause before the court or jury, and this question of fact will generally have to be determined upon proof pro and con by way of affidavits and not by examination of the witnesses before the court. The result of this inquiry, if it have any result at all, will be for the court to determine upon this unsatisfactory proof the truth or falsity of the denials, which is the very question which must be determined by the court upon the trial of the cause; and since . . . the court will never strike such allegations, unless upon the clearest proof of their falsity, it will follow that in very few instances will any good purpose be subserved by this preliminary inquiry as to the good faith of the denials in the answer. It would therefore seem to accord with the better practice to hold that a denial in an answer, if sufficient in form, entitled the defendant interposing it to a determination as to its truth or falsity by the jury or by the court, after a regular trial of the issue thus made, and such we believe to be the established right of the defendant as recognized by the great weight of authority. In all of the cases it is conceded that under the common-law system of pleading the plea of the general issue could not be stricken as sham or frivolous, and it would seem that a general denial of an allegation under the code performs substantially the same function as the plea of the general issue under the common-law system of pleading." In Martin v. Erie Preserving Co., 48 Hun, 81, the court said: "The system of pleading authorized by the code permits the defendant to deny by answer the plaintiff's alleged cause of action, and thus call upon him to make common-law proof on the trial of the issue of the facts alleged constituting his cause of action." In Wayland v. Tysen, 45 N. Y. 281, the same reasoning is tacitly approved, and in Fay v. Cobb, 51 Cal. 313, explicitly. The refusal to strike out denials as sham has also been supported on the ground that such an issue could not be constitutionally tried on affidavits: Lybecker v. Murray, 58 Cal. 186; Thompson v. Erie Ry. Co., 45 N. Y.

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2. **Denials on Information and Belief.**—In several jurisdictions the right to strike out as sham denials on information and belief has, in a proper case, been sustained. Thus where a matter is presumptively within the knowledge of a defendant, a denial thereof for want of sufficient information and belief to enable the defendant to answer the same is properly struck out: *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. So, in an action to foreclose a mortgage, where the complaint avers the execution and recordation of the mortgage and also the execution and recordation of an assignment thereof to plaintiff, an answer verified before the deputy clerk of the district court and attested by the seal of that court, which verification was presumably taken in the very courthouse in which the records were kept, which answer merely denied that defendant had any knowledge or information sufficient to form a belief whether the mortgage was assigned to plaintiff, is properly struck out as sham: *Wheaton v. Briggs*, 35 Minn. 470, 29 N. W. 170. Likewise "an answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous": *First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302. And where in an action in a federal court in New York on a Kansas judgment it appears from defendant's own pleadings that in the Kansas action defendant entered a general appearance, a paragraph in the answer in the federal court denying knowledge or information sufficient to form a belief as to the recovery of the judgment sued on must be stricken out as sham: *Buller v. Sidell*, 43 Fed. 116; see, also, *Gjerstadengen v. Hartzell*, 8 N. Dak. 424, 79 N. W. 872, holding the same in an action in partition, where defendant was the grantee of the former defendant. This power to strike out was also sustained in an earlier New York case (*Kay v. Whittaker*, 44 N. Y.

565), but has been denied in later decisions in the inferior courts (Hatch, J., in *Humble v. McDonough*, 5 Misc. Rep. 508, 25 N. Y. Supp. 965; *Zivi v. Einstein*, 2 Misc. Rep. 177, 23 Civ. Proc. Rep. 56, 21 N. Y. Supp. 583; *Wilson v. Eastman & Mandeville Co.*, 56 Hun, 194, 19 Civ. Proc. Rep. 267, 9 N. Y. Supp. 189).

3. Affirmative Defenses.—The right to strike out an affirmative defense, when shown to be sham, is generally recognized, notwithstanding a material issue is raised by such defense: *Piercy v. Sabin*, 10 Cal. 22, 29; *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90; *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460; *Morton v. Jackson*, 2 Minn. 219 (Gil. 180); *Albany County Bank v. Rider*, 74 Hun, 349, 26 N. Y. Supp. 490; *Wilson v. Eastman & Mandeville Co.*, 56 Hun, 194, 18 Civ. Proc. Rep. 267, 9 N. Y. Supp. 189; *Robert Gere Bank v. Inman*, 51 Hun, 97, 5 N. Y. Supp. 457, affirmed without opinion, 115 N. Y. 650, 21 N. E. 1118; *Martin v. Erie Preserving Co.*, 48 Hun, 81; *Wayland v. Tysen*, 45 N. Y. 281; *Goedel v. Robinson*, 1 Abb. Pr. 116. Contra, *Bank of Shasta v. Boyd*, 99 Cal. 604, 34 Pac. 337; *Farnsworth v. Halstead*, 18 Civ. Proc. Rep. 227, 10 N. Y. Supp. 763.

4. Counterclaims.—In Colorado, the courts are held to have the right to strike out a counterclaim, when sham, as well as any other answer, since any other construction of the statute permitting the striking out of sham answers would permit defendants to evade the consequences of the act and delay judgment by interposing sham counterclaims instead of sham defenses: *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90. But in New York this power has been denied on the ground that a counterclaim is not an answer or defense, and that these alone may be stricken out: *First Nat. Bank v. Slattery*, 4 App. Div. 121, 38 N. Y. Supp. 859; *Baum's Castorine Co. v. Thomas*, 92 Hun, 1, 37 N. Y. Supp. 913.

IV. Procedure on Motion to Strike Out.

a. Time to Move.—Ordinarily a motion to strike out an answer should be promptly made, yet if the defendant is not prejudiced by the delay it may properly be made at any time before trial: *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460. Thus the right to make it is unaffected by the fact that a notice of trial has already been given or received: *Brassington v. Rohrs*, 3 Misc. Rep. 258, 23 Civ. Proc. Rep. 146, 22 N. Y. Supp. 761. Yet if an amended answer is filed on special leave granted on motion after notice, the plaintiff should object to the answer as sham at the hearing of the motion, and is precluded from afterward raising the objection: *Miller v. Hughes*, 13 Abb. Pr. 93, 21 How. Pr. 442.

b. Burden of Proof.—On the hearing of the motion, the burden is on the moving party to show the falsity of the pleading complained of with the requisite clearness: *Pfaender v. Winona etc. R. Co.*, 84 Minn. 224, 87 N. W. 618. Thus where the movant fails to show such falsity,

the pleading cannot be rejected: *Martens v. Burton Co.*, 7 Misc. Rep. 244, 27 N. Y. Supp. 260; *Hyde v. Kitchen*, 66 Hun, 633, 21 N. Y. Supp. 238.

Furthermore, an answer cannot be struck out as sham when notwithstanding the falsity of some averments therein it sets forth a good defense: *Schmitt v. Cassilius*, 31 Minn. 7, 16 N. W. 433; *Winslow v. Ferguson*, 1 Lans. 436. Yet if the matter that is false is so connected with the rest of the plea that the latter ceases to be a defense when the former is struck out, the whole plea should be struck out: *Winslow v. Ferguson*, 1 Lans. 436.

c. Evidence in General.—It is apparent that when a pleading is attacked as sham, it is usually necessary to produce extrinsic evidence in support of the attack: *Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361; *Duffield v. Denver etc. R. Co.*, 5 Colo. App. 25, 36 Pac. 622. In North Dakota, however, a verified pleading cannot be rejected as sham unless its falsity appears from its face (*Gjerstadengen v. Hartzell*, 8 N. Dak. 424, 79 N. W. 872), and in Indiana the only extrinsic evidence admissible in any case consists of written interrogatories propounded to the party in whose behalf the pleading is filed and calculated to ascertain whether it is false: *Stars v. Hammersmith*, 31 Ind. App. 610, 67 N. E. 554; *Lowe v. Thompson*, 86 Ind. 503. Yet ordinarily it is objectionable to try a motion to strike out on oral testimony of witnesses present on the hearing of the motion: *Miller v. Hughes*, 13 Abb. Pr. 93, 21 How. Pr. 442. And in an action on a note where the defense is that it had been altered, the court cannot, from a mere inspection of the note, order its rejection as false: *Rogers v. Vosburgh*, 87 N. Y. 228.

d. Sufficiency of Evidence.—It would seem that on motion to strike out an answer both the moving party and the defendant should state specifically the probative facts on which they rely to establish their respective averments in the pleadings (*Pfaender v. Winona etc. R. Co.*, 84 Minn. 224, 87 N. W. 618; *Kay v. Whittaker*, 44 N. Y. 565; *Corbett v. Eno*, 13 Abb. Pr. 65, 22 How. Pr. 8), though in some cases it has been held to be sufficient to defeat the motion that defendant swears that he expects to be able to prove his defense (*Tucker v. Ladd*, 4 Cow. 47), or that it was interposed in good faith and he believes it to be true: *Gostorfs v. Taafe*, 18 Cal. 385; *Gardenier v. Eldred*, 4 Misc. Rep. 505, 25 N. Y. Supp. 870.

Where evidence put in to support a motion to strike out is uncontested, it may be taken as true for the purposes of the motion: *Gostorfs v. Taafe*, 18 Cal. 385; *Patrick v. McManus*, 14 Colo. 65, 20 Am. St. Rep. 253, 23 Pac. 90; *White v. Moquist*, 61 Minn. 103, 63 N. W. 255; *Van Loon v. Griffin*, 34 Minn. 444, 26 N. W. 601. It certainly is not imposing any great hardship on a defendant to require him to explain or disprove plaintiff's *prima facie* case by rebutting proof, and in the absence of rebuttal to take it as true: *White v. Moquist*,

61 Minn. 103, 63 N. W. 255; Van Loon v. Griffin, 34 Minn. 444, 26 N. W. 601. But where on such motion the defendant files counter-affidavit specifically setting forth facts which show a good defense, he cannot be deprived of a trial in the ordinary mode: Coykendall v. Robinson, 39 N. J. L. 98; Central Bank v. Thein, 76 Hun, 571, 28 N. Y. Supp. 232; People v. McCumber, 18 N. Y. 315, 72 Am. Dec. 515; Pfister v. Wells, 92 Wis. 171, 65 N. W. 1041.

A pleading in a cause that has been superseded by an amended pleading cannot, unless corroborated, be considered sufficient evidence of the falsity of contradictory statements in the amended pleading to warrant its rejection. "The amendment of a pleading is an acknowledgment of the pleader that he has been mistaken. That is the *prima facie* effect, and not that the party or the pleader has willfully or knowingly made a false statement in the pleading as amended: Elizabethport Mfg. Co. v. Campbell, 13 Abb. Pr. 86.

e. Right to File Amended Answer After Rejection.—Where the original answer in a cause is struck out as sham, it is not error to refuse the defendant leave to amend, where such leave was not requested until after the time when the original answer was struck out: Hertz v. Hartmann, 74 Minn. 320, 77 N. W. 232.

CRANDALL v. MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY.

[96 Minn. 434, 105 N. W. 185.]

RAILWAY'S NEGLIGENCE in Leaving Vestibule Door Open.

Though a railway is not bound to have a car vestibuled, yet if it does so, and leads its passengers to believe that the doors of the vestibule will be kept closed between stations and then negligently leaves them open, it incurs liability to passengers injured thereby. (p. 654.)

A. H. Bright and Munn & Thygeson, for the appellant.

J. A. Giantvalley, for the respondent.

434 **START, C. J.** This action was brought to recover damages for personal injuries sustained by the minor son of the plaintiff by reason of the alleged negligence of the defendant, in that the vestibule doors at the rear end of its train were left open between stations for an unnecessary length of time. Verdict for plaintiff in the sum of one thousand dollars. The defendant made a motion for judgment notwithstanding the verdict, which was denied. Judg-

ment on the verdict, and the defendant appealed from the judgment.

The sole question presented by the record is whether the evidence entitled the defendant to a directed verdict in its favor, for the reason that there was no evidence of negligence on its part. The record discloses evidence tending to show: That the boy, who was only seven years old, was a passenger in the care of his aunt on a regular passenger ⁴³⁵ train from Boston to Minneapolis, which passed over the defendant's railway line from Sault Ste. Marie, Michigan (hereafter referred to as the Soo), to its destination; that they occupied a sleeper, which was the rear car in the train; that the rear platform of the car was vestibuled, with a door on each side thereof and a railing at the rear; that when the doors were opened the rear platform was substantially the same as the platform of an ordinary passenger-car, but when they were closed the vestibule was a safe place for passengers to ride in; that on this car the doors of the vestibule were closed between stations east of the Soo, and passengers rode in it, with the knowledge of the employés in charge of the car; that during the forenoon of the day the boy was injured the aunt went with him upon the vestibuled platform several times, and observed that the doors were closed, and in response to her inquiry whether it was safe for them to remain there she was assured by the porter in charge of the car, who accompanied it throughout the trip, that it was, as everything was securely fastened; that when the car reached the Soo at about 5 o'clock in the afternoon it stopped, and the doors in the vestibule were opened for the purpose of permitting passengers to alight, and also for the purpose of furnishing the car with ice and supplies; that when the train left the Soo the doors were left open until the brakeman, commencing at the front of the train, would arrive at the rear to close them; that when the train had gone at least ten miles after leaving the Soo the doors were still open, which fact was unknown to the aunt, who, believing that they were closed, permitted the boy to go out upon the platform to throw away a bottle; that he did not return and she went out to look for him, and found that he had fallen off, and that the doors were open; and, further, that the boy was injured by falling from the car.

The defendant was not bound to have the car vestibuled; but, having done so, it could not by acts and words lead its passengers to believe that the doors of the vestibule would be kept closed between stations, and then negligently leave them open, without incurring liability to passengers injured thereby: See *Sansom v. Southern Ry. Co.*, 111 Fed. 887, 50 C. C. A. 53; *Bronson v. Oakes*, 76 Fed. 734, 22 C. C. A. 520. Whether the defendant in this case led the aunt to believe that the doors would be kept closed between stations, whether it negligently kept them open for an unreasonable time after the train left the Soo, ⁴³⁶ and whether such alleged negligence was the proximate cause of the boy's injury, clearly were, upon the evidence, questions of fact. It follows that the defendant was not entitled to a directed verdict.

Judgment affirmed.

Passengers on Vestibule Trains, the vestibule doors of which are open, are not guilty of contributory negligence in passing from one car to another, unless they know, or should know, that such doors are open: *Robinson v. United States Ben. Soc.*, 132 Mich. 695, 102 Am. St. Rep. 436. See, in this connection, *Piper v. New York Cent. etc. R. R. Co.*, 156 N. Y. 224, 66 Am. St. Rep. 560; *Hunter v. Atlantic Coast Line R. R. Co.*, 72 S. C. 336, 110 Am. St. Rep. 605.

CARLSON v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[96 Minn. 504, 105 N. W. 555.]

NEGLIGENCE, CONTRIBUTORY, When Conclusively Presumed Against Person Injured by Railway Train.—When the train by which a person was injured must have been plainly visible from a point at which the testimony showed that he looked and listened therefor, the law conclusively presumes either that he did not look and listen, or if he did look or listen, or both, that he afterward heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the railway corporation responsible under ordinary circumstances for the dangerous consequences of a collision of which the person injured or killed was the proximate cause. (pp. 657, 658.)

RAILWAYS.—**Signals, Omission of, When does not Relieve Person Injured of Consequence of His Contributory Negligence.**—**Negligence of Employés of a Railway Corporation in Failing to Whistle or Ring the Bell** is excused by negligence on the part of a person about to cross in failing to use his senses to discover danger. (p. 659.)

RAILWAYS, Injuries Due to Collision with an Extra Train.—That a train which did damage was an extra did not relieve either party from his duty of care. Swiftly moving and irregular trains are to be expected, and it is the duty of persons about to go on a crossing to look and listen for such trains as well as for those on time or which run slowly. (p. 659.)

RAILWAYS, Presumption that Person Looked and Listened, When Destroyed.—If it appears that decedent, if he had looked and listened before driving upon a railway crossing, must have seen and heard the train approaching, the presumption that he looked and listened before attempting to cross is destroyed. (pp. 659, 660.)

* Davis & Olson and A. A. Stone, for the appellant.

Brown, Abbott & Somsen, for the respondent.

505 JAGGARD, J. This was an action brought to recover damages from the defendant for causing the death of Erick Pehrson by negligence.

According to the plaintiff the facts are as follows: On August 17, 1903, plaintiff's intestate was proceeding along a public street in the city of St. Peter, called Hartew street. He was driving in a jump-seat top buggy, hitched to a single horse. The horse was very gentle. The top on the buggy was up. The curtains of the top were down, but the one on the right-hand side, where deceased was sitting, was fastened only at the top. The front or jump-seat on the buggy was down, and the other seat in place over the same. He was accompanied by his daughter, thirteen years of age. On the right-hand side of the street was a corn-field, which obstructed entirely the view of the defendant's railroad track and right of way until the deceased arrived at a point fifty feet east of the center of the railroad track of the defendant. As the deceased approached the defendant's railroad track he was driving **506** very slowly, and when he reached a point at the corner of the right of way fence, fifty feet east of the center of defendant's railway track, he pulled up his horse and looked and listened for trains. In order to do so, the deceased had to stand up in the buggy and put his head outside of the buggy top. He then proceeded very slowly forward and onto the railway track of defendant, when he was struck by one of defendant's locomotives and a train of cars and instantly killed. The train was running very fast, more than fifty miles an hour, and in violation of an ordinance of said city, which ordinance is admitted to have been in force by the pleadings. The train which caused the death

of plaintiff's intestate was an "extra," and arrived at the said crossing about thirty minutes after the regular passenger had gone down in the morning. There was no other regular train on this railroad, either way, for about three hours later than the time this "extra" arrived. There was a whistling-post about thirteen hundred feet north of the Hartew street crossing, and near the city limits on the north. This "extra" train, which caused the death of plaintiff's intestate, approached this crossing, passing said whistling-post, without giving any signals by bell or whistle. At any point between the center of the railroad track and the east line of the right of way, fifty feet east, a train could have been seen for a distance of two thousand five hundred feet to the north of said crossing, where a sharp curve prevented seeing it any farther. The railroad track ran almost north and south at the place where it intersected Hartew street, which runs east and west. The day was still, clear, and warm.

The court granted the motion of the defendant to direct a verdict on the ground that the plaintiff's decedent was guilty of contributory negligence, and subsequently denied the plaintiff's motion for a new trial.

The essential question in this case concerns the contributory negligence of plaintiff's intestate. The defendant insists that it has demonstrated to a mathematical certainty that, if the deceased had been traveling at from a mile and a half to three miles per hour, and if the train had been going upward of one hundred miles per hour, and a fortiori if the train had been going at less speed, the engine would necessarily have been in plain sight of the plaintiff's decedent, if he had looked at the point his daughter says he did look. The photographs taken and introduced in evidence tend to sustain this contention. Counsel for plaintiff presented no clear refutation of the correctness of this calculation. ⁵⁰⁷ Without, however, accepting it as unqualifiedly true, we are of the opinion that upon the record it conclusively appears that if the deceased had looked at this point he must have seen the moving train.

The principles of law applicable to this state of facts are definite and well settled. When the uncontradicted evidence conclusively shows that the colliding train must have been plainly visible from the point at which the testimony shows that the injured or killed person looked and lis-

tened for the train, the law conclusively presumes either that he did not look and listen, or that if he did look or listen, or both, he afterward heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the company operating the train responsible under ordinary circumstances for the damages consequent upon the collision, of which the person injured or killed was the proximate cause: *Brown v. Milwaukee etc. Ry. Co.*, 22 Minn. 165; *Miller v. Truesdale*, 56 Minn. 274, 57 N. W. 661; *Weyl v. Chicago etc. Ry. Co.*, 40 Minn. 350, 42 N. W. 24; *Howe v. Minneapolis etc. Ry. Co.*, 62 Minn. 71, 54 Am. St. Rep. 616, 64 N. W. 102, 30 L. R. A. 684; *Nelson v. St. Paul etc. R. Co.*, 76 Minn. 189, 78 N. W. 1041, 79 N. W. 530; *Schmidt v. Great Northern Ry. Co.*, 83 Minn. 105, 85 N. W. 935; *Kemp v. Northern Pac. Ry. Co.*, 89 Minn. 139, 94 N. W. 439; *Chicago etc. Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Northern Pac. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. Rep. 763, 43 L. ed. 1014; *Wardner v. Great Northern Ry. Co.*, 96 Minn. 382, 104 N. W. 1084.

If that point be so far distant from the track as to enable the person injured or killed to know of the approaching train in due season to avoid the collision with it, he is guilty of contributory negligence as a matter of law and there is nothing for a jury to pass upon: *Blount v. Frank Trunk Ry. Co.*, 61 Fed. 375, 9 C. C. A. 526; *Straugh v. Detroit*, 65 Mich. 706, 36 N. W. 161; *Huggart v. Missouri*, 134 Mo. 673, 36 S. W. 220; *Stopp v. Fitchburg*, 80 Hun, 178, 29 N. Y. Supp. 1008; *Morris v. Lake Shore etc. Ry. Co.*, 148 N. Y. 182, 42 N. E. 579; *Marland v. Pittsburgh etc. R. Co.*, 123 Pa. 487, 10 Am. St. Rep. 541, 16 Atl. 624; *Butler v. Gettysburg etc. Ry. Co.*, 126 Pa. 160, 19 Atl. 37.

The present case is obviously distinguishable from *Hendrickson v. Great Northern Ry. Co.* The environment and the cause of the accident in that case were essentially different. When *Hendrickson* emerged from a ravine at a point fifty feet from the railroad, the engine came in ⁵⁰⁸ view in a cut about one hundred and fifty feet away and at once gave short and shrill danger whistles, whereby the horses became frightened and unmanageable, reared, and plunged forward toward the rails, notwithstanding the driver's efforts to control them, whereby the collision occurred: *Collins, J., in Hendrickson v. Great Northern Ry.*

Co., 49 Minn. 245, 32 Am. St. Rep. 540, 51 N. W. 1044. 16 L. R. A. 261, 52 Minn. 340, 54 N. W. 189.

Another principle is well established: That a person crossing as deceased was could not rely upon the signals to remind him of danger. "He is bound to be awake and alive for his own protection": Lewis, J., in Sandberg v. St. Paul etc. R. Co., 80 Minn. 442, 83 N. W. 411. Accordingly, the failure of plaintiff's intestate to look and listen would be negligence or not according to the circumstances, but without being controlled by the defendant's failure to do its duty: Beach on Contributory Negligence, sec. 185; Schneider v. Northern Pac. Ry. Co., 81 Minn. 383, 84 N. W. 124. Negligence of the defendant's employes in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use the senses to discover danger: Railroad Co. v. Houston, 95 U. S. 695, 24 L. ed. 238; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. Rep. 763, 43 L. ed. 1014. And see cases collected in Judson v. Great Northern R. Co., 63 Minn. 248, 65 N. W. 447.

The duty of exercising caution in attempting to cross a railway track, a place of known danger, is not relaxed by the opportunity or occasion for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution: Dodge, J., in Guhl v. Whitecomb, 109 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 142. That the train which did the damage in this case was an "extra" did not relieve either party from the respective duty of the exercise of care. Swiftly moving and irregular trains are to be expected, and it is the duty of persons about to go upon crossings to look and listen for such trains, as well as those on time or which run slowly: Collins, J., in Judson v. Great Northern R. Co., 63 Minn. 248, 65 N. W. 447. It is true that, in the absence of evidence to the contrary, there is sometimes a presumption that one who was killed while crossing a railroad track stopped, looked and listened before attempting to cross the track: Texas etc. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. Rep. 1104, 41 L. ed. 186; Baltimore etc. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262. But in this case the plaintiff introduced evidence of the daughter of deceased, who was driving with him, as ⁵⁰⁹ to what happened. Moreover, when it appears from the un-

disputed evidence that, if deceased had looked and listened before driving upon the crossing, he must have seen and heard the train approaching, as was the case here, the presumption is destroyed: *Rollins v. Chicago etc. Ry. Co.* (C. C. A.), 139 Fed. 639.

Accordingly, upon plaintiff's own view of the facts in this case, that deceased looked up the track at a point fifty feet from it, it is not necessary to determine how far there is to be applied to it the ordinary rule that one who attempts to cross a railroad is bound to use his senses continually while crossing the place of known danger (*Rogstad v. St. Paul etc. Ry. Co.*, 31 Minn. 208, 17 N. W. 287; *Sandberg v. St. Paul etc. R. Co.*, 80 Minn. 442, 83 N. W. 411; *Wright v. Cincinnati etc. Ry. Co.*, 94 Ky. 114, 21 S. W. 581; *Renwick v. New York C. R. Co.*, 36 N. Y. 132; *Whitman v. Pennsylvania R. R.*, 156 Pa. 175, 27 Atl. 290; *Thompson v. New York etc. Ry. Co.*, 110 N. Y. 636, 17 N. E. 690; *Moore v. Chicago etc. R. Co.*, 102 Iowa, 595, 71 N. W. 569), in view of the fact that he was riding in a covered carriage, making it inconvenient for him to look up and down the road: See *Stackus v. New York etc. R. Co.*, 79 N. Y. 464; *Hicks v. New York etc. Ry. Co.*, 164 Mass. 424, 49 Am. St. Rep. 721, 41 N. E. 721.

The conclusion thus reached renders it unnecessary to consider the other questions raised; for example, with respect to defendant's negligence in running faster than the ordinance permitted and to the reasonableness of that ordinance.

Order affirmed.

One Approaching a Railroad Crossing has a right to assume, according to the better rule, that the railroad company will give reasonable, necessary, and statutory signals of coming trains: See *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472, and cases cited in the cross-reference note thereto. He is presumed to know the danger, however, according to many authorities, and must exercise his senses in the manner of an ordinarily prudent person, if he would relieve himself of the charge of contributory negligence: *Passman v. West Jersey etc. R. R. Co.*, 68 N. J. L. 719, 96 Am. St. Rep. 573; *Koch v. Southern C. Ry. Co.*, 148 Cal. 677, ante, p. 332; *Hornstein v. United Railways*, 195 Mo. 440, post, p. 693.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**STATE v. CHICAGO, BURLINGTON AND QUINCY RAIL-
ROAD COMPANY.**

[195 Mo. 228, 93 S. W. 784.]

TAXATION, Uniformity Required in.—The general rule is that taxes must be uniform and equal, coextensive with the territory to which the tax applies. (p. 667.)

A CONSTITUTIONAL AMENDMENT cannot be Held Void because of its conflict with the pre-existing provisions of the same constitution. When the amendment is adopted, it becomes, in effect, the same as if it had been originally a part of the constitution. (p. 671.)

**TAXATION and the Fourteenth Amendment to the Constitu-
tion of the United States.**—The fourteenth amendment to the constitution of the United States imposes limits on the exercise of the powers of the state, including that of taxation. (p. 672.)

CONSTITUTIONAL LAW.—Local Option Laws may be Constitutional, but to be so they must apply to the whole state and confer upon the people of each locality the privilege of taking advantage or not of those laws, as they see fit. (p. 673.)

**TAXATION, Discrimination in Favor of Localities. When For-
bidden by the Fourteenth Amendment to the Constitution of the
United States.**—An amendment to the constitution of the state authorizing the county courts to levy, at their discretion, a special amount of taxes for road and bridge purposes, but exempting designated cities in different counties of the state, makes a discrimination in favor of those cities and against other portions of the state not permitted by the fourteenth amendment to the constitution of the United States. (p. 675.)

**CONSTITUTIONAL LAW, Law Void in Part, Whether Void
in Whole.**—If the parts of a law are divisible, and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts. (pp. 675, 676.)

CONSTITUTIONAL LAW.—Constitutional Amendment Invalid in Part, When Invalid as a Whole.—If a constitutional amendment authorizes the county courts of the several counties of the state, at

their discretion, to impose certain road and bridge taxes, but is void because it exempts designated cities, this exemption cannot be disregarded and the constitutional amendment held to apply to all parts of the state, including the cities so exempted. (p. 677.)

O. M. Spencer, Ben Eli Guthrie and H. J. Nelson, for the appellants.

Sydney J. Roy and Ben F. Glahn, for the respondent.

232 MARSHALL, J. This is an action to recover \$1,175.48, and penalties thereon, together with a reasonable attorney's fee, being a part of the taxes levied for the year 1901 on the property of the defendant in Marion county, "for county purposes . . . to be used for road and bridge purposes, but for no other purposes whatever." There was a judgment for the plaintiff for the taxes and interest and penalties and \$200 attorney's fees, and the defendant appealed.

The petition alleges the official character of the relator as the collector of the revenue for the county; the incorporation of the defendant as a railroad; the fact that it owns certain property, fully described, in Marion county, and then avers "that there was legally assessed and levied against such property for the year ending June 1, A. D. 1901, for state, county, school and other municipal purposes, the aggregate sum of \$10,780.65; that there is now due and unpaid for county purposes, the sum of \$1,175.48, which sum was levied to be used for road and bridge purposes, and for no other purpose whatever, which the defendant had failed to pay as required by law."

The answer admits the incorporation of the defendant and the ownership of the property; denies every other allegation in the petition, and then avers that the taxes sought to be recovered were not levied in pursuance to any law; that the levy of the tax is illegal and void because not authorized by the statutes or constitution of the state, and not made in accordance with, or by virtue of, any law whatever; and then further alleges that prior to the 31st of December, 1901, the defendant paid all taxes which had been legally levied against its property in Marion county, for the year 1901.

The reply is, in effect, a general denial.

The case was submitted to the court without a jury upon an agreed statement of facts, which recites the official character of the relator; that the attorneys for **233** relator were

regularly employed to prosecute this action; that the defendant is a corporation and the owner of the property described in the petition, all of which is situated in Marion county; that the total taxable wealth of that county for the year 1901 was more than six million dollars and less than ten million dollars, and that the county was entitled to levy upon the property of the defendant, for the year 1901, a maximum rate of forty cents on the one hundred dollars valuation for county purposes, out of which it was entitled to a portion for road purposes not less than five nor more than twenty cents on the one hundred dollars valuation of the property of the defendant situated outside of the cities, towns, and villages; that on the 16th of May, 1901, the county court of Marion county made, by order of record, a levy of taxes for state and county purposes as follows: "State tax, 15 cents on the one hundred dollars valuation; state interest tax, 10 cents on the one hundred dollars valuation; county tax, 30 cents on the one hundred dollars valuation; county road tax, 10 cents on the one hundred dollars valuation; special road and bridge tax, 15 cents on the one hundred dollars valuation; courthouse tax, 10 cents on the one hundred dollars valuation," etc.

The valuation of the property of the defendant in that county was then set out in the agreed statement of facts, but as no question is made in reference thereto, it is not necessary to further refer to it. The total assessed valuation of the property of the defendant in Marion county was then agreed to be \$783,608.37. It was further agreed that upon that valuation, a county revenue tax of thirty cents was levied and extended on the railroad tax books for that year, amounting to \$235.83; a road tax at the rate of ten cents on the value of the property outside the cities, which was agreed to be \$671,708.89, amounting, therefore, to \$671.71; a special road tax at the rate of fifteen cents on the value of all property ²³⁴ in the county, including property inside of the cities, of the total value aforesaid, aggregating \$1,175.48. It was further agreed that before December 31, 1901, the defendant paid all of said taxes, except the special road tax. It was further agreed that the city of Palmyra and the city of Hannibal are both within the county of Marion, that said county is not organized under township organization, and that defendant paid the taxes levied by said city on its

property located therein for the year 1901. It was further agreed that in attempting to levy and collect said special taxes, the county court of that county "proceeded on the theory that said levy was authorized by the constitutional amendment adopted at the general election held in November, 1900, designated as the 'second constitutional amendment,' found on page 381 of the Laws of Missouri of 1899, and reading as follows: 'Section 1. In addition to taxes authorized to be levied for county purposes, under and by virtue of section 11, article 10, of the constitution of this state, the county courts in the several counties of this state not under township organization, and the township board of directors in the several counties under township organization, may in their discretion, levy and collect a special tax not exceeding fifteen cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts, and township boards, is declared to be a discretionary power. This constitutional amendment shall not apply to the cities of St. Louis, Kansas City and St. Joseph.' "

It was further agreed that on the 26th of March, 1901, there went into effect an act of the legislature of the state of Missouri, entitled, "An act to amend chapter 151, Revised Statutes of Missouri of 1899, by adding thereto a new article, to be known as article 12," etc., which act is found on pages 237 to 244 of the Laws of Missouri of 1901; and that during the year 1901 the ²³⁵ county court never made any order adopting said new article 12, and did not proceed thereunder, but in making the levy of ten cents out of the rates allowed for county purposes, for the item designated as "road tax," the county court acted under article 1 of chapter 151 of the Revised Statutes of 1899, and in attempting to make a levy of fifteen cents for the item designated "special road tax," proceeded on the theory that the above-mentioned constitutional amendment was self-enforcing, without any act of the legislature to enforce it, and that the provisions of article 8, chapter 149 of the Revised Statutes of 1899, were complied with as to the assessment and levy of the taxes for the year 1901, except that the defendant shall not be deemed to have admitted that either article 8 or the above-mentioned constitutional amendment, separate-

ly or collectively, constituted any authority whatever for the levy of said special road tax of \$1,175.48 involved in this suit.

The defendant then asked the court to declare the law to be that under the pleadings and the agreed statement of facts, the judgment must be for the defendant. The court refused to so declare, and entered a judgment for the plaintiff for \$1,175.48 taxes, \$199.88 interest and penalty, \$200 attorney's fee and costs. After proper steps the defendant appealed.

The defendant assigns six alleged errors, to wit:

1. That the constitutional amendment is void, because the exemption of St. Louis, Kansas City and St. Joseph created an unjust discrimination in favor of those cities, against all the other cities, towns and villages in the state, and therefore violates the fifth and fourteenth amendments of the constitution of the United States.

2. That the levy of the special tax for the year 1901 was void, because the taxes for 1901 were assessed as of June 1, 1900, and the constitutional amendment was not adopted until November, 1900; and that amendment was not retroactive.

²³⁶ 3. That the act of the county court in levying ten cents for county and road taxes, and fifteen cents for special road taxes, made a total levy of fifty-five cents for county purposes, and that under section 11 of article 10 of the constitution, the county was only authorized to levy a total tax of forty cents on the one hundred dollars valuation for county purposes, and hence the levy of the fifteen cents for special road tax is void, unless authorized by the constitutional amendment.

4. That the constitutional amendment was not self-enforcing, and that the act of March 26, 1901, was not followed by the county court in making this levy, but that the levy was made upon the theory that the constitutional amendment needed no legislative aid to enforce it.

5. That when the constitutional amendment was proposed and adopted, the law (section 9436 of the Revised Statutes of 1899) authorized the levy of a road tax of more than twenty cents, and that the amendment to the constitution only attempted to authorize the General Assembly to legislate for the levy of a special road tax "in addition to taxes authorized to be levied," in case the county

court desired more money for road purposes than could be secured by the levy of twenty cents authorized by section 9436, to be taken out of the rate allowed for county purposes, and that Marion county levied only one-half of the twenty cents authorized by section 9436, and levied a special road tax of the full fifteen cents referred to in the constitutional amendment, and hence the levy of fifteen cents special road tax is invalid.

6. That the judgment for the penalties and for an attorney's fee is invalid, because not authorized by the constitutional amendment in question, even if it was valid and self-enforcing; and further, because section 9378 of the Revised Statutes of 1899, which allows a reasonable attorney's fee, is void because it is contrary to the fifth amendment to the federal constitution, and because that section of the statutes imposes a greater ²³⁷ burden on railroads than is imposed upon other persons by section 9302 of the Revised Statutes of 1899, and is therefore in conflict with the fourteenth amendment to the constitution of the United States, which guarantees to all persons equal protection under the law.

1. The first error assigned is that the constitutional amendment of 1900, giving the county courts in the several counties of the state not under township organization, and the township board of directors in counties under township organization, the discretion to levy and collect a special tax, not exceeding fifteen cents on the one hundred dollars valuation, in addition to taxes authorized to be levied for county purposes, under section 11 of article 10 of the constitution, to be used for road and bridge purposes, and for no other purpose whatever, and declaring that the power thus given is a discretionary power, and exempting the cities of St. Louis, Kansas City and St. Joseph from the operation of the amendment, is void, because the exemption of the cities of St. Louis, Kansas City and St. Joseph creates an unjust discrimination in favor of those cities against all other cities, towns and villages in the state, and makes the fifteen cent special road tax void under the fifth and fourteenth amendments of the constitution of the United States, because it violates the uniformity and equality of taxation in this state.

And subsidiary to the general proposition, defendant claims that section 3 of article 10 of the constitution of Missouri provides that "taxes shall be uniform upon the same

class of subjects within the territorial limits of the authority levying the tax"; and upon this basis the defendant claims that the special road tax is not uniform throughout the whole state, and therefore it is void; and further that because in the cities of St. Louis, Kansas City and St. Joseph the cost of improving the streets and roadways may be assessed as special ²³⁸ benefits against the abutting property, there is no reasonable substantial basis for exempting those cities from the operation of the amendment, for the reason that in the various counties of the state there are cities and towns where like provisions for the improvements of streets obtain, and that the practical operation of the constitutional amendment, therefore, is to exempt St. Louis, Kansas City and St. Joseph from the special road tax, and to make the other cities of the state pay for local improvements by means of special taxes, and also to pay the special road tax, thereby making the property in the other cities of the state liable to a double tax for the improvement of the streets of the cities and roads of the counties.

The general rule of law is that taxes must be uniform and equal, coextensive with the territory to which the tax applies: *Gilman v. City of Sheboygan*, 2 Black (67 U. S.), 510, 17 L. ed. 305; *Township v. Talcott*, 19 Wall. (86 U. S.) 675, 22 L. ed. 227; *Day v. Roberts*, 101 Va. 248, 43 S. E. 362; 27 Am. & Eng. Ency. of Law, 2d ed., 590 et seq., 594-597; 1 Cooley on Taxation, c. 6, p. 254 et seq.; *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657, 38 S. W. 295, 35 L. R. A. 657; *City of St. Louis v. Spiegel*, 75 Mo. 145.

This general rule is thus well expressed in 27 American and English Encyclopedia of Law, second edition, 595: "Such restrictions, however, do not mean that there is one fixed and unvarying rule of taxation for all purposes throughout the state. Thus, a tax for state purposes must rest uniformly upon all parts of the state; if for county purposes, upon all parts of the county; if for township or city purposes, upon the entire township or city; if for a special or local purpose, then the tax must be laid with due regard to the proportionate interests of the taxpayers in the locality benefited or affected. In each locality the rate may vary, but for public local purposes all property not exempt under the constitution must be taxed." And this is the idea embodied in the third section of article ²³⁹ 10 of the constitution, wherein

it is said: "Taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

Gilman v. City of Sheboygan, 2 Black (67 U. S.), 510, 17 L. ed. 305, was decided by Justice Swayne in 1862, before the adoption of the fourteenth amendment. It was there said, after a review of the constitutional provisions of Wisconsin, requiring taxes to be uniform, and the interpretation of those provisions by the supreme court of that state, that the supreme court of the United States would follow the interpretation of the state courts, and that the meaning of the constitution of Wisconsin in this regard was, "that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property, and coextensive with the territory to which it applies."

The case of *Township of Pine Grove v. Talcott*, 19 Wall. (86 U. S.) 675, 22 L. ed. 227, was decided by the same learned jurist after the adoption of the fourteenth amendment, and he again reiterated the same rule, saying: "All kinds of property must be taxed uniformly or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a state tax, it must be uniform all over the state. If a county or city tax, it must be uniform throughout such county or city. But the rule does not require that taxes for the same purposes shall be imposed in different territorial subdivisions at the same time. If so a county could not levy a tax to build a courthouse, jail or infirmary without rendering it necessary for every other county in the state to do the same thing, without reference to the different circumstances of each."

In *Day v. Roberts*, 101 Va. 248, 43 S. E. 362, the validity of a section of the charter of the town of Smithfield, which exempted all persons and property in that town from the payment of any poor rates, road, school or other tax of the county of Isle of Wight, and from contributing ²⁴⁰ to county expenses, was presented for adjudication. The supreme court held that provision of the city charter unconstitutional, on the ground that the city was a part of the county, and that county taxes applied as well to city property as to country property, saying: "If a tax is imposed by the state, it must be uniform throughout the whole state; if by a county, city, town, or other subordinate district, the

tax must be uniform throughout the territory to which it is applicable."

The same principle was applied by this court in *City of St. Louis v. Spiegel*, 75 Mo. 145, in reference to a license tax which discriminated between persons located in different parts of the city.

Cooley on Taxation, third edition, volume 1, page 257, quotes the language of Chief Justice Bigelow, in *Commonwealth v. People's etc. Sav. Bank*, 5 Allen, 428, where it is said: "Perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had. Under any system of taxation, however wisely and carefully framed, a disproportionate share of the public burden will be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges, that courts can interpose and arrest the course of legislation by declaring such enactments void."

The same author quotes, at page 258, the language of Sharswood, J., in *Grim v. School District*, 57 Pa. 433, 98 Am. Dec. 237, that "perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect." And the same author quotes the language employed by the supreme court of the United States in *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798, wherein it is said: "Perfect uniformity and perfect equality of ²⁴¹ taxation in all the respects in which the human mind can view it is a baseless dream."

Defendant shows that in Jackson county there are other cities outside of Kansas City, to wit, Independence, Lee's Summit, Blue Spring, Oak Grove, Buckner and Greenwood, and in Buchanan county, there are in addition to the city of St. Joseph, the village of Easton, Rushville, DeKalb, and Agency, in all of which there are local provisions made for assessing special benefits for the improvement of streets, more or less resembling the provisions of the charters of the cities of St. Louis, Kansas City and St. Joseph. The defendant argues that the constitutional amendment discriminates in favor of those three large cities and against the smaller

cities and towns, exempting the former from the operation of the tax and subjecting the latter thereto. If this was the only objection to the constitutional amendment the matter would be of easy solution, for no consideration of special taxes, or more properly speaking, special benefits, for the improvements of streets in a city, can make the provisions as to one city illegal because they are not the same as the provisions in reference to another city. The term "special taxes," as applied to the charging of the cost of the improvement of city streets against abutting property, is not technically correct. Such charges are special benefits and not taxes in any sense of the word. If they were taxes they could not, generally, be enforced, because the amount would make the total tax exceed the limitation prescribed by the constitution.

If the constitutional amendment only excepted the city of St. Louis, a very different question would also have been presented for adjudication, for the city of St. Louis is a political subdivision of the state as much as any county in the state, and is treated as a county, and any law that is passed applicable thereto applies to all persons within its territorial limits; and taxes ²⁴² which are imposed upon property in the city of St. Louis are necessarily uniform because they subject the same class of subjects, within the territorial limits of the city, to the tax. In fact, the laws relating to taxation in St. Louis have for many years been different from the laws applicable to other parts of the state.

But the condition as to Kansas City and St. Joseph is very different. The constitutional amendment attempts to exempt property in those cities from the operation of the amendment, and to leave all other property in the counties in which those cities are located, subject thereto. The tax imposed by the amendment, therefore, does not operate uniformly upon the same class of subjects within the territorial limits of the authority levying the tax, for Kansas City is a constituent part of Jackson county, as St. Joseph is of Buchanan county. Both Jackson and Buchanan counties have county organizations and county courts and both of those counties are authorized to levy county taxes, which must be paid by the people of the cities of Kansas City and St. Joseph, respectively, as well as by all the other people within the territorial limits of those counties.

The amendment in question attempted to leave all of the property in all the counties and cities of the state subject to the special road tax, at the discretion of the county courts or township board of directors, except in the cities of Kansas City, St. Joseph and St. Louis. St. Louis has no county court, and no county tax of any kind is assessed in that city. But the practical working of the amendment is to discriminate in favor of Kansas City and St. Joseph against the people of Jackson and Buchanan counties, and to make all of the property in all of the other counties of the state, and in all of the other cities of the state, liable for those special road taxes, and to exempt the people in Jackson county, who live in Kansas City, and in Buchanan ²⁴³ county, who live in St. Joseph, from the operation of the law.

As above pointed out, the supreme court of Virginia, in the case of *Day v. Roberts*, 101 Va. 248, 43 S. E. 362, expressly held that such a discrimination made the law void under the constitution of that state, and the supreme court of the United States, in *Gilman v. Sheboygan*, 2 Black (67 U. S.), 510, 17 L. ed. 305, and *Township etc. v. Talcott*, 19 Wall. (86 U. S.) 675, 22 L. ed. 227, announced the same principles, and such is also the meaning of section 3 of article 10 of the constitution of Missouri.

These considerations, however, would not be decisive of the case were it not for the fourteenth amendment of the constitution of the United States. For when the constitutional amendment of 1900, under discussion, was adopted, it became just as much a part of the organic law of this state as section 3 of article 10 of the constitution, and the effect of the amendment was the same as if it had been originally incorporated in the constitution. The two would, therefore, have to be construed together, and the effect of it would be that all taxes would be required to be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that in the cities of St. Louis, Kansas City and St. Joseph, the special road tax should not be applicable. If such had been the provisions of the constitution, this court could not have declared the exception void, for the same power that required taxes to be uniform made the exceptions stated.

But the fourteenth amendment to the constitution of the United States provides that "no state shall make or enforce any law which shall . . . deny to any person within its

jurisdiction the equal protection of the laws." Speaking to this amendment, the American and English Encyclopedia of Law, second edition, volume 27, page 590, says: "The fourteenth amendment to the constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges ²⁴⁴ or immunities of citizens of the United States or deny to any person within its jurisdiction the equal protection of the law, imposes a limitation on the exercise of all the powers of the state, including among them that of taxation. This prohibition against the denial by any state to citizens within its jurisdiction of the equal protection of the laws forbids, in a sense, the imposition of unequal taxes. The rule is that unequal taxes may not be imposed on property of the same kind, in the same situation and used for the same purpose."

The same author, at page 591, says: "The provision of the constitution of the United States that no state shall pass any law impairing the obligation of contracts constitutes a limitation on the taxing power of the states."

The same author, at page 584, says: "The theory of government in the United States is that socially and politically all are equal, and that the burden of supporting the government should be borne equally by all the individuals composing it, in proportion to the benefits conferred. This principle of justice and equality which requires each person to contribute toward the public expense his proportionate share according to the advantage which he receives lies at the foundation of our political system, and is usually expressed in the constitutions of the states by various provisions limiting the taxing power. Such provisions, however, are not grants of power, but are restrictions or limitations of an existing power."

The same author, at page 583, says: "The power of taxation is one of the essential attributes of sovereignty and is inherent in and necessary to the existence of every government. Except so far as restrained by the provisions of the federal constitution, the power of the state as to the mode, form and extent of taxation is unlimited where the subject to which it applies is within the jurisdiction of the state."

²⁴⁵ The scheme of the constitutional amendment unquestionably was to create local option as to the levying of special taxes for road and bridge purposes. It expressly de-

clared that the county courts in the several counties not under township organization, and the township boards in the several counties under township organization "may, in their discretion, levy and collect a special tax not exceeding fifteen cents on the one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be discretionary power." Local option laws have been held to be constitutional in this state: *Owen v. Baer*, 154 Mo. 496-539. But local option laws—that is, laws passed by the state which may or may not be taken advantage of and utilized as the people of each locality elect so to do, or not—must apply to the whole state, and must confer upon the people of each locality a privilege of taking advantage, or not, of those laws as they see fit. A local option law that authorizes the people of only a limited portion of the state, or of every portion of the state except specified parts thereof, to avail themselves of it, is not a valid law, for laws must be made by the legislature and must be coextensive with the territorial limits of the state, in respect to the powers conferred or the burdens imposed. A law which attempted to authorize certain counties of the state to have one kind of county government, and prohibited other counties in the state from having the same kind of government, would not be a uniform or equal law, and would violate not only the constitution of this state, but the fourteenth amendment to the constitution of the United States; but laws which authorize all of the counties of this state to have one or the other of two different kinds of local government, as the people may elect, e. g., county organization or township organization, are general laws ²⁴⁶ and are constitutional, because they confer equal privileges upon all the people of the state. So the amendment under consideration would have been a perfectly valid law if it had not been for the last sentence thereof, which exempted the cities of St. Louis, Kansas City and St. Joseph from its operation; and might have been a valid law even excepting the city of St. Louis, because such law could not apply to that city, for the reason that it is an entire, separate, political subdivision of the state, and has no county court or township board and no county taxes; but, as above pointed out, such is not the fact as to Kansas City and St. Joseph, for they are constituent parts of Jackson and

Buchanan counties respectively. By so excepting those cities from the operation of the amendment the effect of the amendment was to discriminate in favor of those cities and against all other portions of the state; to impose an additional county tax of fifteen cents on the one hundred dollars valuation for road and bridge purposes in all the other parts of the state at the discretion of the county courts or the township boards, but to exempt from the operation of the law a large proportion of the taxable wealth of those counties.

It will not do to say that the fact that such exception obtains as to Kansas City and St. Joseph does not affect the validity and constitutionality of the law in other parts of the state where no such condition exists, and where all of the property of a county, whether lying inside or outside of a city in the county, will be subject to the special road tax, and that the local option feature of the law might result in the imposition of a tax in one county and a failure to impose a similar tax in another county, as the county officers deem best, for the question is not as to the practical operation and working of the law, but is as to the question of whether the law, as a law, is a valid and constitutional law. If there had been no exception as to St. Louis, Kansas City and St. Joseph, the practical working of the law ²⁴⁷ would have been that the tax would have been imposed wherever the county authorities deemed it necessary, but that where the county authorities did not deem it necessary, or those localities reflecting the sentiments of the people of that locality, did not desire to take advantage of the benefits of the law, and therefore did not impose the tax, such tax would have been collected in one part of the state and not in another, but the law would have been a general valid law, notwithstanding the difference in the manner in which it was taken advantage of by the various localities of the state. The people of the state, in adopting this amendment, may have understood that, at one time, the people of one locality would need its aid, while the people of another locality would not need its aid. And also that whilst the people might not need its aid at one time, they might need its aid thereafter; and therefore the amendment was made liable to be take advantage of or not, as the necessities of the several localities required it.

The supreme court of the United States, in *Township of Pine Grove v. Talcott*, 19 Wall. (86 U. S.) 675, 22 L. ed. 227, well expressed this idea when it said: "But the law does not require that taxes for the same purpose shall be imposed in the different territorial subdivisions at the same time. If so, a county court could not levy a tax to build a courthouse, jail or infirmary without rendering it necessary for every other county in the state to do the same thing, without reference to the different circumstances of each one." And this same idea is expressed in section 11 of article 10 of the constitution, which limits the rate of taxation for county, city, town and school purposes, to be increased to certain other amounts when the majority of the voters, that are taxpayers, voting at an election to decide that question, vote for the increase. And further permits an increase for the purpose of erecting public buildings in counties, cities or school districts, when two-thirds of the qualified voters of the city, county or school district shall vote therefor; thereby ²⁴⁸ accentuating the exigency which may confront one locality, and make an increase of taxes necessary, when such exigencies do not exist in another county, and therefore such increase is not necessary there.

The amendment under consideration does not, however, measure up to the standard fixed by these rules and principles, for as to Jackson and Buchanan counties, the county courts of those counties cannot levy a county tax, whether for ordinary purposes or under this amendment, unless they apply uniformly upon the same class of subjects, within the territorial limits of those counties, and under this amendment, the special road tax would not apply to Kansas City and St. Joseph.

It follows from the foregoing that the amendment under consideration is not a valid constitutional provision of law, but that it violates the fourteenth amendment to the constitution of the United States, in that it denies to all persons, within the state, the equal protection of the laws, which that amendment forbids any state to do. In reference to acts of the legislature, the general rule of law obtains that if the several parts of the act are severable and some are constitutional, and others unconstitutional, the unconstitutional portions will be adjudged invalid, and the constitutional portions adjudged valid. But this general rule is subject to this qualification, to wit, that the

rule will not apply where it appears that the legislature would not have passed one part without the other part, which the courts adjudged unconstitutional, had also been a part of the law. In other words, that the law was one general scheme. The question then is, Can this court declare the last sentence of the amendment under consideration unconstitutional, and the remaining parts of the amendment constitutional?

The purpose of the exception in favor of the three cities named is apparent, not only from the face of the ²⁴⁹ amendment itself, but from the recent history in this state in reference to the matter treated in the amendment. The question of good roads is one of first importance to the people of every state. It is no longer a matter for debate that good roads enhance the value of all rural property as much as good streets enhance the value of urban property. In the attempt to procure good roads, the practical difficulty has been encountered, that the value of the abutting land is not sufficient, ordinarily, to justify the imposition of a special tax for the improvement of the roads; while in cities the value of all abutting property will stand such an assessment. The people of the country have, therefore, been put to it to find some method whereby they could procure good roads without incurring expenses which amount to as much as the value of the abutting property. The needs of the average county are such that sufficient taxes cannot be levied under the general taxing power of the counties to raise enough money, by general taxation, to pay the running expenses of the county and also to improve the roads. Various attempts have, therefore, been made to procure the passage of some amendment to the constitution which would enable the counties to raise the necessary money to pay for the construction of good roads. Such attempts have met with repeated failures, usually due to the fact that the people of the large cities, especially, voted against the same, because they had to pay the special benefits for the improvement of the streets in the cities, and they were unwilling to also pay an additional tax for the improvement of the roads in the country. The framers of the amendment under consideration, therefore, sought to overcome the reasons which have heretofore prevented the passage of somewhat similar schemes, by excepting the cities of St. Louis, Kansas City and St. Joseph from the opera-

tion of the amendment, and thus make it a matter of indifference to those cities as to whether or not the tax was imposed on other ²⁵⁰ localities; or, it may be, by inducing the vote of those cities to be cast in favor of the amendment and thereby carry the same, when the people of the cities would not be subjected to any burdens in consequence thereof, and when the votes of the people of the county might have been sufficient to defeat the amendment if the votes of the people of those cities, who had no interest in the matter, had not been cast in favor of the amendment.

It cannot, therefore, be said that the amendment would have been passed even if the exception had not been attached to it, and hence it cannot be said that the exception is unconstitutional and that the body of the amendment is a valid law. The whole amendment must stand or fall together. It has been demonstrated herein that it cannot stand together. Hence, it must all fall. Moreover, the court cannot declare the exception in reference to the three cities unconstitutional, and declare the remainder of the amendment constitutional, because by so doing the court would make the whole amendment applicable to all parts of the state, including the three cities named, and would thereby make an amendment to the constitution essentially different from that which the people themselves made or attempted to make. Such is not the province of a court.

These considerations make it unnecessary to consider the other questions raised by the defendant.

For these reasons the judgment of the circuit court is reversed.

Brace, C. J., and Gantt, Burgess, Valliant, Fox and Lamm, JJ., concur.

The Constitutionality of Local Option Laws is the subject of a monographic note to Chicago etc. R. R. Co. v. Greer, 114 Am. St. Rep. 000-000.

The Effect of the Fourteenth Amendment to the federal constitution on the power of the several states of the Union to impose taxes is discussed in the note to State v. Goodwill, 25 Am. St. Rep. 885. Generally speaking, the same rate of taxation must apply to all in any taxing district: Henderson v. London etc. Ins. Co., 135 Ind. 23, 41 Am. St. Rep. 410. It is not within the power of the legislature to divide a county into taxation districts, and thereby authorize the levy of a greater tax in one part of the county than in another, for a purpose which is not local, but is purely a county purpose: Hutchinson v. Ozark Land Co., 57 Ark. 554, 38 Am. St. Rep. 258.

KING v. PHOENIX INSURANCE COMPANY.

[195 Mo. 290, 92 S. W. 892.]

INSURANCE.—Oral Agreements for Insurance are Enforceable although the charter of the insurers or the law of the state declares that the conditions of all policies shall be written on the face thereof, and that all policies and contracts of insurance made by the company shall be subscribed by the president or president pro tempore, and attested by the secretary. (p. 684.)

INSURANCE, Parol Contracts of, Statute Construed as Giving Effect to.—A statute declaring that parol contracts may be binding on aggregate corporations if made by an agent, duly authorized by the corporate vote or under the general regulations of the corporation, and that contracts may be implied on the part of such corporations from their acts or those of an agent whose powers are of a general character, must be construed as authorizing insurance corporations to make parol contracts of insurance. (p. 686.)

CONSTITUTIONAL LAW—Impairment of the Obligation of Contracts by Judicial Decisions.—To come within the provisions of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts not only must the obligation of a contract be impaired, but it must be impaired by some act of the legislature of the state, and not by a decision of its judicial department only. (p. 688.)

INSURANCE, Oral Contracts of not Affected by the Failure to Stamp.—The federal stamp act requiring all insurance contracts to have an internal revenue stamp pasted thereon does not make invalid other contracts of insurance. (p. 689.)

INSURANCE, Oral Contracts of, Agents, When Deemed to Have Authority to Make.—An insurance agent intrusted with blank policies, signed by the president and secretary of the corporation, with authority to negotiate and fill up the same, may bind it by an oral contract of insurance. (p. 689.)

INSURANCE, Oral Contract, When Valid as a Renewal.—If a contract of insurance is about to expire and the assured applies for ten days' further insurance and agrees with the agent therefor, this may be regarded as a mere renewal of the pre-existing insurance contract, and as within the authority of the agent, when there is no limitation upon his power to renew a policy of insurance by oral agreement. (p. 690.)

WITNESS, Contradiction of the Party's Own.—Though the plaintiff has taken the deposition of an insurance agent and has offered it in evidence at a pre-existing trial of the cause, he may, at a trial at which he does not offer such deposition, prove statements contradicting those of the witness as therein shown. (pp. 690, 691.)

INSURANCE—Builder's Contract, Amount Recoverable Under. If a policy of insurance issues in favor of a builder, the amount which he is entitled to recover is not diminished by the fact that he has been paid the greater part of the contract price. If the building is destroyed, he is under obligation to rebuild it, and for so doing is not entitled to any payment beyond that stipulated for in the original contract. (p. 691.)

INSURANCE.—The Valued Policy Law of Missouri Applies in Favor of a Builder who, as such, has procured a policy of insurance on a building which he is constructing under a contract with the owners of real property, in which real property such builder has no interest. (p. 692.)

Norton, Avery & Young and Barclay, Shields & Fauntleroy, for the appellant.

E. B. Woolfolk and W. A. Dudley, for the respondent.

297 MARSHALL, J. This is an action to recover seven hundred and fifty dollars for the loss of a frame building in Elsberry, Lincoln county, Missouri, that was in process of construction, or reconstruction, for church purposes. The plaintiff recovered a judgment for seven hundred and forty-eight dollars, and after proper steps the defendant appealed. This is the second judgment in favor of the plaintiff, and the second appeal by the defendant. The former appeal was to the St. Louis court of appeals: *King v. Insurance Co.*, 101 Mo. App. 163, 76 S. W. 55.

The petition, after alleging the character of the defendant, states that on the 7th of February, 1901, John W. Pace was the defendant's local agent at Elsberry, and was duly authorized and empowered as such agent, "to receive applications, to take risks and insure and make out and deliver policies of insurance on property, for defendant, against loss or damage by fire, and to collect and receive premiums therefor; that on the seventh day of February, 1901, plaintiff applied to said John W. Pace, agent for defendant, for insurance against loss or damage by fire, upon a one-story frame, shingle-roof building and its foundations, to be occupied as a church when completed, and situated in survey 1724, township 50, range 2 east, in Lincoln county, Missouri, then and until the happening of the loss hereafter mentioned, the property of the plaintiff; that said defendant, on said date, by its agent, agreed and contracted to insure said property for a term of ten days from said date, in the amount of seven hundred and fifty dollars, at a premium of two dollars, to be thereafter paid to defendant by plaintiff in a reasonable time, which sum the plaintiff then and there agreed and became liable to pay defendant, and it was then and there agreed in pursuance to said **298** contract of insurance so made and entered into, and in consideration of the liability so assumed, by plaintiff, to pay the premium aforesaid, that defendant would issue

and deliver to plaintiff an insurance policy binding said defendant to pay plaintiff all such loss or damages, as plaintiff might sustain by reason of injuries to or the destruction of the property above described by fire, within said term of ten days, to the amount of seven hundred and fifty dollars."

The petition then alleges the destruction of the building by fire, on the 9th of February, 1901; the attempt to make proof of loss and the tender of the premium on the 12th of February, 1901, together with an averment that the plaintiff had performed all of the conditions of the contract, on his part to be performed. The answer is a general denial.

The case made is this: The plaintiff is a contractor and was engaged in the construction or reconstruction of a building for church purposes, under a contract and specifications, which required him to build and complete a church building in accordance with the plans and specifications, and subject to the approval and acceptance of the church committee; and in consideration therefor he was to receive the materials in the old building on the premises, valued at four hundred to four hundred and eighty dollars, and six hundred and seventy-five dollars cash. The plaintiff had given a bond for one thousand dollars for the performance of his contract. While so engaged in the work, the plaintiff, on the 9th of February, applied for and received from the defendant a policy of insurance on the building for seven hundred and fifty dollars, for a term of sixty days from its date, to wit, until the 7th of January, 1901. On the 7th of January, 1901, and before the expiration of the policy, the plaintiff procured from defendant another policy for like amount, insuring the building for a further term of thirty days from the 7th of January, and to expire at noon on the 7th of February, 1901. ²⁹⁹ This policy contained the following provision: "\$750 on the one-story, frame, shingle-roof building and its foundation to be occupied as a church when completed (builder's risk) and situated in survey 1724, township 51, range 2 east, Lincoln county, Missouri."

The plaintiff paid the premiums required by the defendant for said policies, to wit, four dollars and fifty cents for the first policy, and three dollars for the second. All of the plaintiff's dealings were had with John W. Pace,

the defendant's agent at Elsberry. Pace was acting under a written commission or appointment as agent of the defendant, which recited the appointment of Pace, as agent, "with full power to receive proposals for insurance against loss and damage by fire, in Elsberry, Missouri, and vicinity, to fix rates of premiums, to receive moneys, and to counter-sign, issue, renew and consent to the transfer of policies of insurance signed by the president and the secretary of the said Phoenix Insurance Company, subject to the rules and regulations of the said company, and to such instructions as may from time to time be given by its officers." No rules or regulations or instructions were introduced in evidence in this case. On February 7th, before 12 o'clock noon, and before the expiration of the second policy, the plaintiff notified Pace that he had been unable to complete the building at that time, and applied to him for insurance on the building for a like amount, and on the same terms as the last policy. Pace asked him how long he wanted the insurance to run. The plaintiff replied that he would like to have it for five or six days, and asked Pace what limit of time he could write a policy for, saying that he did not care to carry the policy any further than was necessary for him to complete the building. Pace replied that he could write a policy for as short a time as five days. The plaintiff replied that he could not get the building done in five days. Thereupon Pace said he would write a policy for ten days and charge two dollars and twenty-five cents premium therefor. Plaintiff objected to the rate of ³⁰⁰ premium, with the result that Pace agreed to charge only two dollars premium. The plaintiff accepted the proposition and said to Pace, "Don't fail to have this policy at 12 o'clock." Pace replied that when he told a man anything he could depend on it. Nothing was said about the payment of the two dollar premium. Prior to that time plaintiff had not been required to pay the premium on the two other policies at the time he applied for them, or when they were issued, but had paid them thereafter, Pace saying that it did not make any difference about paying the money at the time, but that it could be paid at "any time in the run of the policy, so I can make my report, will do." On this understanding the plaintiff left and heard nothing more about the matter until after the 9th of February, when the fire occurred. The second policy, which

expired on the 7th of February, had never been delivered to the plaintiff but had remained in Pace's hands.

The defendant objected to all the testimony relating to the insurance for ten days last aforesaid, on the ground: 1. That the stamp act of the United States, then in force, required a United States revenue stamp to be fixed on all policies of insurance, and that under article 6 of the federal constitution the effect of the constitution and revenue laws of the United States is to require every fire insurance risk and contract to be expressed in the form of policies and in writing; 2. Because insurance contracts, under the laws of Missouri must be in writing; 3. Because under the terms of the commission of appointment, Pace had no power to make any oral contract of insurance, and that it would impair the obligation of said contract between Pace and the defendant if the courts of Missouri should bind defendant by the oral contract, and that such a declaration of law by the courts of Missouri would violate article 1, section 10 of the federal constitution, which prohibits any state to pass any law impairing the obligation of contracts.³⁰¹ The court overruled the objection, and defendant now assigns that ruling as the principal error in the case.

The defendant also offered testimony tending to prove that the amount of the plaintiff's interest in the building at the time the fire occurred was only one hundred and eight dollars. On the objection of the plaintiff the court excluded the evidence, and this is assigned as error. Error is also assigned as to certain instructions given for the plaintiff, which will be noticed in the course of the opinion.

1. The first question that is presented for adjudication in this case is whether or not an oral contract of insurance is valid.

This question first came before this court in *Henning v. Insurance Co.*, 47 Mo. 425. Wagner, J., delivering the opinion of the court, held that "at common law there is nothing absolutely requiring that the contract should be in writing." After stating that there was much disagreement in the books as to the power of insurance companies to make contracts of insurance by parol, and after reviewing a number of cases bearing on the subject, and saying that the court would be strongly inclined to follow the rule laid down in most of the cases cited which held that a parol contract of insurance was good, the learned judge then

quoted from the act incorporating the defendant company, which declared that "all the conditions of policies issued by said company shall be printed or written on the face thereof," and that authority had been given the company to make by-laws, one of which required the president to sign all policies or contracts by which the company was to be bound, and another required every proposal for insurance to be by written application, signed by the applicant or his agent, and concluded that, by virtue of the act of incorporation, and the by-laws referred to, "there could be no original and binding contract by parol," as to the defendant company.

³⁰² The question came again before this court in *Baile v. St. Joseph etc. Ins. Co.*, 73 Mo. 371. That was a suit in equity to enforce a verbal agreement to issue a policy of insurance. The defense was that the defendant could only be liable for a written or printed policy, signed by the president and attested by the secretary, and that no verbal contract of insurance was binding on the defendant under its charter, and the laws of this state. The court said: "The validity of the contract is the first point demanding attention. The charter of the defendant company is that furnished by the general laws: Gen. Stats. 1865, c. 67, p. 353. The concluding words of section 1 of that chapter require that the 'conditions of all policies issued by such company shall be written or printed on the face thereof'; and section 8 of the same chapter provides that 'all policies and contracts of insurance and instruments of guaranty, made by said company shall be subscribed by the president, or president pro tempore, and attested by the secretary.' Similar language to that just quoted was passed upon by this court in *Henning v. United States Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332, and it was held that with such a charter and by-laws the company could make no original and binding oral contract of insurance. In that case, however, section 6 of chapter 62 of the General Statutes of 1865 was overlooked. That section, which has been on the statute books for over thirty-five years (Stats. 1845, p. 232, sec. 8) provides that: 'Parol contracts may be binding on aggregate corporations, if made by an agent, duly authorized by a corporate vote, or under the general regulations of the corporation, and contracts may be implied on the part of such corporations, from their corporate acts, or those of an agent whose pow-

ers are of a general character.' [That section is now section 974 of the Revised Statutes of 1899.] Passing upon the effect of this section it was held in the circuit court of the United States for the eastern district of Missouri, in an action between the forementioned ³⁰³ parties, that, construed in the light of the general law, the charter of the insurance company did not disable it from making a binding contract of insurance without writing: *Henning v. United States Ins. Co.*, 2 Dill. C. C. 26, Fed. Cas. No. 366.

"This view is certainly the better one, even where there is no such general provision as that above quoted, making oral contracts of aggregate corporations valid. It must now be considered as the well-settled doctrine by the nearly universal concurrence of the authorities that oral agreements of insurance are enforceable, although the charter of the company contains similar provisions to those contained in chapter 67, *supra*. The principle underlying these doctrines is this: That the right to make contracts of insurance, like any other right of contracting, exists as at common law, unless prohibited by statute; that the contract of insurance having its origin in mercantile law and usage, the distinction which denies the power to enter into such a contract, except in particular modes and forms, is without foundation and repugnant to, and inconsistent with, that general capacity of contracting which the common law concedes to every person ordinarily competent to enter into binding engagements; that the provisions of a charter of a company that they shall have the right to make contracts of insurance by the signature of a president, etc., are regarded by the courts as merely enabling and not restrictive of the general power to effect contracts in any other mode not unlawful, dictated by convenience; and that 'the distinction between a contract to insure or to issue a policy of insurance, and the policy itself, is obvious and constantly recognized by the courts': *May on Insurance*, secs. 14, 22, 23, 128; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82; *Sanborn v. Firemen's Ins. Co.*, 16 Gray, 448, 77 Am. Dec. 419; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *New England etc. Ins. Co. v. Robinson*, 25 Ind. 536; *Claffin v. Torlina*, 56 Mo. 369; *Henning v. United States Ins. Co.*, 2 Dill. C. C. 26, Fed. Cas. No. 6366.

304 "In view, however, of the broad statutory provisions heretofore cited, relating to the power of aggregate corporations to contract orally, all difficulty as to the power to make, in the present circumstances, an oral contract of insurance, vanishes. Besides this, section 8, *supra*, requiring the signature of the president, etc., uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature. It is unnecessary to the proper determination of this case that the one already cited from our own reports, and greatly relied on by defendant, be overruled; but it is not unworthy of remark that the utterances in that case were, for the most part, almost, if not altogether, obiter, since therein it is distinctly asserted that the contract in that instance was 'nothing but a naked verbal agreement . . . sued upon. This is denied, and there is no proof of it.' So that that case could have been very briefly disposed of, as having no evidential foundation requiring either judicial discussion or determination. Be that as it may, the doctrine announced in that case does not dominate this one, for the reason that that case was a suit at law on an alleged oral and completed agreement; this is a proceeding in equity to compel that to be done which already upon sufficient consideration had been agreed should be done. And the case under discussion expressly recognizes the principle announced in *Commercial Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 15 L. ed. 636, as well as in numerous other cases cited by plaintiffs, that equity will specifically enforce 'agreements to make insurance.'"

Baile v. St. Joseph etc. Ins. Co., 73 Mo. 371, has since been cited and approved, and the doctrine announced that, unless prohibited by statute, a corporation has all the rights of contracting, under the common law, that an individual has: *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *St. Joseph etc. R. R. v. St. Louis etc. R. R.*, 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; *State v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593. In the case last cited it ³⁰⁵ was said: "Corporations, when they are not restrained in any particular manner by their charters, may adopt all reasonable means in the execution of their business which a natural person may adopt in the exercise of similar powers."

The same doctrine was taken as settled law in this state in *Duff v. Fire Assn.*, 129 Mo. 460, 30 S. W. 1034.

Thus it will appear that the rule laid down in the *Henning* case, *supra*, has not been followed in this state since, but that, as pointed out in the *Baile* case, the statutes of this state (now section 974 of the Revised Statutes of 1899) expressly provide that parol contracts may be binding upon aggregate corporations if made by an agent authorized to contract, and contracts may be implied on the part of such corporations from their corporate acts, or those of an agent whose powers are of a general character. In fact, while the *Henning* case was not expressly overruled in the *Baile* case, because it was not essential to the decision of that case that it should be overruled, nevertheless, it was distinctly pointed out in the *Baile* case that the learned judge who delivered the opinion in the *Henning* case had overlooked the express statute of the state, and it was further pointed out that the correct doctrine announced by the great weight of authority is that parol contracts of insurance are valid, unless expressly prohibited by statute. The rule thus announced in this state is in harmony with and amply supported by the great weight of modern authority. In 16 *American and English Encyclopedia of Law*, second edition, 852, it is said: "The contract is sometimes evidenced by a binding slip signed by the insurer's agent, or by a memorandum in his record book, but neither the statute of frauds nor public policy requires it to be in writing, and it is equally valid if made orally." Decisions from the supreme court of the United States, and from the supreme courts of Alabama, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Missouri, ³⁰⁶ Nebraska, New York, Ohio, Oregon, Pennsylvania, South Carolina and Wisconsin are cited in the note to the text sustaining that doctrine.

The same rule is announced by the text-writers. *Joyce on Insurance*, volume 1, section 525, says: "As we have stated in a preceding chapter, the company may be bound by an oral contract of insurance, or an oral agreement to insure; so an agent intrusted with blank policies, signed by the president and secretary, with authority to negotiate, fill up, and issue the same, may bind the company by a parol contract to insure, and an agent authorized to make the necessary surveys, and negotiate and conclude all the terms

of the contract, and to fill up and countersign the policy, may bind the company by a parol contract to issue a policy. . . . And a local agent of a foreign company, with similar authority, may bind the company by parol to contracts of original or renewal insurance."

Richards on Insurance, section 41, lays down the rule as follows: "An oral contract of insurance or an oral contract to issue a policy is valid, unless prohibited by statute, as by the Civil Code of Georgia, or sometimes by stamp laws, and will be binding from the time the oral contract is completed, although the loss occur before the policy is issued. The statute of frauds is not applicable; and, although the charter of a company provides that the contract of insurance must be in writing, this requirement is, by most courts, held to be a direction to the company, and not binding upon an innocent party, who has parted with value to the company in good faith under an oral contract."

May on Insurance, fourth edition, volume 1, section 23, says: "On principle it would seem that at common law there could be no objection to an oral contract to make an insurance in future; or to issue a policy at a time named, or within a reasonable time, holding the applicant insured meanwhile (this is the usual agreement); or to insure now, making the full contract by parol, without ³⁰⁷ any expectation of a policy. So far the law is clear when the contracting parties are natural persons, and there is no statute in the way. But when a corporation makes the contract, or a statute enters the question, the problem is not so simple. Unless prevented by the charter a company may make valid oral insurance policies." Citing *Henning v. United States Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332, which, as above shown, is no longer the law in Missouri. But the rule is that, unless prevented by statute, a corporation has the same right to contract that an individual has, under the common law, and that, under the statute of this state, parol contracts of corporations are binding on the corporation if made by the corporation, or by an authorized agent, and that such contracts may be implied from the corporate acts, or those of the agent whose powers are of a general character; and that the provisions of the charter or by-laws, requiring the signature of the president to all poli-

cies of insurance, and using no prohibitory words, do not prevent the making of oral contracts.

There was, therefore, no error in the ruling of the trial court in admitting the evidence tending to prove an oral contract of insurance.

2. It is contended, however, that such construction of the law impairs the obligation of the contract between the company and its agent, in that, under the written appointment of the agent, he had no power to enter into an oral contract of insurance, and that, therefore, the rights of the defendant, guaranteed by section 10 of article 1 of the federal constitution, would be denied the defendant.

This contention is untenable. The modern rule is that "in order to come within the provisions of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract ³⁰⁸ be impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only": *City of Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386, and cases cited.

3. It is next contended that at the time this contract was entered into the federal stamp act required all contracts of insurance to have an internal revenue stamp fixed there-to: 30 U. S. Stats. at Large, p. 448 et seq. And it is argued that as the stamp cannot be fixed to an oral contract, it would enable parties to evade the stamp act and defraud the government, by permitting oral contracts of insurance to be made, and therefore the oral contract relied on in this case was invalid.

Section 7 of the stamp act provides as follows: "That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote such tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

It is a sufficient answer to the contention to say that the literal wording of that statute is that the failure to stamp such instrument, document or paper is made a misdemeanor and the document is inadmissible as evidence, but in this case there was no such instrument made, and none such is offered in evidence, and the statute does not prohibit the making of oral contracts, such as, under the common law, every person and every corporation has the right to make, under the ³⁰⁹ laws of this state, and under the laws of the United States.

In addition thereto, it has been held that under the act the instrument may be received in evidence, unless it be shown that the omission to stamp it was with the intent to evade payment of the revenue, and that in the absence of such showing the instrument or contract is not void: *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355; *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 50, 37 S. E. 481, 53 L. R. A. 130. In the case last cited it was held that while Congress had the power to require revenue stamps to be placed on written instruments, and to prescribe a punishment for the failure or refusal to comply with that requirement, and to require that such instruments, unless stamped, should not be admissible as evidence in the federal courts, it had no power to prescribe rules of evidence for the state courts, and, therefore, the act which declared that such instruments should not be received in evidence in any court until stamped, is to be understood as applicable to the federal courts only. To the same effect are *Wade v. Foss*, 96 Me. 230, 52 Atl. 640; *Clemens v. Conrad*, 19 Mich. 170; *Sammons v. Halloway*, 21 Mich. 162, 4 Am. Rep. 165; *Wilson v. Carey*, 40 Vt. 179; *Garland v. Gaines*, 73 Conn. 662, 84 Am. St. Rep. 182, 49 Atl. 19; *Latham v. Smith*, 45 Ill. 29.

4. It is contended that Pace had no authority, under his written appointment, to make an oral contract, but that his power was limited, "to fix rates of premium, to receive moneys, and to countersign, issue, renew and consent to the transfer of policies of insurance, signed by the president or the secretary" of the defendant.

As hereinbefore pointed out, where an agent is intrusted with blank policies signed by the president and secretary of the company, with authority to negotiate, fill up and issue the same, he may bind the company by an oral con-

tract to insure: 1 Joyce on Insurance, sec. ³¹⁰ 525. But even under the strictest construction of his appointment, the act of Pace, in this instance, may be regarded, under the facts in judgment, as a mere renewal of the contract that was to expire on the 7th of February at noon, and there are no rules, regulations or instructions of the company in this regard tending to show that the agent had no power to renew a policy of insurance by a verbal agreement, and for consideration.

5. The St. Louis court of appeals reversed the former judgment in this case, because, after the plaintiff had introduced the deposition of Pace denying that he had authority to make a contract of insurance for ten days, the plaintiff introduced evidence of statements made by Pace, after the loss, tending to show that he had such authority, and it was held by the St. Louis court of appeals that such statements were inadmissible, because they were not a part of the *res gestae* of the business Pace was transacting, and also because they tended to contradict the testimony of Pace, who was plaintiff's witness.

It is now insisted that on the trial anew, the plaintiff fell into "the same old error." The record discloses, however, that on this trial the plaintiff did not introduce the deposition of Pace, nor did he call Pace as a witness. It is true the plaintiff had formerly taken Pace's deposition, but he did not introduce it in this case. The record shows that in rebuttal the plaintiff was called and asked whether or not Pace, the agent, or anybody else, had told him at any time that a policy could not be made for less than ten days. This was objected to on the ground, among others, that the plaintiff was thereby seeking to contradict Pace's testimony, and that the plaintiff could not do so because the plaintiff had taken Pace's deposition, although the plaintiff had not used it, and it had not, up to that time, been introduced ³¹¹ in evidence by either party. The objection was overruled, and the witness answered that he had no such knowledge. Thereupon, on cross-examination, it was proved that the plaintiff had called Pace as a witness on the former trial, and over the objection of the plaintiff the defendant introduced the bill of exceptions preserving the testimony of Pace on the former trial, and also introduced the deposition of Pace, which had been previously taken by the plaintiff.

It is plain, therefore, that in this case the plaintiff was not guilty of the error for which the St. Louis court of appeals reversed the former judgment. Here the plaintiff did not call Pace at all, and, therefore, the evidence admitted did not tend to contradict anything Pace had said, for up to that time Pace had not spoken either in person or by deposition, on this trial. Neither did the plaintiff, on this trial, introduce testimony as to statements made by Pace after the fire occurred.

6. The first instruction is claimed to be erroneous, because it speaks of the building insured as "the property of the plaintiff." And it is argued that it was not the property of the plaintiff, because he had only one hundred and eight dollars interest in it. The policy was a builder's policy. The contract required the plaintiff to take down the old building, and to furnish the church a complete building in consideration of the materials that came out of the old building, and six hundred and seventy-five dollars cash. The fact, if it be a fact, that the plaintiff had received all but one hundred and eight dollars on the contract price, would not deprive him of an insurable interest in the building, for if the building was destroyed the plaintiff would have to rebuild it, and he would not be entitled to any further payments than were provided by the original contract. The plaintiff, therefore, had an insurable interest in the building; and the building was a part of the realty, and hence the plaintiff ³¹² had, at least, a qualified interest in the realty: 16 Am. & Eng. Ency. of Law, 2d ed., 846.

7. The second instruction for plaintiff is claimed to be erroneous because it gave the plaintiff the benefit of the valued policy law of Missouri: Rev. Stats. 1899, sec. 7969. That instruction told the jury that although they might believe from the evidence that the building in question did not stand on premises owned by the plaintiff, yet if they believed that the plaintiff had contracted with the agent or building committee of the owners of the property to build a complete church building upon the premises, and turn the same over to the owners when completed and accepted by them, and that, at the time of the fire, said building had not been accepted by and turned over to them, then the plaintiff had such ownership or interest in said building as entitled him to insure the same and collect the

insurance under the conditions mentioned in instruction 1 given for the plaintiff in this case.

It is claimed that the instruction is erroneous because the interest the plaintiff had was simply an interest in personalty, and that the valued policy law does not apply to personalty, but only to realty. This objection is more technical than real. The interest the plaintiff had was a builder's interest. That interest was in the building that was attached to the land, and was therefore a part of the land. True, the building might be destroyed by fire, while the land could not; hence the necessity for insuring against loss by fire during the construction of the building. But the building was none the less a part of the realty because it might be destroyed by fire, like personalty may be destroyed by fire. The same argument might be applied to insurance on a building taken out by the owner of the land on which the building stood. Yet the valued ³¹³ policy law applies to the buildings on the land and not to the land itself, and no good reason is perceived, or has been suggested, why there should be any difference in the application of the valued policy law to a policy taken out by the owner of the land and where the policy is taken out by the builder. The building is as much personalty to the one as it is to the other.

For the foregoing reasons the judgment of the circuit court is affirmed.

All concur.

Contracts of Insurance may rest in parol: *Summers v. Mutual Life Ins. Co.*, 109 Am. St. Rep. 992; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358.

The Failure to Affix a Revenue Stamp to an instrument when required by statute, as affecting its validity, is discussed in the monographic note to *Garland v. Gaines*, 84 Am. St. Rep. 185-199.

HORNSTEIN v. UNITED RAILWAYS COMPANY.

[195 Mo. 440, 92 S. W. 884.]

STREET RAILWAYS—Negligence, Contributory, When Imputed to Person Injured by.—One who alights from a street-car, and whose view is obstructed by it and who knows that, by waiting a short time, it will move on and his view become unobstructed, is guilty of contributory negligence if he at once crosses the other track, where he is struck by another car which he must have seen and been able to avoid had he waited until his view became unobstructed. (pp. 699, 704.)

STREET RAILWAYS.—The Duty to Stop, Look and Listen applies to street as well as to steam railways. (p. 706.)

STREET RAILWAYS.—The Failure to Sound the Gong or Give Other Warning, though it constitutes negligence on the part of the operatives of a street railway, will not entitle a person to recover for injuries due to a collision, if he was guilty of contributory negligence in not stopping, looking, and listening to ascertain whether a car was approaching. (p. 708.)

George W. Easley with Boyle & Priest, for the appellants.

Lee Sale, for the respondent.

442 MARSHALL, J. This is an action for ten thousand dollars damages for personal injuries received by the plaintiff on the 6th of June, 1901, about half-past 6 o'clock P. M., in consequence of a collision with the defendants' street-car, at the corner of Vandeventer avenue and Page avenue, in the city of St. Louis. There was a verdict and judgment for the plaintiff for six thousand dollars, from which the defendants appealed.

443 The petition alleges that at the time of the accident the defendants' cars were provided with a bell or gong, "which it was customary and usual for said motorman to ring, for the purpose of warning persons of the approach of said car, whenever said motorman had reason to anticipate the sudden appearance of persons upon or near the track on which the car was running," and were further provided with a brake for stopping the car, or checking the speed thereof; that on the day named the plaintiff was a passenger on one of defendants' cars going south on Vandeventer avenue, and that when the car reached the south side of Page avenue it was stopped for the purpose of permitting passengers to alight from said car; that plaintiff alighted from said car, and was proceeding in the rear thereof, along the south side of Page avenue, going

from the west track of defendants' railway to the pavement on the east side of Vandeventer avenue; that as he approached the east track of defendant's railroad, upon said Vandeventer avenue, and was about to cross the same, a north-bound car, in charge of defendants' servants, as aforesaid, carelessly and negligently ran into plaintiff and knocked him down, and injured him in a painful manner; that the injuries were caused "by the carelessness and negligence of defendant's servants in operating its cars in the following respects, to wit, that immediately prior to the happening of the said injury, and while said south-bound car was discharging its passengers upon the street on the south side of Page avenue, defendants' servants in charge of said car carelessly and negligently failed to give the plaintiff, as he was alighting from said car, and was about to cross defendants' eastwardly track, any warning of the fact that said north-bound car was approaching and was near to the south side of Page avenue; that while said south-bound ⁴⁴⁴ car was so discharging its passengers as aforesaid, including the plaintiff, said north-bound car was negligently permitted to run at a high and dangerous rate of speed as it approached and passed the corner of Page avenue; that notwithstanding the fact that his view of the south crossing at Page and Vandeventer avenues was obstructed by defendants' south-bound car, and he had reason to anticipate the sudden appearance of persons desirous of crossing the eastward track of said road, at said point, the motorman of said north-bound car negligently and carelessly failed to ring his gong, or to give any warning whatever of the approach of said north-bound car to Page avenue, and negligently and carelessly failed to check the speed of his said car, or to have said car under control; and that the said motorman negligently failed to keep watch for persons approaching said eastward track, or to stop said car as soon as he could have done after he saw, or by the exercise of ordinary care could have seen, plaintiff in a position of danger. Plaintiff further states that but for the carelessness and negligence of the defendants' servants in operating its said cars, as aforesaid, the injuries herein complained of would never have happened."

The answer is a general denial, coupled with a plea of contributory negligence, in that the plaintiff stepped upon or near the railway track while the car of the defendants

was in close proximity to him, and in that the plaintiff failed to look or listen or heed the approach of the car. The reply is a general denial.

The case made is this: Vandeventer avenue runs north and south. Page avenue runs east and west. The defendants have a double street-car track on Vandeventer avenue. The south-bound cars run on the west track and the north-bound cars run on the east track. The space between the said two tracks is four feet eight inches, according to the plaintiff's statement, or five feet, according to ⁴⁴⁵ the defendants' statement. The space between the passing cars is ten inches, according to the plaintiff's statement, and one foot according to the defendants' statement. The plaintiff lived on the south side of Page avenue and east of Vandeventer. He worked down town. On the day of the accident, as was his custom, he took the car to go home, which would take him west to Vandeventer avenue, and thence south to Page avenue. When the car reached the south crossing of Page avenue on Vandeventer avenue, a passenger alighted therefrom before the car stopped and crossed Vandeventer toward the east. When the car stopped, the plaintiff alighted, and immediately passed around the rear of the south-bound car, for the purpose of crossing Vandeventer avenue toward the east, in order to reach his home.

The testimony for the plaintiff tends to prove that as he passed along the rear of the south-bound car, he listened for the bell, to see if a north-bound car was approaching, and heard no bell, and that no bell was sounded; that his view to the south was obstructed by the south-bound car from which he had alighted, so that he could not see whether a north-bound car was approaching; that as he passed to the east side of the south-bound car he stooped to look toward the south for a north-bound car, and that at that time he was "a little over the west track, one foot over the west track, I guess, with my left foot I went over a little. . . ."

"Q. Had you gotten as far as the north-bound track when you saw the car? A. Yes, sir.

"Q. You just now told me that you had gotten to the corner of that car. A. Yes, sir.

"Q. The corner nearest to your house? A. Yes, sir.

"Q. The corner is between the east track and the west track, isn't it? A. Yes, sir.

"Q. Had you got as far as the east track, the car track that goes north—had you gotten that far? A. Pretty near it; near that.

"Q. Then you had not gotten that far; you say you had gotten or had stepped beyond ⁴⁴⁶ the west track with your left foot? A. Yes, sir; the west track with my left foot, yes; that is right.

"Q. Do you remember how you turned back? A. I can remember that when I saw the car coming I turned right back with my body, at the same time the car struck me on my right shoulder, the car running north, the car on the east track, and I fell down and I fell unconscious."

For the plaintiff, Miss Caroline Zwalhas, a music teacher, testified that she lived in a flat, upstairs, on the south side of Page avenue, three doors east of Vandeventer avenue; that "I was looking out of my window and I saw Mr. Hornstein coming toward his house, and just as he was about to cross the east track he turned his head to the south, and then I heard someone halloo, 'Look out'; just that instant the car struck him.

"Q. Where was Mr. Hornstein when you first saw him? A. He was right behind the south-bound car.

"Q. In what track, or whereabouts in the street? A. On the west track.

"Q. You saw him coming east toward his home? A. Yes, sir.

"Q. On what side of Page avenue? A. On the south side.

"Q. He was coming on the south side, and when you saw him he was there? A. He was on the track, on the west track, the first time I saw him, and then he was coming toward the east track, he stooped and looked around to the south.

"Q. Will you show the jury exactly how he stooped? A. Well, he was walking this way (indicating) as if looking behind something, just as a person would when looking behind something that was there.

"Q. Where was he, do you say, when he stooped as if looking behind something? A. Well, on the track.

"Q. How is that? A. On the track, on the west track, or a little beyond, a little more to the east

"Q. A little beyond the west track? A. Yes, sir; on the east side.

"Q. Which direction did he look? A. To the south.

"Q. With reference to that action on his part, when was he struck? A. Just as I saw him do that movement ⁴⁴⁷ somebody hallooed out, 'Look out,' and then he was struck just the same time, those three things went all together, I could not say it as quick as it was done."

Conrad Cohnheim, the passenger who alighted ahead of the plaintiff, testified for the defendants, and said that he got off of the car before it stopped, and had crossed the track going eastwardly. He then testified as follows:

"Q. At the time you got off, did you see Mr. Hornstein? A. I did not.

"Q. When did you first see him? A. I first see him when I crossed the tracks, and he was coming around the car, the rear end of the car.

"Q. Which end was he coming in? A. He was coming east.

"Q. What direction was he facing? A. He was facing slightly northeast.

"Q. When you saw him state whether he was standing still or moving? A. He was moving when I first saw him.

"Q. Did you see this north-bound car coming? A. Yes, sir, I did.

"Q. What, if anything, did you say to Mr. Hornstein at that time? A. When I got across the street, at the east crossing of Vandeventer and Page avenue, I turned around and I seen the car, and I hallooed to him to stand back.

"Q. In what tone did you halloo? A. A very loud tone.

"Q. Louder than you are speaking now? A. Yes, sir, a good deal louder.

"Q. He was then looking in your direction, was he? A. Yes, sir.

"Q. State whether or not, at any time, after he started toward the east track, you saw him look toward the south. A. I did not.

"Q. Did you see the car strike him? A. Yes, sir, I did.

"Q. What portion of the car struck him? A. Why, the front end of the platform; that is, the northwest corner of the dashboard.

"Q. Did you see the north-bound car stop? A. Yes, sir.

"Q. Where was it when it stopped? A. The rear end stopped about ten feet from where it struck him. . . .

"Q. State whether or not, at any time, after Mr. Hornstein started toward the east, behind the south-bound car, you saw him stop before he was hit. A. Well, I don't know as he did stop, he simply was walking ⁴⁴⁸ along and seemed to look more toward the north.

"Q. And was in that position? A. And was in that position when he was struck."

The testimony of Miss Zwalhas was that the bell on the north-bound car was not rung.

Mrs. Fleming, a witness for the plaintiff, who was more than one hundred feet west of Vandeventer avenue, testified that she heard the car, from its noise, coming north, half a block away from the crossing. The testimony of the defendants' witness, Cohnheim, was that he did not remember hearing any gong sounded, on the north-bound car. It is conceded in the briefs that the car was running at a speed of seven miles an hour, and that the grade on Vandeventer avenue, at the point of collision, was a slight upgrade toward the north. Over the objection and exception of the defendants, the plaintiff read in evidence a rule of the defendants as follows: "When passing a car that is discharging passengers, or when at or near the crossings, the gong should be sounded once when within one hundred feet of each other, and once when halfway past. The current must be turned off, and the car slowed up so that it could be stopped instantly in case any person should attempt to cross the track in front of the moving car. The gong must also be sounded one hundred and fifty feet before the crossing at all streets both day and night."

At the close of the plaintiff's case, and again at the close of the whole case, the defendants demurred to the evidence, the court overruled the demurrers and the defendants excepted, and now assign that ruling as the chief error relied on.

1. The first error assigned is the refusal of the trial court to give the instruction asked for a nonsuit. The case was formerly tried and resulted in a verdict for the plaintiff for one thousand dollars. The defendants appealed to the St. Louis court of appeals, where the ⁴⁴⁹ judgment was reversed and the cause remanded. The majority of the

court (Judges Barelay and Goode) voted in favor of a reversal, because of the failure of the trial court to give an instruction in reference to joint, mutual and concurring negligence. Bland, P. J., wrote the opinion, and held that the demurrer to the evidence should have been sustained. Thus making the court unanimous in favor of a reversal, the two named being in favor of remanding, while the one was in favor of reversing without remanding. The case is reported in 97 Mo. App. 271, 70 S. W. 1105. The opinion of Bland, P. J., upon the question now being considered is so terse, lucid and convincing, that it is a pleasure to reproduce it here. It is as follows: "Defendant insists that its demurrer to plaintiff's evidence should have been given. In the circumstances of the case negligence of defendant is not to be inferred from the mere happening of the injury: *Murphy v. Wabash R. R. Co.*, 115 Mo. 111, 21 S. W. 862; *Yarnell v. Kansas City etc. R. R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Harper v. Standard Oil Co.*, 78 Mo. App. 338; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202.

"There is no evidence in support of the first, second and fourth allegations of negligence in the petition. In respect to the third allegation of negligence, the failure to give the warning signal, it is unquestionably the law that the duty of the motorman in charge of the car running north was to have sounded the gong on approaching the crossing. The omission of this duty was negligence: *Dixon v. Chicago etc. R. R. Co.*, 109 Mo. 413, 19 S. W. 412, 18 L. R. A. 792; *Weller v. Chicago etc. R. R. Co.*, 164 Mo. 180, 86 Am. St. Rep. 592, 61 S. W. 141.

"While there is no direct proof that the signal was not given, there is negative evidence of the fact, and it was within the power of the defendant to have proven affirmatively by the motorman in charge of the car, if it was a fact, that the warning was given. Defendant failed to produce the motorman as a witness or to account for his absence. The negative evidence of ⁴⁵⁰ the failure to give the warning signal and the failure of defendant to prove affirmatively that it was sounded, if such was the fact, was sufficient proof of the third allegation of negligence to send that issue to the jury, and there was no error in refusing defendant's peremptory instruction, unless the evidence is all one way that plaintiff was guilty of such contributory

negligence as to preclude his right of recovery, notwithstanding the defendant was guilty of negligence in failing to give the warning signal.

"The plaintiff testified that he looked for the north-bound car as he was moving out of his car, but he saw none; that he looked and listened when he got off, but that he neither saw nor heard the approaching car. He could not see on account of the obstruction caused by the car he had just left; looking, under the circumstances, was a useless performance. The car from which he had alighted, he testified, began to move away when he was in the middle of the west track. Had he then halted but for one moment, the car that was obstructing his vision would have moved away and he could have seen the north-bound car, but he did not take this precaution. He moved on toward the east track without halting or hesitating and arrived sufficiently near that track just in time to come in contact with the corner of the vestibule of the car. This was negligence of the most pronounced sort. It was plaintiff's duty, in the circumstances, to have stopped and waited until he could see whether or not there was an approaching car on the east track before blindly proceeding to cross over that track: *Weller v. Chicago etc. R. R.*, 164 Mo. 180, 86 Am. St. Rep. 592, 61 S. W. 141; *Dlauhi v. St. Louis etc. R. R.*, 139 Mo. 291, 40 S. W. 890; *Kelsay v. Missouri etc. R. R. Co.*, 129 Mo. 362, 30 S. W. 339; *Childs v. Bank of Missouri*, 17 Mo. 213; *Easley v. Missouri etc. R. R. Co.*, 113 Mo. 236, 20 S. W. 1073; *Culbertson v. Metropolitan R. R.*, 140 Mo. 35, 36 S. W. 834; *Pinney v. Missouri etc. R. R. Co.*, 71 Mo. App. 577; *Lien v. Chicago etc. R. R.*, 79 Mo. App. 475.

"Common prudence would have dictated, when the south-bound car began to move away, that the plaintiff ⁴⁵¹ stop for a moment that he might have an unobstructed view of the east track and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of his injury; where this is the case, the law is well settled that no recovery can be had: *Weber v. Kansas City etc. R. R.*, 100 Mo. 194, 18 Am. St. Rep. 541, 13 S. W. 587, 7 L. R. A. 819; *Hogan v. Citizens' Ry. Co.*, 150 Mo. 36, 51 S. W. 473; *Moore v. Kansas City etc. R.*

R. 146 Mo. 572, 48 S. W. 487; Corcoran v. St. Louis, etc. R. R. 105 Mo. 399, 24 Am. St. Rep. 394, 16 S. W. 411; Tesch v. Milwaukee etc. R. R., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618."

There is substantially no difference in the facts as they appeared when this case was before the court of appeals, and the facts as they appear in this record. Counsel for plaintiff claim that the evidence here is different from the evidence there in this, that at the former trial there was no evidence as to the exact speed of the north-bound car as it passed Page avenue; whereas at the second trial defendants' witnesses admit a speed of seven miles an hour; also that at the former trial there was only negative evidence that the bell was not sounded, whereas here there is positive evidence that the bell was not sounded. These considerations, however, do not make the essentials of the case here presented different from the case that was presented to the St. Louis court of appeals, for conceding the speed of the car to have been seven miles an hour, that was not an unlawful or dangerous rate of speed, and was not shown to have been in excess of the authorized rate of speed; and there is no material difference between the negative evidence that the gong was not sounded and positive evidence that it was not sounded, so far as the question of whether or not the plaintiff had made out a *prima facie* case for the jury was concerned. The reasoning and conclusions of Bland, P. J., above quoted, are strictly in harmony with the rules of law declared by this court in the opinion of Valliant, J., in Giardina v. St. Louis etc. R. R., 185 Mo. 330, 84 S. W. 928. ⁴⁵² In that case the plaintiff went to a car, going in one direction, to give his brother a key, and after he had done so crossed in the rear of that car and was injured by a collision with the car coming in the opposite direction on the other track. The rule of the company as to the running of the cars that was introduced in this case was also introduced in that case. The trial court sustained a demurrer to the evidence in that case, and the plaintiff appealed; and the correctness of the ruling of the trial court was the sole point decided by this court. Valliant, J., said:

"Plaintiff testified that he had noticed that it was a custom of the company in the operation of its cars to have the motorman of a car which was approaching a car that had stopped, to sound his gong and go slowly and, know-

ing this custom, he, before attempting to cross the north track, passed behind the east-bound car and listened, but hearing no gong, concluded that no car was coming west, stepped out and was struck.

"The tracks looking east from where the plaintiff stood were straight for one thousand feet and the car coming west could have been seen from that distance if one had been looking.

"It may be conceded that the defendant was negligent in running its car at a high rate of speed and without sounding the gong past a standing car from the rear of which the motorman ought to have known that people were liable to pass. It is not likely that the peremptory instruction was given on the theory that no negligence of the defendant was shown, but rather that the plaintiff failed to observe that degree of care that was to be expected of a man of ordinary prudence, and that his negligence contributed with the negligence of the defendant to produce the injury complained of.

"Plaintiff was familiar with the location and also the movements of the cars; he had even taken such notice of the operation of the cars that he was aware ⁴⁵³ that it was the custom for a running car, passing one that had stopped, to be checked in its speed and its gong sounded freely. He was so confident of this custom that he seemingly on this occasion staked his life on its observance, for, after pausing to listen for the sound of the gong and hearing none, he stepped on the north track or in front of the coming car without looking and was struck. From where he stood the body of the east-bound car shut off his view to the east, but one who was as familiar with the movements of the cars as he said he was, in fact, any man of common experience in the plaintiff's place, should have known that in a moment the east-bound car would have gone and the obstruction to his vision have been removed. But even if he had not had that moment to spare he could have leaned forward beyond the line of the standing car in perfect safety and have seen the west-bound car coming. The measured distance between the tracks was six feet ten inches. One witness for plaintiff said that the distance between two cars passing on those tracks was about one foot, but he also said that the distance between the tracks was about four feet; he had made no measurements for

either estimate; he was short two feet and ten inches in his estimate as to the distance between the tracks. But even if the space between the passing cars was only one foot, it was sufficient to enable the plaintiff to have looked and if he had looked he would have seen the car coming and would not have been hurt. His act in stepping on or near the north track without looking for the west-bound car was negligence and it contributed to cause the accident. If authorities are needed to sustain this view of the law, they may be found in the cases cited in the brief for respondent, and the cases cited in the brief for appellant are not to the contrary."

In that case it appeared that the car that struck the plaintiff was running at a high rate of speed, and without sounding the gong while passing the standing car, and thus it was shown that the defendant was ⁴⁵⁴ guilty of negligence, but a recovery by the plaintiff was denied solely on the ground that although defendant was negligent, the plaintiff was also guilty of such contributory negligence as barred his recovery. There is no substantial difference between that case and the case at bar except in this, that here it is not shown that the car was running at a high rate of speed, but on the contrary it is conceded that the car was running only seven miles an hour, and that rate of speed is not shown to have been an unauthorized rate, nor was it negligence in itself.

The principal contention of the plaintiff here is that there is no law which requires him to stop until the car from which he had alighted had moved away, so as to afford an unobstructed view of the north-bound car. But even if this contention be conceded to the plaintiff, nevertheless, it is and must be admitted that the common-law duty was cast upon the plaintiff to exercise ordinary care, before stepping upon the north-bound track, or getting so close thereto as that a collision with a car thereon was almost inevitable, to discover whether or not there was a car approaching on the north-bound track.

The argument of the plaintiff is that there was only a space of four and one-half feet between the two tracks, and a space of only ten inches between the passing cars, and that the plaintiff could not by the exercise of ordinary care have discovered the approach of the car on the north-bound track, because there was not space enough between

the passing cars for him to have looked around the rear of the south-bound car, without getting so close to the north-bound track that a collision with the car coming on that track was inevitable. And plaintiff differentiates this case from the Giardina case by claiming that in the latter there was a distance of six feet ten inches as against four feet eight inches here, and a distance of one foot between the passing cars as against a distance of ten inches ⁴⁵⁵ here. The distance between the tracks is immaterial, and the difference between the distance between the tracks in the Giardina case and here was only a difference of two inches, which is too insignificant to constitute a difference between the principles of the Giardina case and of this case. But conceding that there was not space enough between the passing cars for the plaintiff to have looked around the rear of the south-bound car to see whether there was a car coming on the north-bound track, and that without so doing he could not have determined whether there was or was not a car approaching, it also follows that the motor-man of the north-bound car could no more have seen the plaintiff in his position, at the rear of the south-bound car, than the plaintiff in his position could have seen the approach of the north-bound car.

These considerations necessarily compel the conclusion that common prudence on the part of the plaintiff demanded that he take some other precaution to discover whether or not there was a car approaching on the north-bound track before getting so close to that track as to make a collision with the car inevitable. The plaintiff lived in that immediate vicinity and was familiar with the conditions there existing. He traveled on the same road every day. He knew the frequency with which cars passed. He knew the distance between the tracks and the distance between the passing cars, or, at any rate, was chargeable with notice thereof, for he had the means constantly at hand of knowing those facts. It would have been but the loss, at most, of a second or two for the plaintiff to have paused, before getting so near to the north-bound track as to come in contact with a passing car, long enough to have permitted the car from which he had alighted to move southwardly far enough for him to see whether or not it was safe for him to attempt to cross the north-bound track. As was well said by Bland, P. J.: "Common prudence

would have dictated, when the south-bound car ⁴⁵⁶ began to move away, that the plaintiff stop for a moment that he might have an unobstructed view of the east track, and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of the injury; where this is the case the law is well settled that no recovery can be had."

The report of this case before the St. Louis court of appeals shows that counsel for plaintiff then cited Cincinnati St. Ry. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276; Evansville St. R. Co. v. Gentry, 147 Ind. 277, 62 Am. St. Rep. 421, 44 N. E. 311, 37 L. R. A. 378; Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 55 Am. St. Rep. 620, 34 Atl. 1094, 33 L. R. A. 122; Chicago C. R. R. v. Robinson, 127 Ill. 9, 11 Am. St. Rep. 87, 18 N. E. 772, 4 L. R. A. 126; Smith v. Union T. Line, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169. Counsel for plaintiff now also cite those same cases, and in addition thereto the following cases: Dobert v. Troy City R. R., 91 Hun, 28, 36 N. Y. Supp. 105; Bass' Admr. v. Norfolk etc. Co., 100 Va. 1, 40 S. E. 100, and Cincinnati etc. R. R. v. Whitcomb, 66 Fed. 915.

The cases then and now cited differentiate between steam railroads and street-cars, and whilst conceding that it is contributory negligence for a person to thus enter upon or near a steam railroad under circumstances like those here presented, hold that it is not contributory negligence for one so to do with reference to street-cars. In fact, some of them go to the extent of holding that it is not the duty of the person to stop, look or listen before attempting to cross a street-car track.

Counsel for defendant have been equally diligent, and in addition to the cases from other jurisdictions cited by them in this case when it was before the St. Louis court of appeals now refer the court to the following cases: Buzby v. Philadelphia Traction Co., 126 Pa. 559, 12 Am. St. Rep. 919, 17 Atl. 895; Smith v. City R. R. Co., 29 Or. 539, 46 Pac. 136, 780; Creamer v. West End St. Ry. Co., 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391, 16 L. R. A. 490; Railroad v. Boddy, 8 Am. Neg. Rep. 555—which hold to the rule, that where a person deliberately ⁴⁵⁷ walks from behind a

street-car, from which he has alighted, and attempts to cross a public street without using his power of observation, and is injured by an approaching car which could have been avoided by the use of ordinary care, he cannot recover damages for such injury. In some of the cases cited by plaintiff, notably *Cincinnati etc. R. R. v. Whitcomb*, 66 Fed. 915, it is said that the doctrine contended for by defendant is the rule in Pennsylvania, that the courts of the other states have not adopted it, and that it is not the rule in the federal courts. The learned judge who made that statement evidently had not had the benefit of the research of counsel that is afforded this court by the cases cited. The sum of the matter as to the state of the law in other jurisdictions may, therefore, be said to be that in Ohio, New York, Virginia, Illinois, New Jersey, Washington and Indiana the rule contended for by plaintiff obtains, and likewise the distinction between steam railways and street-cars also obtains, or did obtain before the adoption of rapid transit, such as now exists in all large cities. Whereas, in Pennsylvania, Maryland, Oregon and Tennessee the rule stated by the defendants obtains.

The later cases in Missouri do not recognize such a distinction between steam railroads and street railroads, with respect to the obligation of the pedestrian to look or listen for an approaching car, and if necessary stop, but the courts of this state, keeping pace with the progress of the times, recognize that there is quite as much danger to be apprehended now from stepping on the street-car tracks where the cars are run by electricity and at a rapid rate, and with great frequency and at short intervals, as there is from stepping on the steam railroad tracks, where the cars do not run as often. And therefore common prudence requires increased care on the part of the pedestrian in proportion to the dangers to be apprehended. In other words, the decisions in this state have kept step with the times. ⁴⁵⁸ This is the rationale of *Giardina v. St. Louis etc. R. R.*, 185 Mo. 330, 84 S. W. 928, and the principles there announced have been followed by this court ever since.

Plaintiff, however, cites the cases of *Riska v. Union Depot R. R.*, 180 Mo. 168, 79 S. W. 445, and *Eckhard v. St. Louis T. Co.*, 190 Mo. 593, 89 S. W. 602, as holding a different doctrine. But an examination of those cases clearly demonstrates that the contention is untenable. In *Riska v. Union*

Depot R. R., 180 Mo. 168, 79 S. W. 445, the conditions here presented were not shown to have existed. That was a plain case of a person stepping onto the track, without any obstruction, such as a car from which he had just alighted, preventing his seeing the approach of the car. There was no evidence to show whether the deceased in that case looked or listened before stepping onto the track. The car was running from fifteen to thirty miles an hour. The authorized rate of speed was ten miles an hour. The case went off entirely on the proposition that the car was being operated at an unlawful and dangerous rate of speed, and the presumption that the deceased listened and saw the car, but that he indulged the presumption, "as he had a right to do," that the car was not running at an unlawful rate of speed, and that he could cross the track in safety. That case is easily distinguishable from the case at bar, in that the plaintiff walked behind the rear of the car and was struck by a car coming in the opposite direction. But it was unlike the case at bar, in that the deceased had almost completely crossed the track, on which the car was coming that struck him—one more step would have put him in a place of safety—and the car that struck him was running at an unlawful rate of speed of from twenty to twenty-five miles an hour; and that the motorman saw the deceased when he was from thirty to fifty feet away from him; and upon the presumption that the deceased was exercising ordinary care, and that he had a right to presume that the railroad company would obey the ordinance, with reference to speed. The vigilant watch ordinance of St. Louis also figured ⁴⁵⁹ in the case. A recovery was sustained in that case on the ground of the unlawful rate of speed of the car, and the question of the contributory negligence of the deceased was held to be a proper question for the jury, because fair-minded men might reasonably differ as to whether or not it was exercising ordinary care for the deceased to attempt to cross the track, under the circumstances, upon the presumption that the car was not running at a higher rate of speed than the law authorized. Stress was also laid upon the fact that the deceased was not instantly struck upon stepping on or near the track, but that he had almost crossed the track before the collision occurred.

That case is very different from the case at bar, and does not support the contention here made that a person is not obliged, when passing along the rear of one car, to stop until that car moves far enough for him to see whether it is safe to attempt to cross the other track, if it is impossible for him to see while the car from which he has alighted obstructs his view, and likewise impossible for him to look around the end of the car from which he has alighted without getting so close to the other track as to be necessarily struck by an approaching car. The physical facts in this case, even under the most favorable view that can be taken of the plaintiff's testimony, show that he got so close to the north-bound track before looking to discover whether a car was approaching on that track as that a collision with that car was inevitable, and that there was either no necessity for him so to do, or that if there was such a necessity it was his duty to wait until the car from which he had alighted had moved far enough away to the south to enable him to see whether a car was approaching on the north track, and would have only been a matter of a second, for the evidence is that the north-bound car was then only half a car-length from the place of collision.

⁴⁶⁰ The plaintiff says that when he looked around the south-bound car he saw at once the north-bound car coming, and then "I turned back and the car struck me on my shoulder."

Conceding that there was only a space of ten inches between the passing cars, and that the plaintiff, therefore, had only that space in which to look for the approaching car, still he could have so looked without placing himself in such close proximity to the approaching car as to make it necessary for him to "turn back," or as to be struck on his shoulder by the approaching car.

Upon the case made, therefore, the conclusion is inevitable and irresistible that there is no essential difference between the case at bar and the Giardina case, and the prior decisions of this court applicable to facts like those here presented.

Even conceding that the defendant was guilty of all the negligence charged, nevertheless, under the unquestioned facts in this case, the plaintiff was guilty of contributory negligence, which bars his recovery.

The trial court, therefore, erred in overruling the demurrers to the evidence, and its judgment is reversed.

All concur.

A Person about to Cross the Track of a street railway is not under a duty to observe the same degree of watchfulness and care as when crossing a steam or commercial railroad: Marden v. Portsmouth etc. St. Ry., 100 Me. 41, 109 Am. St. Rep. 476, and cases cited in the cross-reference note thereto. It has recently been held that the negligence of a railroad corporation in failing to blow the whistle or ring the bell is excused by the negligence of a person about to cross in front of the train in failing to use his senses to discover danger: See Carlson v. Chicago etc. Ry. Co., 96 Minn. 504, ante, p. 655, and cases cited in the cross-reference note thereto.

HOBBS v. BOATRRIGHT.

[195 Mo. 693, 93 S. W. 934.]

AID OF PERSONS in Pari Materia.—The doctrine that the courts will not aid a plaintiff who is in *pari materia* with the defendant is not a rule of universal application. It is based on the principle that to give plaintiff relief in such a case would contravene public morals and impair the good of society. Therefore, the rule should not be applied in a case in which to withhold the relief would to a greater extent offend public morals. (pp. 711, 712.)

IN PARI DELICTO, Public Policy, What is.—The question of what is public policy in a given case is as broad as the question of what is fraud in a given case, and is addressed to the good common sense of the court. (p. 712.)

IN PARI DELICTO, Relief, When May be Granted.—There may be such an inequality of conditions between persons in *pari delicto* that relief may be given to the more innocent, if there are collateral and incidental circumstances attending the transaction and affecting the relations of the parties which render one of them comparatively free from fault, or where the courts intervene from motives of public policy. (p. 719.)

IN PARI DELICTO—Relief in Favor of a Plaintiff Who has been Entrapped by a Gang of Swindlers into Joining Them in a Supposed Scheme to Swindle Third Persons.—If an organized gang exists assuming to be an athletic club, but in fact devising fake contests, the result of which is agreed upon and known in advance, for the purpose of cheating the public, and representatives of such gang or club induce a third person to wager his money on a contest which they assure him is to result in a particular manner, when it has been arranged to result precisely the contrary, whereby the money so wagered by him is lost, public policy will permit the maintenance of an action in favor of such person to recover the money so lost. (p. 719.)

BANKS AND BANKING—Liability for Assisting in Swindling Operations.—If a bank and its officers, knowing that a gang of men are, and long have been, engaged in swindling through a series

of fake athletic contests, the result of which was arranged in advance, lent the gang the appearance of respectability that a banking institution affords, and allowed the bank to be used for the exchange and transmission of money, such bank is liable to a person swindled out of his money by such gang in one of such contests. (pp. 719, 720.)

EVIDENCE of Other Transactions, When Admissible.—In an action to recover money out of which the plaintiff is alleged to have been swindled by false athletic contests, the result of which has been arranged in advance, evidence of other transactions of like character in which the defendants had engaged previously to the one in question is admissible for the purpose of showing knowledge of the defendants of the methods and course of conduct on which the plaintiff relies for a recovery. (p. 721.)

EVIDENCE of Other Transactions, Though Subsequent to that in Question, May be Admitted where it tends to show knowledge of all the defendants of the character of the transaction, and throws light on their motives, and that after the plaintiff had been foully dealt with, defendants went on in their course of dealing and aided in victimizing others in the same manner. (pp. 721, 722.)

PLEADING—Action to Recover Money Obtained by a Fraudulent Scheme.—A complaint alleging that the defendants conspired to have what is called fake footraces run on which strangers were enticed to bet, and that the races were so arranged in advance that a stranger was sure to lose, no matter which of the racers he bet upon, that schemes to entice strangers were devised, and that plaintiff was caught in one of these schemes and inveigled into putting six thousand dollars into the hands of the defendant Boatright, as a stakeholder in what the plaintiff supposed was a race, with the result that the man he bet on, who was one of the conspirators, was beaten in the race, as it had previously been agreed between him and his co-conspirators he should be, so that plaintiff lost his money, and that the defendants Exchange Bank and J. P. S. aided and abetted the defendant B. and his gang in perpetrating the fraud, contains more allegations than is necessary to maintain an action for money lost at gambling, but is sufficient as disclosing a common-law right of action against defendants for obtaining the money of the plaintiff by a fraudulent scheme. (p. 722.)

BANKS AND BANKING—Liability for Acts of Cashier in Assisting a Scheme to Defraud.—If a person is cheated by a fraudulent scheme through the assistance of a cashier of a bank, he knowing of the scheme and that its object was to defraud, and the acts done by him being in the banking business, such as receiving money, opening an account, and rushing checks off for quick collection, he represents the bank, and renders it, as well as himself, liable. (p. 723.)

A. E. Spencer and W. R. Robertson, for the appellants.

H. W. Currey and McReynolds & Halliburton, for the respondent

714 VALLIANT, J. This is a suit to recover the sum of six thousand dollars which the plaintiff avers was obtained from him by defendants Boatright and others by means of a fraudulent scheme in which they were aided

and abetted by the defendants, the Exchange Bank and Stewart, its cashier.

The evidence shows that the plaintiff was enticed from his home in Oklahoma by the allurements of a scheme in which he was made to believe he would assist his tempters in obtaining money from other persons by means of inducing them to bet on a footrace to come off at Webb City, which race was to be so fraudulently conducted as to make it sure the other persons would lose. Plaintiff yielded to the temptation, went to Webb City, put up his money and lost, and then and there discovered that the supposed victims, in the defrauding of whom he was going to assist, were partners with his tempters in an organized gang of cheating gamblers; that this gang had been operating in this manner at Webb City for a considerable time, had victimized others in the same way, and that the bank and its officials had knowledge of the conduct of these men, connived at their nefarious schemes and assisted them in it, to the extent, at least, of allowing the bank to be used to give the appearance of respectability and responsibility to Boatright and the other members of the gang. The trial resulted in a judgment against Boatright and his associates, and also against the bank and its cashier, Stewart, who alone have appealed, and who are presumably the only ones out of whom the amount of the judgment could be realized.

715 1. The difficult question in the case is, Upon which side of this controversy should the law of public policy be applied? Plaintiff schemed with men, as he supposed, to defraud others; his only disappointment was that the men with whom he thought he was scheming had readily schemed to defraud him and they did fleece him to the sum of six thousand dollars. If we should now say to the plaintiff, you cannot recover because, although you did not accomplish what you intended, yet your purpose was to assist those men to defraud others, and therefore you are as guilty as any of them, we would by so saying allow the gang and their aiders and abettors to go free, retain the booty and set their traps again. The doctrine that courts will not aid a plaintiff who is in *pari delicto* with the defendant is not a rule of universal application; it is based on the principle that to give the plaintiff relief in such case would contravene public morals and impair the good of society; therefore, the rule should not be applied in a

case in which to withhold the relief would to a greater extent offend public morals. To promote the good of the public is the highest aim of the courts in the application of this doctrine. Under the head of exceptions to the rule in 9 Cyclopaedia, page 550, it is said: "Although the parties are in *pari delicto*, yet the court may interfere and grant relief at the suit of one of them where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with the defendant. But here the guilt of the parties is not considered as equal to the higher right of the public; and the guilty party to whom the relief is granted is simply the instrument by which the public is served." A question of what is public policy in a given case is as broad as a question of what is fraud in a given case and is addressed to the good common sense of the court.

In that view of the question it becomes proper for us to state a little more fully than we have above stated the facts which the evidence in this case discloses.

716 For several years prior to the date of the plaintiff's troubles there existed an organization in Webb City calling itself the Webb City Athletic Club, and professing to be composed of wealthy miners and other responsible business men in that vicinity who were fond of athletic sports and desired to give encouragement to such in a highminded way. That is what they said of themselves; in the community, however, they were generally called the "Buckfoot gang," and were understood as being engaged in promoting foot-races in which they arranged with the racers in advance of the race which one was to win. The reputation of the gang was such that bettors on the races could be obtained only from outside of that community, and in order to allure victims into their net emissaries were sent out who told seductive stories that appealed strongly to men to whom the hope of obtaining a dishonest gain with seeming immunity from punishment was a temptation. Two of these emissaries, Wasser and Fisher, found the plaintiff in his home in Oklahoma and told him their story, which in effect was that Wasser had been running races for this athletic club, had won many races and much money for the club, but had not been treated fairly by them, had not been given his fair proportion of the money won; that it was arranged between him and Fisher that they would be the competing

champions in a race to be run, the club men would, as usual, bet on Wasser, their favorite, and he would allow Fisher to beat him, and thus Wasser, who was a poor boy and had a father to take care of, would be enabled to get back from the unjust members of the club money that he had really earned, but which had been so unjustly withheld from him; that Mr. Boatright, who was the president of the club, knew of the scheme and would secretly aid them in accomplishing its purpose, but that he would have to act secretly lest the members of the club and the betting public would suspect something, therefore it was necessary to have an entire ⁷¹⁷ stranger who would be the ostensible bettor on Fisher. In the beginning the proposition contained no suggestion that the plaintiff would put up any money of his own on the race, but he was asked to bet only the money that would be given him by Boatright after he got to Webb City. Nevertheless it was adroitly suggested that it would give a much better air to the whole project if the plaintiff could carry with him a letter of credit from the bank in his home town to exhibit to a bank in Webb City and thus show that he was a man of substance at home. According to the testimony given by the plaintiff himself, he was not promised any share of the money to be won, but went into the scheme for pure benevolence for poor Wasser, whom, however, he had never seen before. Plaintiff's testimony would have been more candid if he had owned up to an agreement to share in the gains with Wasser, or had given a more plausible reason for taking the letter of credit with him. But the jury were doubtless right in giving credence to his story on the whole, making allowance for the natural reluctance of confessing one's own guilty motive.

The tempter came to the plaintiff on Friday and found him at first reluctant to take part in the fraudulent scheme, but the plaintiff, after holding the proposal in the balances between an inclination to do right and a temptation to do wrong until the following Monday morning, yielded and went to Webb City armed with his letter of credit.

They arrived in Joplin early in the morning, and after breakfast at the Hotel Fisher went with plaintiff to the park lying between Joplin and Webb City, where Wasser with Boatright met them. Boatright told the plaintiff the same story that Wasser had told him. Boatright gave plain-

tiff two thousand six hundred and fifty dollars, and instructed him to go to the Exchange Bank and deposit it, and show his letter of credit to the bank cashier, and then to go over to a barroom just across the street. Fisher went with plaintiff to point out to him the bank; plaintiff deposited ⁷¹⁸ the money Boatright had given him, showed his letter of credit and told the cashier he was having a little deal with the athletic club and Mr. Boatright; the cashier told him if he wanted any money on his letter of credit he could get it. He asked the cashier if Mr. Boatright was a reliable man and the cashier answered that he was. Then, according to the program Boatright had given him, he and Fisher went across the street to the barroom and, as instructed by Boatright, plaintiff asked the barkeeper, "Have you a sprint in town?" Whereupon the barkeeper answered yes, and called up Boatright and others and introduced them to the plaintiff—plaintiff and Boatright both acting as if they had not met before. The conversation then turned on the footrace and many men seemed anxious to bet on Wasser; they all went upstairs to what they called the clubroom and then and there was some fine acting, manifesting enthusiasm to bet, which enthusiasm was increased with some apparent intoxication; plaintiff crossed over to the bank, drew money, returned and put it up in Boatright's hands as stakeholder; the money so put up was quickly covered in sums of five hundred dollars or more by the apparently enthusiastic bettors on Wasser, and more money was needed by plaintiff to cover the demands; he went again to the bank and drew some of his own money and put it up and it was quickly covered. Then a seeming dispute arose by one man insisting that he had put up more money in the hands of Boatright as stakeholder than Boatright acknowledged, and insisted on a count of the money in the stakeholder's hands; the excitement appeared to be great; the plaintiff was given quietly to understand that in passing the money to and fro between the bank and Boatright, the stakeholder, some mistake had been made, and he was three thousand dollars short on stake money, and that the man demanding a count was a dangerous one to encounter when angry, that bloodshed was likely to ensue, and that in the affray all the money in the hands of the stakeholder would be ⁷¹⁹ taken; that the only safety was for the plaintiff to draw

three thousand dollars more of his own money and put it in Boatright's hand, who assured him positively that he would return it to him as soon as the race, which they had fixed to win, was over. The result was the plaintiff went again to the bank, told the cashier, "We got mixed over there and the boys were in trouble, and I would have to draw the other money. I said, 'Do you think those fellows are all right?' He says, 'Yes,' and we went to work and fixed up a draft." Plaintiff then drew three thousand dollars more of his own money, went back to the saloon and gave it to Boatright; then the storm subsided, they all went to the park, the race was run, and the man that plaintiff bet on was beaten. Plaintiff demanded his money of Boatright, but the latter said he was only a stakeholder, had no control of it, that he was a ruined man—had disgraced his old father and would have to leave the country. He told the plaintiff that there was one way in which he could get even; that was to go back to Oklahoma and find wealthy cattlemen there whom he could inveigle into the same trap in which he had been caught, and they would give him forty per cent of the booty, but plaintiff declined the proposal. Plaintiff got home the next evening and the following morning went to the bank on which he had drawn, in hopes to stop the payment of his checks, but it was too late; they had been forwarded immediately from Webb City, and were presented and paid the day before plaintiff arrived.

The evidence shows that this Buckfoot gang had been engaged in practices of this kind for years, and this bank and its cashier had allowed it to be used to the extent at least that it was used in this instance, giving the gang, to strangers, the appearance of being backed by a respectable financial institution. The testimony is quite voluminous in its history of these nefarious practices running through several years before this plaintiff was victimized, and it tends to show that in all the cases the defendant bank and its officers had ⁷²⁰ such connection with the transactions that they could not have helped knowing the nature of the practices and knowing that when the plaintiff presented his letter of credit and when he drew his checks he was going to be robbed of his money.

One of the cases growing out of these practices was tried in the United States circuit court, southwestern division

of Missouri, where the evidence on this point was practically the same as in the case before us: *Wright v. Stewart*, 130 Fed. 905. In that case Judge Phillips, in a summary of the evidence, shows the conduct of this gang for years in such a light as to make it a matter of astonishment that it could be tolerated for so long a period in a civilized community.

Coming back now to the law question in the case, and considering it in its application to the particular facts we are dealing with, does public policy require us to turn this plaintiff away because he was, in the single transaction in question, as guilty as the men who defrauded him? Will it contravene good morals or degrade the courts if we listen to this plaintiff with his confession of guilty purpose, and if, notwithstanding his guilt, we give judgment in his favor against this gang of bad men who had been preying upon the community for years and who by playing upon this man's cupidity had tempted him beyond his power to resist? Will we promote good morals to say to this gang and their friends and abettors, "You have so debauched and degraded your victim that the law will not touch him or hear his complaint; therefore you may go free, keep what you took from him, and look out for another victim"?

Before answering these questions we ought to consider the spirit rather than the letter of the law, and keep in view the purpose it was designed to accomplish. Whilst the principles on which this law is founded are never to be violated and the purpose of the law is never to be defeated, yet, in its application to the facts of a ⁷²¹ given case, courts are not circumscribed by inflexible rules, but exercise a large judicial discretion. The doctrine has several times been before this court and has been considered in that light.

In *Kitchen v. Greenabaum*, 61 Mo. 110, the plaintiff owned a lottery ticket which had drawn a prize of six hundred dollars, a fact known to defendant, but unknown to plaintiff; defendant deceived the plaintiff by telling him his ticket had not drawn that prize, and having induced the plaintiff to believe that his ticket was of little, if any, value, bought it of him for five dollars, and collected the six hundred dollar prize. The court held that the plaintiff could not recover because he was guilty himself of violating the law in buying the lottery ticket. In the opinion, after quoting the maxim, "*In pari delicto, potior est conditio de-*

fendentis et possidentis," as containing the law of the case, the court, per Sherwood, J., said that the maxim was not of universal application, and as an example of the exceptions he said: "Where the parties to the transaction, although concurring in the illegal act, are regarded as not equally guilty, in consequence of fraud, oppression, imposition or hardship, practiced by one party upon the other, thereby obtaining an unconscionable advantage. Under such circumstances, courts of equity have not hesitated to interfere in behalf of the less guilty party, and against the chief mover in the unlawful enterprise." The writer of that opinion then proceeds to say *arguendo* that the exceptions do not apply to a case involving moral turpitude, but only to an act *malum prohibitum*.

In *Green v. Corrigan*, 87 Mo. 359, plaintiff claiming to have been a partner of defendant in a certain contract with a waterworks company under which the works were built, sued to recover his share of the profits; it turned out in the evidence that the plaintiff was the attorney of the waterworks company, and was intrusted by his client to fix the price to be agreed on for ⁷²² the work, and without his client's knowledge made the contract with defendant for a share of the profits. There was a case of moral turpitude, yet the court held that the defendant was not equally guilty with the plaintiff, and therefore he was allowed to plead the illegality of the contract in his defense and thereby defeat the recovery.

What was said in the opinion in *Kitchen v. Greenabaum*, 61 Mo. 110, correctly expressed the law of that case, but what was there said in reference to the distinction between a transaction that was only *malum prohibitum* and one that was *malum in se* was not necessary to the decision because there was no question of that kind in the case.

In *Green v. Corrigan*, 87 Mo. 359, which, as we have seen, involved a transaction *malum in se* and in which the defendant was allowed to plead the illegal contract and escape liability on the ground that the plaintiff was more guilty than he, the decision in *Kitchen v. Greenabaum*, 61 Mo. 110, was referred to and approved; evidently, however, what was said in the former case apparently limiting the exception to the rule to acts *mala prohibita* was regarded as *obiter*.

There are other decisions of this court on this subject cited in the briefs (*Poston v. Balch*, 69 Mo. 115; *Williamson v. Baley*, 78 Mo. 636; *Sprague v. Rooney*, 104 Mo. 349, 16 S. W. 505; *Bell v. Campbell*, 123 Mo. 1, 45 Am. St. Rep. 505, 25 S. W. 359; *Haggerty v. St. Louis etc. Storage Co.*, 143 Mo. 238, 65 Am. St. Rep. 647, 44 S. W. 1114, 40 L. R. A. 151); but it would render this opinion too long to discuss them. In all of those decisions this court has treated the law of this subject on the principle that it is designed to promote public morals and the public good. Courts treat the less flexible statute of frauds as designed to prevent fraud and refuse to apply it when to do so would promote fraud. So with this rule of law; it should never be applied when to do so would be detrimental to public morals.

This is the view of the most distinguished law-writers. In 1 Story's *Equity Jurisprudence*, thirteenth edition, section 300, it is said: "And indeed in cases where both parties are in delicto, ⁷²³ concurring in an illegal act, it does not always follow that they stand in *pari delicto*; for there may be, and often are, very different degrees in their guilt. . . . And besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be." Was there ever a better opportunity for a court to punish the flagrantly guilty and set a wholesome example before the community than is afforded in this case? It may be difficult to apply the criminal law to such men, but sometimes requiring them by a civil suit to make good the losses that they have caused, or helped others to cause, is a better punishment than the prison affords.

In 2 Pomeroy's *Equity Jurisprudence*, third edition, section 940, after stating the general rule that no action arises, in law or in equity, from an illegal contract, the author says: "The rule has sometimes been laid down as though it were equally universal, that where the parties are in *pari delicto*, no affirmative relief of any kind will be given to one against the other. This doctrine, though true in the main, is subject to limitations and exceptions which it is the special object of the present inquiry to determine." Then in section 942 he says: "Lastly, when the contract is illegal, so that both parties are to some extent involved in

the illegality—in some degree affected with the unlawful taint—but are not in *pari delicto*—that is both have not with the same knowledge, willingness and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy. . . . Such an inequality of condition exists so that relief may be given to the more innocent party in two distinct classes of cases: 1. It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction, and ⁷²⁴ affecting the relations of the two parties, which render one of them comparatively free from fault.”

If the case at bar disclosed but one transaction, if we should shut our eyes to the other transactions of like character that distinguished the history of this Buckfoot gang, if our whole attention was confined to the scheme entered into by the plaintiff with Wasser and Fisher in Oklahoma and the denouement at Webb City, we could not say that one was less guilty than the other; it was a scheme of dishonest purpose and there is no justification or palliation of it, and if there was nothing else in the case to make the offense of one more enormous than the other, we would not listen for a moment to the plaintiff's prayer for relief, and if we do listen to him and grant him what he asks, it is not through any consideration of wrongs suffered by him, but in tender consideration for the welfare of that community whose laws have been defied, and whose public morals have been shocked by this gang of bad men and to bring them to the bar of justice.

The learned law-writer whose text we have last above quoted, in section 941, says: “To the foregoing rules there is an important limitation. Even where the contracting parties are in *pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him.” In the case before us we hold that public policy is advanced by allowing the plaintiff to recover the money of which he was defrauded.

2. There is no evidence that Boatright or any of his gang divided the money obtained from the plaintiff with

bank or its officers. If such was the fact it would, in the very nature of the case, be out of the power of the plaintiff to prove it. But the evidence tends to show that the officers of the bank knew the business ⁷²⁵ these men were engaged in, knew their methods of enticing strangers into their net and fleecing them, yet, knowing all this, lent to the gang the appearance of respectability that the backing of a banking institution afforded. With this knowledge they allowed their bank to be used to effect the exchange and transference of money. If they got nothing more out of it than the exchange and the incidental bank use of the deposits, they assisted bad men to do a bad deed for a small consideration.

We attach no importance to the fact that the cashier assured the plaintiff that Boatright and his associates were honorable men; because before the plaintiff went to the bank he knew from the transaction he himself had had with these men and the scheme they had entered into with him that they were dishonest men, and therefore the banker could only enlighten him as to their financial ability, unless perchance his inquiry was to learn if they possessed that quality which the learned counsel for appellant in their brief designate as "honor among thieves," a quality which the law does not recognize. It is not, therefore, on the theory the plaintiff trusted in the assurance given him by the cashier that these men were worthy of confidence, but because of the actual aid the bank, with knowledge of the facts, rendered this gang in fleecing the plaintiff.

3. There were a number of other similar transactions that had previously occurred in which the evidence tended to show that the bank allowed itself to be used to aid these men and of which it was notified by the victims as soon as they realized the fraud, which unfortunately for them, as it was also for this victim, owing to the expedition with which the checks had been forwarded by the bank for collection, was just too late to stop payment of the checks. It is urged for appellants that the introduction of evidence relating to other previous transactions of like character was erroneous. ⁷²⁶ That testimony bore directly on the issue respecting the knowledge of the bank officers of the methods and course of conduct of these men, and it points to the fact that when the bank cashed the plaintiff's checks, gave him the money and rushed the checks off for collection, its cashier knew,

or had every reason to believe, that that was then presently going to occur which directly afterward in fact did occur.

Some of the other similar transactions shown in the evidence occurred after the one in question in this case, and it was insisted that because they were of subsequent occurrence it was error to receive the evidence. There is some plausibility in that objection, but the evidence as affecting the issues in this case is not to be condemned as illegal by reason of what this court said in *State v. Boatright*, 182 Mo. 33, 81 S. W. 450, on which appellant relies. In that case Boatright, Ellis and Brumley, three of the gang, together with Stewart, the cashier of the bank, were indicted for grand larceny; a severance and change of venue were granted, Boatright, Ellis and Brumley's case was sent to Lawrence county, and Stewart's to Barton county. The three former were convicted and sentenced to a term in the penitentiary and the cause came here on their appeal. The evidence showed that the injured man in that case had voluntarily deposited the money in the bank. This court said: "The first and most serious difficulty we encounter on this record is whether there was any evidence of a taking and asportation by these three defendants of the money alleged to have been deposited by Griffith with Stewart, or the bank of which he was cashier." Then the court said that since Griffith voluntarily deposited the money in the bank there was no trespass, and that there was no evidence that the bank's possession was changed by turning the money over to these three defendants. So it was as bearing on the question of the taking and carrying away by the three ⁷²⁷ defendants of the money deposited in the bank that this court held that the evidence of other transactions of similar character was not admissible, but we have no such narrow issue here. Here the charge is that Boatright and his associates obtained the plaintiff's money by fraud, and that the bank and its cashier aided them. Evidence of similar transactions preceeding and following the one in suit in such regular course as to show a concerted plan and an established scheme to inveigle and defraud the unwary is competent, because it tends to show the unlawful association and the fraudulent course of business. And in this case it tends to show that the bank through its officers knew the character of transactions their codefendants were practicing, and it throws light on their

motive and their plea of innocent banking in this transaction when it shows that after they knew that this plaintiff had been foully dealt with they went on in an even course dealing with these men and aiding them to victimize others in the same way. The testimony also bears on the question of public policy which we have above discussed. In the brief for respondent will be found a collection of authorities which sustain the ruling of the trial court in admitting this evidence.

4. There is a good deal of discussion in the briefs as to the name to be given to the cause of action stated in the petition, whether we should call it a suit under section 3424 of the Revised Statutes of 1899, to recover money lost in gambling, or one at common law for money obtained through fraud and deceit, or money obtained by defendants in the perpetration of a crime under section 2390 of the Revised Statutes of 1899.

The petition states in substance that the defendants Boatright and others had, prior to the grievance complained of, conspired to have what it calls fake footraces run at Webb City, on which strangers were enticed to bet, and that the races were so fixed in advance ⁷²⁸ that whichever one of the racers a stranger should bet on was sure to lose, that schemes to entice strangers were devised, and that plaintiff was caught in one of these schemes and inveigled into putting six thousand dollars into the hands of Boatright as stakeholder on what plaintiff supposed was a race, with the result that the man he bet on, who was one of the conspirators, was beaten in the race, as it was previously agreed between him and his co-conspirators he would be, and so plaintiff lost his money, and that the defendants, the Exchange Bank and J. P. Stewart, aided and abetted Boatright and his gang in perpetrating the fraud.

If the petition was intended to state a cause of action under section 3424 as for money lost at gambling, there is a good deal more of it than necessary. Fraud or unfairness in the game is not essential to the right of action given by that statute; and, on the other hand, if there was no such statute, the petition states a right of action at common law—that is, that defendants Boatright and others obtained the plaintiff's money by a fraudulent scheme in which they were assisted by the bank and its cashier Stewart. That is what the petition means.

5. Appellants contend that since the case was submitted to the jury on the theory that it was an action for fraud and deceit, the bank and its cashier cannot be held on the evidence tending to show that they represented to the plaintiff that Boatright and his associates were honorable men and worthy of trust, because they say the plaintiff knew to the contrary, and therefore could not have been misled thereby to his disadvantage.

We have already said that we attach no importance to that evidence, and it is not on that theory that we hold appellants liable, but because the evidence tends to show that they lent their influence and gave material ⁷²⁰ aid to assist Boatright and the others in doing what they did, well knowing their scheme. If that is so, then they are liable as participating in the fraud committed by Boatright and his crew.

6. Appellants complain that the instructions given at the request of the plaintiff assume that whatever defendant Stewart, the cashier, did, rendered not only himself but the bank also liable.

The instructions are to the effect that, if the plaintiff was defrauded, in the manner hereinbefore indicated, by Boatright and the others, and the cashier of the bank knew their scheme and assisted them in the manner indicated to operate it, he and the bank were both liable. There is nothing wrong in the instructions in that respect. The aid given, according to the evidence, was the aid of the bank; it was banking business, first receiving the money which Boatright gave plaintiff with which to open the account, then cashing the checks covering not only that money but also six thousand dollars of plaintiff's money besides, and rushing the checks off for quick collection, knowing all the while, as the evidence tended to show and as the instructions required the jury to believe before they could hold appellants liable, that plaintiff was putting his money into the hands of men who were deceiving him. In that matter defendant Stewart acted *ex officio*; he was *pro hac vice* the bank, and whilst he cannot take refuge in the corporation to avoid his own personal liability, yet his act was the act of the bank, and it, too, is liable: *National Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750. We are not now dealing with a bank where there are innocent stockholders to suffer; this bank was owned and

managed by the three Stewarts, two brothers and a cousin, and if the plaintiff's testimony is true, they all had knowledge of the Buckfoot gang and their practices.

⁷³⁰ We have been favored with very able briefs by the learned counsel on both sides of this controversy, and we are tempted to refer to many of the cases cited and discuss them, but it would make this opinion too long.

We find no error in the record. The judgment is affirmed.

All concur.

THE RULE OF PARI DELICTO.

I. In General, 724.

II. Where Fault not Equal.

a. Where the Transaction Violates a Rule Made for the Protection of One Party, 727.

b. Where Undue Influence is Exercised, 728.

c. Relations of Trust and Confidence, 729.

III. Collateral Illegality.

a. In General, 731.

b. Agents, 732.

c. Partners, 733.

d. Stakeholders, 734.

IV. Public Policy, 735.

I. In General.

Where the parties to an unlawful contract or enterprise engage in it with equal knowledge and equal willingness and the same fraudulent intent, and the contract or enterprise has been executed (*Anderson's Admr. v. Merideth*, 82 Ky. 564), no party to it will be given any relief in a court of justice in respect to any matter directly connected with it, either to recover back money or other property paid or given under it, or to reform a deed or other writing, or to collect damages for any breach of it, but such court will leave them where it finds them: *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614; *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368; *White v. Franklin Bank*, 22 Pick. 181; *Bowditch v. New England Mut. Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798; *Kitchen v. Greenabaum*, 61 Mo. 110; *Ellicott v. Chamberlain*, 38 N. J. Eq. 604, 48 Am. Rep. 327, affirming 37 N. J. Eq. 470; *Ford v. Harrington*, 16 N. Y. 285; *Free-love v. Cole*, 41 Barb. 318; *Farrow v. Holland Trust Co.*, 74 Hun, 585, 26 N. Y. Supp. 502; *Phillips v. Thorp*, 10 Or. 494; *Stewart v. Parnell*, 147 Pa. 523, 23 Atl. 838; *Hukill v. Yoder*, 189 Pa. 233, 42 Atl. 122; *Bearden v. Jones* (Tenn. Ch.), 48 S. W. 88; *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805, reversing (Tex. Civ. App.), 30 S. W. 64, 726. Thus a bill filed by an administrator of a decedent to recover certain stock that decedent had given the defendant in consideration of her living with him as his mistress, is properly dismissed with costs: *Brindley v. Lawton*, 53 N. J. Eq. 259, 31 Atl. 394. And a court of

equity will not order a note and the assignment thereof, such note having been given in settlement of a gambling transaction on the board of trade, to be delivered up and canceled at the instance of the maker, but will leave the parties where it found them: *Smith v. Kammerer*, 152 Pa. 98, 25 Atl. 165.

Likewise where an unlawful contract is executed only on one side, a court of justice will not entertain an action to enforce it against the other party: *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Jones' Admr. v. Jenkins*, 83 Ky. 391; *Ellicott v. Chamberlain*, 38 N. J. Eq. 604, 48 Am. Rep. 327, affirming 37 N. J. Eq. 470; *Gilliam v. Brown*, 43 Miss. 641; *Crosier v. Acer*, 7 Paige, 137.

In explanation of this rule of *pari delicto*, the court, in *Phillips v. Thorp*, 10 Or. 494, said: "When the defense, as in this case, is illegality, it is allowed upon grounds of public policy, and not out of any regard for the rights or interests of the objecting party. Although it may be unjust between the parties, when one is in the enjoyment of the fruits of the agreement, to set up the illegality, the law sustains it out of consideration for the interests and welfare of society. It may be, as argued, that the objection comes with a bad grace from him who has reaped the benefit of the agreement, but on this subject, in *Holman v. Johnson*, Cowp. 341, Lord Mansfield said: 'The objection that a contract is immoral or illegal as between plaintiffs and defendants sounds at all times very ill in the mouth of the latter. It is not for his sake, however, the objection is allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice between defendant and plaintiff—by accident, if I may say so. The principle of public policy is, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' "

In explanation of certain decisions which apparently override this principle, the court, in *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805, says: "We are not unmindful of the fact that there are cases holding that money paid on, or collaterals delivered as security for, gaming debts, may be recovered, but we think it will be found that these cases do not conflict with the principles announced above, but are based upon statutes declaring void any notes given, or transfers made, of collaterals to secure gaming debts; some of the statutes have gone so far in attempting to suppress gaming as to provide for a recovery in such cases. . . . In so far as these cases may appear to be based upon the proposition that a court of equity, independent of statute, has any more power to allow a recovery in gaming cases than it has in other unlawful transactions where the parties are in *pari delicto*, we do not think they are based upon sound reasoning."

The foregoing points, in addition to the cases above cited, have also been sustained by very many other decisions, among which might be mentioned *Patten v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Thorn-*

hill v. O'Rear, 108 Ala. 299, 19 South. 382, 31 L. R. A. 792; Edwards v. Randle, 63 Ark. 318, 58 Am. St. Rep. 108, 38 S. W. 343, 36 L. R. A. 174; Branham v. Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213; Wallace v. Cannon, 38 Ga. 199, 95 Am. Dec. 385; Garrison v. Burns, 98 Ga. 762, 26 S. E. 471; Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147; Gunderson v. Richardson, 56 Iowa, 56, 41 Am. Rep. 81, 8 N. W. 683; Smith v. Richmond, 114 Ky. 303, 102 Am. St. Rep. 283, 70 S. W. 846, 24 Ky. Law Rep. 1117; Jameson v. Carpenter, 68 N. H. 62, 36 Atl. 554; Hope v. Linden Park Blood Horse Assn., 58 N. J. L. 627, 55 Am. St. Rep. 614, 34 Atl. 1070; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Dixon v. Olmstead, 9 Vt. 310, 31 Am. Dec. 629; Buck v. Albee, 26 Vt. 184, 62 Am. Dec. 564.

But where an unlawful contract or enterprise remains unexecuted so far as the unlawful acts contemplated thereby are concerned, a court of justice will uphold a rescission and enforce a recovery of money or other property already transferred thereunder. In Tyler v. Carlisle, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356, the court, referring to a case of an action brought to recover money loaned for the express purpose of promoting the design of the borrower to use it in gambling, but not actually used for illegal purposes, said: "In minor offenses, the locus penitentie continues until the money had been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract, or the illegal purpose has not been put in operation. The lender can cease his own criminal design, and reclaim his money. 'The reason is . . . the plaintiff's claim is not to enforce but to repudiate an illegal contract.' . . . The object of the law is to protect the public—not the parties. 'It best comports with public policy to arrest the illegal transaction before it is consummated.' " In Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98, where a principal sued to recover money he deposited with his agents to purchase futures, but which was not used for that purpose, the court said: "The agents cannot set up the illegal contract, because they made it and got a consideration for using the money illegally, and are particeps criminis. Just as if it had been necessary for the plaintiff—the principal—to use the illegal contract to recover the money, which would have been necessary had he sued for the profits of the venture; so it is illegal for the agents to use it to defend the suits for money they have belonging to the principal." And in Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203, the court held that where a party has advanced money upon an undertaking or agreement to do an act that is illegal, immoral, or against public policy, at any time before the wrongful act is done, and while the agreement or undertaking remains wholly unexecuted, but not thereafter, he may rescind the contract, prevent the act from being done, and recover back.

Where a contract is neither *malum in se* nor *malum prohibitum*, but merely *ultra vires* (being beyond the power of the corporation which was a party to it), the parties cannot be said to be in *pari delicto*, for, in the proper sense of the word, there is no *delictum*, and the principle of *pari delicto* does not apply: *Maryland Hospital v. Foreman*, 29 Md. 524.

II. Where Fault not Equal.

a. **Where the Transaction Violates a Rule Made for the Protection of One Party.**—In many cases of illegal contracts or transactions, however, the parties are not deemed to be in equal fault, since there are degrees of crime and wrong, and in such cases the courts will give relief as against the more guilty party: *Roman v. Mali*, 42 Md. 513; *Freelove v. Cole*, 41 Barb. 318, affirmed in 41 N. Y. 619. Also, *Pullman Palace Car Co. v. Central Transp. Co.*, 65 Fed. 158; *Harper v. Harper*, 85 Ky. 160, 7 Am. St. Rep. 583, 3 S. W. 5, 8 Ky. Law Rep. 820; *White v. Franklin Bank*, 22 Pick. 181; *Kitchen v. Greenabaum*, 61 Mo. 110. This limitation on the rule of *pari delicto* applies in all cases where the mind of one of the actors in the fraud exercises an undue dominion over that of the other: *Anderson's Admr. v. Merideth*, 82 Ky. 564. Where the transaction is in violation of a law made for the protection of one party against the acts of the other, they are not equally guilty, and the party protected may recover: *Scotten v. State*, 51 Ind. 52; *Gray v. Roberts*, 2 A. K. Marsh. 208, 12 Am. Dec. 383. In *Ferguson v. Sutphen*, 8 Ill. 547, the court says: "A statute may declare a contract to be void, and still but one of the parties be guilty of its violation. Enactments of this character are often made for the purpose of protecting one class of men from the oppression and imposition of another class of men; and in such cases the really guilty party is never allowed any relief under the statute, or permitted to set up the statute as a defense to relief sought by the other party. Such is the case with all laws which declare usurious contracts to be null and void. The lender is never allowed to take advantage of the statute, because he is the guilty party; the borrower may do so, because he is not a *particeps criminis*. He is regarded as the victim of the usurer, and not in *pari delicto*. This principle applies to every contract declared to be void by the statute, in the making of which but one of the parties is in *pari delicto*": See, also, *Miller v. Davidson*, 8 Ill. 518, 44 Am. Dec. 715.

Thus the Kansas statute providing that a vendor of letters patent must make and file a certain affidavit of the genuineness of the letters, otherwise the sale is void, is for the benefit of the vendee, and in cases of failure to comply with the statute, the vendee is not in *pari delicto* with the vendor, and is not barred from maintaining an action to set aside the purchase and recover the consideration: *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76, 41 L. R. A. 548. Where a druggist contracted to sell his entire stock in which was included certain intoxicating liquors, and the pur-

chaser paid some money on account but did not have a druggist's permit, by reason of which fact it was unlawful for the vendor to sell liquors to him in bulk, and the statute penalized the vendor for such a sale, but not the purchaser, the parties are not in equal fault, and the purchaser may recover back the consideration from the vendor: *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614. Under the Kentucky act of 1769 against lotteries, the penalty being denounced only against those who set up the lottery, a person may recover the sum paid by him as the purchase price of a lottery ticket: *Gray v. Roberts*, 2 A. K. Marsh. 208, 12 Am. Dec. 383. Under Revised Statutes of the United States, section 5485, making it a misdemeanor for an agent or attorney to receive more than a certain fee for prosecuting a claim for pension or bounty land, where an attorney enters into a contract with a client for a larger fee than so allowed and actually collects the same, the client may recover the excess of the fee from the agent by suit: *Smart v. White*, 73 Me. 332, 40 Am. Rep. 356. Where the statute of Maryland prohibited a bank from lending its funds to a director, and prescribed a penalty against a director violating this prohibition, and the bank did in fact lend money to a director, taking certain lands as security, the bank is entitled to resort to this security as against the creditors of the director: *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211. And where a Massachusetts statute made it unlawful for a bank to make any contract for the payment of money at a certain future day with interest, a person paying money to the bank and receiving such contract may recover the money back: *White v. Franklin Bank*, 22 Pick. 181.

In some decisions, however, the court holds that where there is moral turpitude on both sides, a court of justice will not undertake to ascertain the relative guilt of the parties: *Pullman Palace Car Co. v. Central Transp. Co.*, 65 Fed. 158; *White v. Franklin Bank*, 22 Pick. 181; *Kitchen v. Greenabaum*, 61 Mo. 110.

b. Where Undue Influence is Exercised.—The doctrine that the parties to an illegal transaction are not in *pari delicto* and that the less guilty may recover, is especially applicable where, although the parties concur in the illegal act, some fraud, duress, oppression, imposition, or undue influence is practiced by one party upon the other so that it appears that the guilt of the latter is subordinate to that of the former: *Roman v. Mali*, 42 Md. 513; *Kitchen v. Greenabaum*, 61 Mo. 110. In *Davidson v. Carter*, 55 Iowa, 117, 7 N. W. 466, where a stronger mind took advantage of a weaker, and by persuasion and influence procured the weaker to enter into an unlawful transaction, the court held that in such case "the wrong then rests chiefly, if not solely, on the person by whom it was contrived, and his confederate is regarded as the mere instrument for accomplishing an end not his own. If a party should be allowed immunity under such circumstances, he would be permitted to take advantage of his own wrong and reap a benefit from his fraud." So, where

the surety on a bail bond worked on the fears of the person bailed, and induced him to believe that if he did not flee the country he would be placed in jail and perhaps ultimately sent to the penitentiary, and the person bailed deeded certain land to the surety and absconded, but the surety was not required to pay over the bail money, and afterward, the charges being dismissed, the fugitive returned, in a suit by him to recover the property, a defense that the parties were in *pari delicto*, in that the transfer of the land was made with a view to assist the person bailed to flee from justice, is not well taken: *Baehr v. Wolf*, 59 Ill. 470.

c. Relations of Trust and Confidence.—The existence or nonexistence of confidential relations between the parties in fault is a strong element in determining whether or not they are in *pari delicto*. In *Harper v. Harper*, 85 Ky. 160, 7 Am. St. Rep. 583, 3 S. W. 5, 8 Ky. Law Rep. 820, where a conveyance of her property by a mother to her son in fraud of her supposed creditors who did not really exist was set aside, the court said: "When a relation of trust and confidence exists, the party in whom it is reposed, and who has obtained a benefit, should show an undoubted right to it. The onus is upon him to make it appear that the transaction was fair and proper; and relief will not be denied to the one least in fault, if he has been led into it in violation of confidence and by exciting false alarms or fear of legal consequences. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threats upon the one side, and confidence or weakness upon the other, equity will grant relief to the latter. Even if the party had sufficient capacity to contract, yet if, through trusting confidence, the other has led him into the illegal act, and then imposed upon him, such relief will not be refused." To the same effect, see *Anderson's Admr. v. Merideth*, 82 Ky. 564. And in *Barnes v. Brown*, 32 Mich. 146, the court said that "relief will not be denied to the party least in fault against one who had led her into the act by a violation of confidence."

Likewise where a husband, in separating from his wife, gave her a sum of money and received from her a discharge of all claims against him for alimony or otherwise, and subsequently the wife brought suit for divorce wherein her attorneys, without knowledge of this agreement, and without authorization from her, inserted a demand for alimony and costs, and the husband, being alarmed at this demand, requested a supposed friend to intercede with his wife, but the friend, instead, advised the wife to insist on the demand, and, notwithstanding her refusal to do so, reported to the husband that the wife would insist on the demand and caused the husband to transfer his property to him to avoid such claim, in an action by the husband to set aside such transfer the supposed friend cannot resist it on the ground that they were in *pari delicto*: *Poston v. Balch*, 69 Mo. 115.

Indeed, in New York the court of appeals has held that the defense of *pari delicto* cannot be interposed by an attorney at law in a suit against him by a client of his: *Ford v. Harrington*, 16 N. Y. 285, *Johnson, J.*, dissenting; *Freelove v. Cole*, 41 Barb. 318, affirmed 41 N. Y. 619. For, as said in *Ford v. Harrington*, 16 N. Y. 285: "If an attorney will so far forget or willfully disregard his duty to the courts, whose license to practice he holds, to his clients, who in consequence of such license are induced to seek and act upon his counsel, and to the public, as for the purpose of gain and profit to himself, to induce by his advice the commission of fraud by those who thus confide in him, he at least should be compelled to restore to his victim the fruits of his iniquity. It would be a reproach to our judicial tribunals should they allow their officers, those appointed by them as their assistants in the administering of justice and equity, thus to acquire property by a prostitution of the trust so confided in them, and then to interpose the fraud committed pursuant to their advice as such officers, as a shield to protect them in the possession and enjoyment of that property." And in Mississippi this doctrine has been enlarged to cover the cases of all trustees, the court saying: "It may be safely asserted that it will be of far greater protection to the public, that one occupying the relation of guardian, trustee, executor, or administrator, shall in all cases be compelled to return any property or profit secured by his frauds from those whose interests he is bound to protect than to permit him, under any circumstances, to shelter himself behind the plea that those defrauded by him were themselves guilty of an equal wrong": *O'Conner v. Ward*, 60 Miss. 1025. Moreover, in Massachusetts the court relieved a client from a champertous agreement made with his attorney for the payment of a contingent fee amounting to one-half the net proceeds of the litigation: *Belding v. Smythe*, 138 Mass. 530. In other jurisdictions, however, the courts hold that the mere existence between wrongdoers of the relation of attorney and client does not of itself alone afford any sufficient ground for allowing a recovery by the client against the attorney in disregard of the rule of *pari delicto*: *Schermerhorn v. De Chambrun*, 64 Fed. 195, 12 C. C. A. 81; *Roman v. Mali*, 42 Md. 513. For by authorizing a recovery in every case attorneys would form a special class from which assignees would be sought in all cases where parties desired to cheat or defraud their creditors by the assignment of their property. The general rule by which all relief is withheld might deter a party from conveying his property to an unprofessional person, but under the exception to that general rule sought to be established in this case, if an unprincipled and fraudulent attorney could be found, the party could deal with him with impunity, being secure in the full protection of all the remedies administered by the courts for the restoration of the property after the fraudulent object had been accomplished: *Roman v. Mali*, 42 Md. 513.

III. Collateral Illegality.

a. **In General.**—Although the parties to an action have been engaged in a transaction either *malum in se* or prohibited by law, yet if the cause of action between them is disconnected with the illegal act and is founded upon a distinct and collateral consideration, and the plaintiff is not obliged to resort to the illegal contract or transaction in order to maintain the suit, the illegality of the former transaction will not impair, nor bar the right to maintain, the present suit: *Liverpool & London & Globe Ins. Co. v. Clunie*, 88 Fed. 160; *Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *State v. Baltimore etc. R. Co.*, 34 Md. 344. Thus in a suit to set aside the settlement of an account on the ground of usury and undue influence, and breach of confidence, where it appears that plaintiff had given in the settlement a mortgage, his wife's signature to which was obtained by coercion, that fact will not bar plaintiff's right to relief: *Bateman v. Fargason*, 4 Fed. 32, 2 Flipp. 660. Likewise "money received by a third person not a party to an illegal transaction may be recovered back before it is paid over, as money had and received to the plaintiff's use": *Wheeler v. Spencer*, 15 Conn. 28. And where a plaintiff loans money to another with the knowledge that it is to be used in gaming, and it is so used, but the plaintiff does not loan it for the express purpose of promoting the illegal design of the borrower, but merely to accommodate him as a man, he may recover it: *Tyler v. Carlisle*, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356. So where a peddler put up at an inn, and his wagon and goods were put in the innkeeper's stable and certain goods were stolen therefrom during the night, the fact that the peddler was unlawfully peddling without a license is no defense to the action for their loss: *Cohen v. Manuel*, 91 Me. 274, 64 Am. St. Rep. 225, 39 Atl. 1030, 40 L. R. A. 491. In an action by a husband for divorce for an adultery committed by his wife in March, 1885, the fact that in January, 1886, the husband procured another to lure his wife into a further act of adultery will not defeat his action: *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424. And where a creditor of an estate of a decedent, representing it to be hopelessly insolvent, buys from one of the heirs his distributive share, ostensibly as an act of charity, but in reality under agreement with another of the heirs in whose behalf he purchased it, well knowing its very considerable value, in an action by the vendor to set aside such sale as fraudulent, the fact that he acquiesced in the proposition of the latter heir to suppress certain assets of the estate in order to keep them from the creditors will not defeat his recovery: *Wright v. Wright*, 51 N. J. Eq. 475, 26 Atl. 166.

The rule of collateral illegality has also been expressed in another shape, in *Yarborough's Admr. v. Avant*, 66 Ala. 526, as follows: "The test by which to ascertain whether a contract, assailed as illegal, is capable of enforcement, is, whether the plaintiff re-

quires the aid of the illegal transaction to support his case. When his rights can be established without the aid of the illegal transaction, it does not affect them." To the same effect, *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203. In *Hinnen v. Newman*, 35 Kan. 709, 12 Pac. 144, where a person confederated with an auctioneer at an executor's sale to buy in the property for the auctioneer, and the property passed into the possession of the auctioneer, the confederate sued to recover it from him, and the court held the plaintiff in *pari delicto* with the auctioneer and not entitled to recover, the court threw some doubt on the efficacy of this test of collateral illegality, but it is not apparent how, in any view of the matter, the illegality could be deemed collateral in this case. In *Beer v. Landman*, 88 Tex. 450, 31 S. W. 805, reversing (Civ. App.), 30 S. W. 64, 726, the court applied this test, stating in substance that where a person gives a firm a note secured by collaterals in settlement of a balance due on a gaming transaction, if such person were to sue in a court of law for the possession of the collaterals, and the firm were to answer that the legal title and special interest therein had been vested in them by the indorsement to secure an indebtedness, such answer would be a complete defense to the suit, without setting up any facts implicating the firm in the unlawful transaction. Thus the defense would not be based upon the illegality. In order to avoid the defense plaintiff would be compelled to urge and rely upon his own participation in the unlawful transaction, thus bringing himself within the rule prohibiting his recovery.

In *Johnston v. Smith's Admr.*, 70 Ala. 108, the court clearly states the rule of collateral illegality in its different phases: "When a party plaintiff can establish his cause of action without the necessity of proving or relying upon an illegal agreement in any way connected with it, he cannot be defeated by the plea of illegality, because the connection is then too remote for the one to be affected by the vice of the other." "If an attorney, for example, should make a champertous agreement with his client, to receive as a fee half the amount he might recover on a promissory note due him by a defendant for borrowed money, it would come with poor grace from the latter that he should be exonerated from paying anything on the note because of such illegal agreement between the payee and a third person."

b. Agents.—In a number of states the courts sustain the right of a principal to recover moneys from his agent received by the agent in the execution of an illegal business for the principal. For, as said in *State v. Baltimore etc. R. Co.*, 34 Md. 344, quoting *Paley on Agency*, 28 L. Lib. 62, "though the law would not have assisted the principal, by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet when the contract is at an end, the agent, whose liability arises solely from having re-

ceived the money for another's use, can have no pretense to retain it." And in *Willson v. Owen*, 30 Mich. 474, the court adds: "It is true that the trials of speed for money at the horse fair and the selling of pools under the auspices of the association were illegal; but there is no illegality in the promise, express or implied, of the defendant, to pay over to the plaintiffs the moneys received for them from whatever source derived, or from whatever transactions springing." Thus in an action by a club to recover moneys belonging to it and in the hands of its treasurer, where plaintiff can recover on showing the balance in the defendant's hands, and that he had promises to pay plaintiff on a week day, the fact that defendant collected the moneys on a Sunday in contravention of the Sunday law cannot be interposed as a defense to a recovery: *Haacke v. Knights of Liberty Social etc. Club*, 76 Md. 429, 25 Atl. 422. And where plaintiff, through his agent, during the Civil War sold goods to Confederates, plaintiff being a Northerner, and his agent received the proceeds of the sale, plaintiff is entitled to recover them from such agent: *Gilliam v. Brown*, 43 Miss. 641.

In other jurisdictions, however, the court has refused the principal a recovery from his agent. In *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829, the court holds: "The rule is that when persons enter into an illegal contract, and one of them receives the profits or other advantages arising therefrom, the courts will not compel him to account therefor, as in such case the right of the other to a share therein, or to the whole of it, if such were the agreement, would have to be based upon the illegal contract, and to permit him to recover it would be, in reality, an enforcement of the illegal scheme." In *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98, the same conclusion was reached.

In Indiana, in *Daniels v. Barney*, 22 Ind. 207, the court draws a distinction, not found in the other cases, holding that where an agent has received money for his principal on an illegal transaction, the illegality is not a defense to the duty of the agent to pay it over—provided that the agent did not engage in the illegal transaction under order of the principal, in which case the principal cannot recover against the agent or his sureties.

c. Partners.—A difference of opinion as to the right of a partner to recover from his copartner his share of the proceeds of an unlawful venture, similar to that prevailing in case of principals and agents, is disclosed by the cases.

The right of a partner or association to recover is supported by some decisions: *Gilliam v. Brown*, 43 Miss. 641; *Andrews v. New Orleans Brewing Assn.*, 74 Miss. 362, 60 Am. St. Rep. 509, 20 South. 837. So where the superintendent of a boom company became a member of a partnership that entered into a contract with the boom company to do certain work for it, the fact that it was a constructive fraud against the boom company for the superintendent to engage in such other business is no defense in an action by

him against one of his partners to compel a division of profits: *Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172.

In other jurisdictions, however, it is held that a court of justice will not lend its aid in the division of the profits of an illegal transaction between associates. Thus where a number of persons associated in an illegal combination in restraint of trade, and certain profits accrued thereunder, a court of equity will not, the contract having been executed, require an accounting: *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171. And a bill in equity cannot be sustained by one of the parties to a contract for illegal trading with inhabitants of states in insurrection against the United States government, against another party to such contract, for an accounting of resulting profits: *Snell v. Dwight*, 120 Mass. 9. Likewise where three persons enter into a partnership to buy and race a racehorse, and by fraudulent representations to cause another to race his horse against theirs on a wager, which he does, losing his wager, and one of the partners pockets all the gain, the other two cannot maintain a suit against him for contribution: *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158.

d. Stakeholders.—Where money deposited with a stakeholder on an illegal wager has not been paid over by the stakeholder, although it has been lost by the happening of the event, upon notice and demand, the stakeholder is liable to the loser for the amount by him deposited. And before the ascertainment of the result either party may recover his deposit money upon demand: *Lewis v. Burton*, 74 Ala. 317, 49 Am. Rep. 816; *Wheeler v. Spencer*, 15 Conn. 28; *Shannon v. Baumer*, 10 Iowa, 210; *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *House v. McKenney*, 46 Me. 94; *Kitchen v. Greenabaum*, 61 Mo. 110. In *Shannon v. Baumer*, 10 Iowa, 210, the court reasons this rule out at length: "It is because the agreement, upon which it was deposited with the stakeholder, is void, that the party betting may treat it as no contract and recover his money. The title to the money is not, and cannot be, changed by such a contract, and if either party disaffirms the unlawful transaction, he may recover from the intermediate stakeholder. The doctrine that the parties are in *pari delicto*, and the rule, *potior est conditio possidentis*, has no application. It might apply if the action was by the loser against the winner, after the money was paid over. It is otherwise, however, as to the stakeholder. He is not a party in interest as to the illegal contract. He is not in *pari delicto*. He is not equally criminal with the plaintiff, but is the mere bailee or agent of the parties to hold money, the title to which has not been changed. The plaintiff does not seek to recover upon a promise which, within the meaning of the statute, is a void promise, but upon the ground that he elects to disaffirm the unlawful contract, and to recall his money while it, so to speak, is in transitu. This he may do without the violation of any rule of either law or morals." Thus if the stakeholder pays the money to the winner after notice from the loser not to do so,

he is liable to the loser, notwithstanding such payment: *Fisher v. Hildreth*, 117 Mass. 558. Or if he pays to the winner before the result of the wager is duly ascertained, and after payment and before such ascertainment the loser gives notice not to pay, the stakeholder is liable: *Lewis v. Burton*, 74 Ala. 317, 49 Am. Rep. 816. It has also been held that in case of such unauthorized payment by the stakeholder, the loser may recover his deposit money from the winner as money had and received to plaintiff's use: *Love v. Harvey*, 114 Mass. 80. But when the deposit money is once duly paid over by the stakeholder to the winner, the loser and winner are in *pari delicto*, and the loser cannot recover it back from the winner: *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755.

IV. Public Policy.

In the principal case it is said that courts will not refuse to interpose on behalf of plaintiff, though he is equally guilty with the defendant, where public policy requires their interposition. That case was exceptional in its circumstances. The plaintiff had entered upon what he believed to be a scheme to defraud others for his benefit, and, viewed upon principles of sound morality, his conduct was as reprehensible as that of defendants, except that he had yielded in a single case through solicitations and representations primarily due to them, whereas they had conceived and long pursued an iniquitous scheme. Public policy, however, manifestly required that their purposes should be thwarted and their nefarious scheme rendered less surely profitable, rather than that the continuance of that profit should be guaranteed by denying relief to plaintiff and to others who should subsequently be placed in the same position as he.

It is perhaps more accurate to say that the whole doctrine respecting the subject here under consideration has its entire support in principles of public policy, and where this support is not present, must fall. "Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to the policy": *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211; *Johnson v. Cooper*, 2 Yerg. 524, 24 Am. Dec. 502.

If a statute prohibits a banking corporation from making a loan to any of its officers, or otherwise makes provisions respecting the management of corporations apparently intended to secure the fidelity of their officers or to prevent their interests being placed in opposition to that of the stockholders or creditors or of the general public, the manifest object of such prohibition is the better security of such stockholders or creditors or the general public, and not that of investing the corporations with immunity from their liabilities, and the object sought would be thwarted, rather than promoted, by permitting a person who had borrowed money from the corporation

or otherwise secured benefits from it to avoid his liability therefor. Hence he cannot, as a general rule, plead with success that the contract or transaction with him was prohibited, and therefore that relief to the corporation must be denied on the ground that it is in *pari delicto* with him: *Lester v. Howard*, 33 Md. 558, 3 Am. Rep. 211; *Farmers' etc. Sav. Bank v. McCabe*, 73 Mo. App. 551; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Wroten's Assignee v. Armat*, 31 Gratt. 228. A statute prohibiting any partnership from transacting business in the name of a person not interested in the firm, and providing that when the designation of "and company" is used, it must represent an actual partner or partners, has for its object the preventing of a false credit being created in favor of the firm and not its exemption from its obligations, and therefore, a contract entered into with a firm which has not complied with the statute cannot be avoided by it on that ground: *Wolf v. Joubert*, 45 La. Ann. 1100, 13 South. 806, 21 L. R. A. 772.

GIVENS v. MCCRAY.

[196 Mo. 306, 93 S. W. 374.]

DEEDS OF TRUST—Sales—Trustee's Duty.—A trustee must, in all cases in conducting sales, discharge his duties impartially with the view of protecting the interests of all parties, and is vested with a discretion as to the manner of conducting the sale, which discretion should always be exercised in such manner as to produce the best results for those interested. (p. 740.)

DEEDS OF TRUST—Trustee's Sales—Trustee's Discretion.—If the owner of a homestead subject to a deed of trust dies leaving a widow and minor children, and a third person acquires the interest of some of the children, after which the trustee in the deed of trust proceeds to sell the premises during the minority of two of the children, such third person has no absolute right to control the method of the sale, and the trustee must exercise a sound discretion for the protection of all of the persons interested in the premises. (p. 743.)

DEEDS OF TRUST—Trustee's Sales—Setting Aside.—The right to have a trustee's sale under a deed of trust set aside depends on the allegations of the petition therefor, and if it does not contain allegations of fraud, unfair dealing, inadequate consideration, or abuse of discretion on the part of the trustee, and none that the sale was made in bulk to increase the trustee's fees, these matters cannot be considered, at law or in equity, in passing upon the sufficiency of the petition. (pp. 745, 746.)

DEEDS OF TRUST—Trustee's Sales en Masse—Discretion.—A discretion is vested in a trustee in a deed of trust to sell in the way which will produce the largest sum, and a sale en masse will not be set aside simply because the land was not sold in parcels, in the absence of evidence of fraud, unfair dealing, inadequacy of price, or abuse of confidence. (p. 747.)

DEEDS OF TRUST—Trustee's Sales—Petition to Vacate—Sufficiency of.—A petition to vacate a sale of land en masse made

by a trustee under a deed of trust, which merely alleges that the trustee sold in bulk and refused to sell in parcels, but failing to allege that the sale as made operated to petitioner's injury, and which does not allege the true nature and character of the property sold, its susceptibility to division, or any abuse of discretion or confidence on the part of the trustee in making the sale, or that in conducting such sale he in any manner acted otherwise than impartially with all parties in interest, or did not exercise a proper or sound discretion in adopting methods and manner of the sale of such property, does not state facts constituting a cause of action. (pp. 747, 748.)

Selby & Givens and Hicklin, Leopard & Hicklin, for the appellant.

Gillihan & Gillihan and B. Dudley, for the respondent.

308 FOX, J. This cause is here upon appeal from a judgment of the Daviess circuit court upon a demurrer to a petition filed by the plaintiff to set aside a sale. The cause of action stated to which the demurrer was sustained was as follows:

"Plaintiff, for his amended petition and cause of action herein, filed by leave of court, says that defendant Robert D. McCray is the duly elected, qualified and acting sheriff of said Daviess county, and has been since the first day of January, 1901; that defendants Lewis Butler and Malinda M. Butler are minors under the ages of twenty-one and eighteen years respectively; that defendant Archibald Youtsey is the duly appointed guardian of said minors; that one James Butler died intestate, seised and possessed of the following described real estate in said Daviess county, to wit, all north of the Wabash railroad of the west half of the southeast quarter of section 36 in township 59 of range 27, containing forty-four acres; that at the time of his death the said James Butler was the head of a family and occupied said real estate as his homestead; that said Butler left surviving him his widow who died within a few months after the death of her husband, and eight children, two of whom are minor defendants who were under the age of sixteen years at the time of the death of their said father; that at the death of said James Butler there was a valid and subsisting encumbrance on said real estate in the form of a deed of trust to which all the rights of said James Butler were subject; that said deed of trust secured the payment, with others that matured at an earlier date, of a certain note of date March 7, 1891, for one hundred and fifty dollars, due March 7,

1898; that all of said notes secured by said deed of trust, except the one for one hundred and fifty dollars becoming due March 7, 1898, were paid as they became due; that plaintiff is now the owner of six-eighths of said real estate, and was at the time of the sale thereof under and by virtue of said deed of trust, as hereinafter ³⁰⁹ stated, subject to said deed of trust, the owner of five-eighths of said real estate, and had been so the owner since the — day of November, 1901; that default having been made in the payment of said note for one hundred and fifty dollars, becoming due March 7, 1898, and the trustee to whom said real estate was conveyed in and by said deed of trust being permanently absent from this, the state of Missouri, and there being a provision in said deed of trust for the acting sheriff of said Daviess county to sell in the event of said trustee's absence from this state; that by reason of such absence of said trustee, and by virtue of said provision for the acting sheriff to sell, defendant advertised said real estate for sale under the terms and conditions of said deed of trust at the public square in the city of Gallatin in said county and state on the first day of August, 1902, and on the said day last aforesaid did sell the whole of said real estate at once and in bulk to the defendant Marcus Tolen for the price and sum of sixteen hundred and forty dollars, against the desire and protest of plaintiff; that on the day of sale, but before it had occurred, plaintiff demanded of the defendant McCray that he sell a less part of said real estate than the whole to make the amount of said note and the costs and expenses of sale, but that defendant McCray refused so to do; that at the time of such demand plaintiff, who is solvent and amply responsible for any bid or agreement he might make, offered to defendant McCray to bid and pay two hundred and twenty-five dollars for any ten acres of said real estate that he, McCray, might carve out of the same, said sum of two hundred and twenty-five dollars being more than sufficient to pay the amount due or claimed on said note and all costs and expenses of sale, and demanded that he, the said McCray, select and offer for sale ten acres of said real estate, but that he refused so to do, and afterward sold the whole of said real estate in bulk to defendant Marcus Tolen as aforesaid, who has received a deed therefor from said McCray; that had said ten acres been offered as requested by plaintiff, it would have brought ³¹⁰ its full value per acre as a part of the whole of said forty-four

acre tract, and not resulted in impairing in value the remainder of said tract; that said tract of forty-four acres was reasonably worth two thousand two hundred dollars at the time of its sale, and that by reason of selling the same in bulk great injury resulted to this plaintiff and other owners thereof; that defendant minors own the other two-eighths of said real estate, subject to said deed of trust, each of the two owning one-eighth thereof; that said minors will not attain their majority until 1912; that until said minors do arrive at full age, they are entitled to the use and benefit of the entire proceeds of said sale to the exclusion of the participation of plaintiff therein. Wherefore plaintiff prays that said sale be set aside and for naught held, and for such other relief as may be proper."

To this petition the following demurrer was interposed:

"Come now defendants R. D. McCray, and Lewis Butler and Malinda M. Butler, by their guardian and curator, Archibald Youtsey, and demur to the amended petition of plaintiff's filed in the above-entitled cause and assign the following grounds of demurrer, to wit:

"1. Because the petition fails to state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendants or either of them.

"2. Because this proceeding being a suit to set aside a trustee's deed under sale is a suit in equity and said petition states no equity."

This demurrer filed by the defendants was by the court sustained, and plaintiff declining to plead further, a formal judgment was rendered upon the demurrer in favor of the defendants. Motions for new trial and in arrest of judgment were timely filed and by the court overruled, and hence followed the prosecution of this appeal to this court by the plaintiff and the record is now before us for consideration.

³¹¹ It is apparent that there is only one legal proposition involved in this proceeding. Appellant insists that the trial court erroneously sustained the demurrer to his petition and that is the only question presented for consideration.

We have carefully analyzed the petition in this cause which was successfully challenged by the demurrer in the court below, and have reached the conclusion that such petition does not state a cause of action which would authorize the interference by a court of equity with the sale made. It will be observed that this was a sale by the sheriff acting

in the absence of the trustee in foreclosing a deed of trust upon the land as described in the petition, which consisted of only forty-four acres.

It is fundamental that the trustee must, in all cases in conducting sales of real estate by reason of the powers conferred upon him by the deed of trust, discharge his duties impartially with the view of protecting the interests of all parties who may be interested in such property, and it is also well settled and fully recognized by the law upon this subject that trustees are vested with a discretion as to the manner of conducting their sales, and this discretion should always be exercised in such manner as will produce the best results for those interested.

The demurrer to the petition admits the truth of all the allegations properly pleaded in the petition, and the petition in this cause shows upon its face that the plaintiff and three of the children of James Butler, deceased, were interested in this land, and so far as the sale under the deed of trust was concerned, plaintiff and the three children interested in the land occupied a relation to such sale similar to that of the original debtor. There would be no question that, if the plaintiff in this case had been the only person interested in the real estate, subject to the deed of trust, he ³¹² clearly would have had the right to have insisted on such land being subdivided, and so much of it sold as would pay the debt and costs to which it was subjected by reason of the deed of trust, but this does not follow if other persons also have interests in such real estate. In that event the trustee must exercise such discretion in selling as will produce the best results to all parties interested. This case is unlike any of the cases cited by appellant in support of the contention that the petition states a good cause of action.

The case of *Kelly v. Hurt*, 61 Mo. 463, was a sale by the sheriff of Saline county foreclosing a mortgage given to the county for money borrowed by the plaintiff. In that case it will be observed that the sale was in the nature of an execution, for the court says that the petition will be treated as averring that the sale was made by the sheriff in obedience to an order of the county court to foreclose a mortgage. It will be noted in that proceeding that there were no conflicting interests to be protected by the sheriff, and the petition averred that the land was worth four thousand five hundred dollars, and it further appeared from the petition that the land sold

consisted of two eighty-acre tracts and two forty-acre tracts, which did not adjoin each other; that one forty-acre tract lies three or four miles from the remainder of said lands. It further appeared from the petition in that case that the land, consisting as it did of separate tracts, was sold in mass for the sum of thirteen hundred and eighty dollars, to satisfy a debt of one thousand and eighty-two dollars and sixty-six cents, which was then due on said mortgage. From the allegations of the petition in that case it clearly appears that the land was susceptible of division, and that it was unnecessary to sell the whole of said land to satisfy said mortgage debt. The further allegation appeared in that petition that if the land had been sold in parcels or separate tracts, it would have brought a much larger sum than was paid for the same by defendant. It also appeared from the petition that the plaintiff had no knowledge of the sale so ³¹³ made in time to move to set the same aside. It is clear that there is no similarity between the facts appearing in the petition in that case and those in the case at bar.

State v. Yancy, 61 Mo. 397, was a case upon motion to set aside a sale made under an execution by the sheriff, and upon the hearing of said motion there was only one person interested in the entire estate sold, and that was Mrs. Dickson, and she manifestly, under the facts in that case, was in a position to complain, and we take it that it is clear that the rule therein announced as applicable to the question before the court falls far short of furnishing any support to the contention of appellant in the case at bar.

What is said in the two cases above referred to is equally applicable to the case of Gordon v. O'Neil, 96 Mo. 350, 9 S. W. 920, cited by appellant. It will be observed in that case that there is no similarity of averments in the petition upon which relief was sought to the allegations in the petition in the case at bar. Black, J., speaking for the court in Gordon v. O'Neil, 96 Mo. 350, 9 S. W. 920, said that "the substantial averments of the petition are: That Dougherty, who was a deputy sheriff, and O'Neil conspired together to purchase the property at a nominal consideration, and pursuant thereto prevented other persons from bidding, so that O'Neil became the purchaser at fifty-one dollars, the property being worth three thousand five hundred dollars; that the lot should have been divided and a part only sold." The petition in this case, the sufficiency of which is challenged

by the demurrer, contains no statement or averment which in any way approaches the statement of a cause of action, similar to the Gordon-O'Neil case (96 Mo. 350, 9 S. W. 920).

The case of Tatum v. Holliday, 59 Mo. 422, is very much unlike the case at bar. It was an action in equity to set aside a sale made under a deed of trust and asking the chancellor for permission to redeem. The plaintiffs in that case were the widow and the minor children ³¹⁴ of David Tatum, and were the only parties that were interested in the land, and clearly they had the right to insist upon a division of the property in making the sale. They were the only parties in respect to such sale that stood in the relation of the original debtor; therefore, they were in a position to demand of the trustee to adopt such method and manner of sale as would render it most beneficial to the debtor.

Take this case and the allegations of the petition, which are to be taken for the purpose of this demurrer as true, and it is manifestly a different state of facts to those relied upon for relief in the numerous cases cited by appellant. In the case at bar we have only a small tract of land of forty-four acres, which was left to the widow and minor children surviving James Butler, deceased, as a homestead. The widow and minor children upon the death of James Butler had the joint right of occupancy of such homestead, and the minor children had the right to occupy and enjoy the benefits of such homestead until they arrived respectively at their majority. Mrs. Butler, the widow of James Butler, deceased, died shortly after her husband, hence the minor children were left with the right to occupy and enjoy the homestead so left by their father until they arrived at their majority. The plaintiff in this cause, Mr. Givens, purchased prior to the sale under the deed of trust the interest of five of the children in such homestead. His interest so acquired was not only subject to the deed of trust which was given before the death of James Butler, but was subject to the homestead rights of the widow and minor children in such real estate. In other words, the interest so acquired by plaintiff could not be actively asserted so as to participate in any of the rents or profits of such real estate until after the expiration of the homestead rights of the widow and the minor children. At the time of this sale there were two minor children entitled to occupy and enjoy the benefits of such homestead until they reached their ³¹⁵ majority, and

after the expiration of their homestead rights they were each entitled to one-eighth interest in fee in such real estate.

It is clear that the plaintiff in this proceeding had no absolute right to control the manner or method of sale under the deed of trust, and it is equally clear that under the facts alleged in the petition there were others interested in the sale of this property, the protection of whose interests the trustee was not at liberty to ignore; therefore, the condition confronting the trustee at said sale was one which required him to exercise a proper and sound discretion as to the manner and method of such sale, and he was simply bound to act in good faith and adopt such reasonable methods of proceeding with the sale as would produce the most beneficial results to the parties interested. That the trustee under this deed of trust had the right to sell this property there can be no doubt; that right and power was expressly conferred by the deed of trust. It is equally clear that according to the allegations in the petition this was a case in which no particular one of the parties interested had the right to control the manner and method of sale, and that it was clearly a case the circumstances of which required the exercise of a sound and proper discretion by the trustee in making the sale. While, on the one hand, it may have been to the interest of the plaintiff to have carved out of this forty-four acres a small portion of it to satisfy the deed of trust, yet, on the other hand, the interests of the minors were unlike the interests of the plaintiff. While it may be that practically the value of the remainder of the land would not have been impaired by reason of the sale of part of it to pay the debt, yet the occupancy and enjoyment of it as a homestead, which the minor children had the right to, may have been greatly impaired and in fact so far as the occupancy of it as a home, have been absolutely destroyed. Therefore, the trustee may have justly concluded that to have carved out ten acres ³¹⁶ of the homestead would have been injurious to the minor children, and may have very logically reasoned that the parties interested in this land were interested in it for what it was worth, and that it would realize more if sold in bulk than if a small portion was carved out of an already small tract of land and sold to satisfy the deed of trust. It may also have occurred to the trustee, and it doubtless does occur now to the curator of these minors, who is resisting the proceeding to set aside the sale, that in the event of carving

out ten acres of this land to sell to satisfy the deed of trust, and the retention of the remainder by the parties interested, that at best it would only be a few years until the remainder, which clearly would not be susceptible of division in kind, would be sold for the purpose of partitioning the interests of these three children and the interests of the plaintiff, and therefore concluded that the sale of the entire land under this deed of trust would bring its full value, and that the proceeds were simply a fair substitute for the land, and that after the payment of the amount of the deed of trust, the remainder would be held for the benefit of those who were entitled to enjoy the occupancy of the land during their minority, and after reaching their majority such proceeds would be divided in accordance with the respective interests of the parties.

What we have said was simply deemed appropriate for the purpose of marking the distinction between this case and those cited by appellant, and of indicating that upon the facts as alleged by the plaintiff this was a case in which the trustee was vested with discretion, and was only bound to act in good faith and adopt such methods of procedure in respect to this sale as would result most beneficially to all the parties interested, and to indicate the necessity in a proceeding to set aside such sales of at least making such allegation and averments in the petition which, if taken as true, would show an abuse of discretion and an improper and unsound ³¹⁷ exercise of it by the method and manner of proceeding in the consummation of such sale.

Recurring now to the allegations of the petition as well as the essential and material allegations which should be embraced in it, we find on the one hand the sole grounds alleged for equitable relief in this case: the statement that plaintiff demanded that a less part of such land than the whole be sold to make the amount of said debt and costs, which demand was refused by the trustee; that plaintiff offered to bid and pay two hundred and twenty-five dollars for any ten acres of said land, which was more than enough to pay the debt and costs; it is also alleged that said minors will not attain their majority until 1912; that until said minors do arrive at full age they are entitled to the use and benefit of the proceeds of such lands to the exclusion of the participation of plaintiff therein. On the other hand, an analysis of the petition shows an entire absence of any al-

legation or averment that this small tract of land of forty-four acres had any natural subdivision or subdivisions by surveys; no allegation that it was in any way divided into small tracts, or that it was held by separate holdings, so that these minors could have occupied and enjoyed the remainder of said land as a homestead, or that the land would sell for more by being divided, but, on the contrary, the petition alleges that the plaintiff offered to bid and pay two hundred and twenty-five dollars for any ten acres, and if that is to be taken as a criterion of value upon the subdivision of the land, the sale demonstrated that each ten acres of that small tract of land brought, when sale is made, twenty dollars more on the acre than plaintiff offered to bid and pay for any ten acres in the premises if it had been divided. It is not alleged that any person would have given more than two hundred and twenty-five dollars for any ten acres the trustee might carve out if he had sold that way. There is an entire absence from this petition of any allegation of fraud, unfair dealing, misconduct or abuse of discretion on the part of the trustee. There is no complaint upon the ground ³¹⁸ of inadequacy or insufficiency of the consideration realized for the land. It is simply stated in the petition that the land was reasonably worth two thousand two hundred dollars, but it is manifest from the allegations in the petition that plaintiff does not predicate his right of relief upon the ground of the insufficiency of price paid for the land.

As to the allegation in the petition that the minor defendants would not reach their majority until 1912, and would enjoy the use and benefits of the entire proceeds of such sale to the exclusion of the participation of plaintiff, we might stop to inquire as to what different attitude would plaintiff be in respecting the remainder of the land if it had not been sold. He would not be enabled to participate in any rights of enjoyment, rents or profits of the remainder of such land until the minor defendants reached their majority; hence that allegation fails to show any injury whatever to the plaintiff.

There is a further complaint in the brief and argument of counsel for appellant that the whole petition, when fully considered, charges unfair treatment and abuse of discretion on the part of the sheriff as trustee; however, with commendable frankness, learned counsel for appellant concedes that

no such words are used in the petition. It is also insinuated that the sheriff made this sale in bulk for the purpose of increasing the amount of his commission upon such sale. If such was the fact, clearly there should have been some averment of that kind in the petition. We have carefully considered the petition and we are unable to agree with counsel, when fully considered, that it shows any abuse of discretion on the part of the trustee. If there was such abuse of discretion in such sale, there is only one way in which you can call into action the powers of a court of equity, and that is by alleging it in the petition which seeks the relief. The relief sought in the petition is based upon the ground as heretofore indicated, which, ³¹⁹ in our opinion, does not sufficiently state a cause of action.

The correct rule as applicable to the question presented in this case is nowhere more clearly or correctly stated than in *Benkendorf v. Vincenz*, 52 Mo. 441. It was there said: "While it is true that sales of this character will be narrowly watched, and every possible safeguard thrown around the interest of him who has been truly called 'a servant to the lender'; yet the mere fact that the property conveyed by deed of trust is sold in gross is not per se sufficient to avoid the sale; and no case that I am aware of has gone to that length. There must be some attendant fraud, unfair dealing, or abuse by the trustee of the confidence reposed in him; or some resulting injury from a sale made in this way, in order to obtain the aid of a court of equity to divest a title thus acquired. In the very nature of things some latitude of discretion ought in this regard to be allowed the trustee; indeed, the very instrument conferring the power contemplates this, and so long as his acts are free from any suspicion of bias, and that discretion is not arbitrarily nor unsoundly exercised, those acts will be exempt from equitable interference."

In the case of *German Bank v. Stumpf*, 73 Mo. 311, it was expressly ruled that "the mere fact that property which is susceptible of division has been sold in mass will not render a trustee's sale void. It is only where substantial injury has been inflicted by a failure to subdivide and sell in parcels, that a court of equity will interfere and set the sale aside." The cases last cited were followed and approved in *Chase v. Williams*, 74 Mo. 429.

In the case of *Lazarus v. Caesar*, 157 Mo. 199, 57 S. W. 751, Gantt, J., speaking for this court, reviewed all the authorities upon this subject, and thus announced the conclusions, in which all the members of this division concurred: "While it may be conceded that where a tract of land has been divided into parcels or lots for separate ³²⁰ and distinct enjoyment, the presumption is that the property will realize more when sold in parcels than in one piece, because such a sale will better correspond to the probable wants of the purchasers and their ability to purchase, this is by no means a conclusive presumption. On the contrary, the books abound with cases which hold that a discretion is vested in the trustee to sell in the way which will produce the largest sum, and this court has often refused to disturb a sale en masse simply because the land was not sold in parcels, but has required, in addition, evidence of fraud, unfair dealing, or abuse of confidence. Thus, in *Carter v. Abshire*, 48 Mo. 300, this court said: 'A trustee, in exercising his duties and powers under a trust deed, is a trustee for the debtor, and is bound to act in good faith and adopt all reasonable modes of proceeding in order to render the sale the most beneficial to the debtor. Therefore, where property will bring more by being separated when sold, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. . . . But no general rule can be laid down for the government of trustees on this subject. In some cases the sale of an entire tract will be more judicious and better subserve the interest of the debtor than a division in parcels. A farm or a piece of real estate may derive additional value from its unity or entirety.' "

We see no necessity for pursuing this subject further. We are unwilling to assent to appellant's contention that the mere statement that the trustee had sold the land in bulk and refused the request of plaintiff to sell a less quantity, and the offer to bid and pay two hundred and twenty-five dollars for any ten acres carved out of the forty-four acres, and that such failure to make such sale as requested and desired by plaintiff operated to his injury, in the absence of any substantial allegation indicating the true nature and character of this property, its susceptibility of division, or of any abuse of discretion or confidence on ³²¹ the part of the trustee in making such sale, or that in conducting such sale he in any manner acted otherwise than impartially with

all the parties in interest, or did not exercise a proper and sound discretion in adopting methods and manner of the sale of such property, constitutes a statement of a good cause of action.

Entertaining the views as herein expressed, it results in the conclusion that the judgment in this cause should be affirmed, and it is so ordered.

All concur.

Sales and Conveyances by Trustees are discussed in the note to *Tyler v. Herring*, 19 Am. St. Rep. 266-297. This subject is further discussed under the title of "Sales Under Powers, in Mortgages and Trust Deeds," in the monographic note to *Houston v. National etc. Loan Assn.*, 92 Am. St. Rep. 573-598.

ANDERSON v. MISSOURI-PACIFIC RAILWAY CO.

[196 Mo. 442, 93 S. W. 394.]

RAILROADS—Negligence—Sufficiency of Complaint.—In an action to recover for the death of plaintiff's husband, a complaint alleging that he was killed by reason of defendant's train, on which he was traveling as a passenger, being run into and wrecked by another of defendant's trains, and that such collision was occasioned by the negligence or unskillfulness of the officers, servants, or employes thereon in running, conducting and managing such train, is sufficient, and it is not necessary to allege the particular acts of any particular servant or employé which occasioned the collision. (p. 754.)

RAILROADS—Passengers.—A passenger who has only paid his fare to a certain point of destination is not required to leave the train at that point, and if he desires to continue the journey, he has a right to remain in the car, retaining his status as a passenger, and when demanded of him pay his fare to the farther place of his destination. (p. 759.)

RAILROADS—Passengers—Presumption.—Everyone riding in a railroad car is presumed, *prima facie*, to be there lawfully as a passenger, having paid, or being liable, when called on, to pay, his fare, and the burden of proof is on the carrier to prove affirmatively that he was a trespasser. (p. 760.)

RAILROADS—Passenger—Persons Remaining on Train.—A person who is on a train as a passenger when it stops at a station, and who desires to continue his journey farther than was originally intended, and who remains on the train for that purpose, whether he has paid fare or notified the trainmen of his intention to continue his journey or not, is still a passenger. (p. 762.)

RAILROADS—Negligence—Brakemen.—A brakeman is a train servant of a railroad company engaged in the operation and management of the company's train, for whose negligence in causing the death of a passenger the company is liable for a statutory penalty imposed for death caused by negligence. (pp. 764, 765.)

M. L. Clardy, W. S. Shirk and J. Cashman, for the appellant.

W. G. and G. T. Pendleton and W. M. Williams, for the respondent.

445 FOX, J. There was a verdict and judgment for the plaintiff in the Cooper circuit court, and this cause is here upon appeal by defendant. The judgment in **446** this cause is predicated upon the following acts of negligence complained of in the petition filed by plaintiff:

“Plaintiff states that she is the widow of Robert Anderson, deceased. That the defendant is, and was at the time hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and as such running and operating a railroad in said state through and from the city of Nelson, in Saline county, to the city of Blackwater, in Cooper county; that defendant in the operation of said railroad is, and was at said time, a common carrier of passengers for hire between said points.

“That on the fifth day of June, 1902, the said Robert Anderson entered into a passenger-car of defendant on its said railroad at said city of Nelson, a station on said railroad, as a passenger for transportation over said railroad to said city of Blackwater, and as such passenger was lawfully in said car, which was part of and situated at or near the rear of a train of cars attached to a locomotive headed east on said railroad. That while said Robert Anderson was a passenger on defendant's said train as aforesaid, and while said train and locomotive was standing on defendant's railroad track at said station of Nelson, another train of cars drawn by a locomotive, also headed east and on the same railroad track as aforesaid, approached at high speed and ran into the rear end of and collided with the first above-mentioned train, upon which plaintiff's said husband was a passenger, with great force and violence, completely wrecking and demolishing the car in which the said Robert Anderson was situated, and wounding and bruising the said Robert Anderson, from the effect of which he then and there died.

“That the aforesaid car, train of cars and locomotives at the time aforesaid belonged to, and were being run, conducted and managed by officers, agents, servants and employés of the defendant, and the injury **447** resulting in the death of the said Robert Anderson as aforesaid was oc-

caused by the negligence and unskillfulness of said officers, agents, servants and employés whilst so running, conducting and managing said car, trains of cars and locomotives.

"Wherefore plaintiff has been damaged in the sum of five thousand dollars, for which, together with costs of suit, she prays judgment against defendant."

The answer to this petition consists of a general denial, followed by a special denial of any negligence on the part of the agents and servants of defendants, and a statement that whatever injuries plaintiff's husband may have received, were the result of and occasioned by pure accident, without negligence on the part of the agents and servants of defendant.

The trial of this cause was had on the twenty-ninth day of January, 1903. There is practically no dispute as to what the testimony tended to prove in this cause. There is no controversy over the fact that Robert Anderson was plaintiff's husband, and there is no contention that the suit was not instituted within the statutory period—that is, six months after his death. The testimony upon the trial tended to establish substantially the following state of facts: That Robert Anderson resided at Blackwater, a town and station on defendant's railway; that he left Blackwater on the afternoon of June 5, 1902, on defendant's west-bound passenger train for the city and station of Marshall on said railway; that he reached Marshall, and later on the same afternoon took passage on another of defendant's trains returning east toward Blackwater, his home; that the latter train reached the station of Nelson between Marshall and Blackwater late on said afternoon; that the train (a mixed stock and passenger train) stopped at Nelson twenty-five or thirty minutes, loading and unloading freight, and taking on stock-cars; that immediately after this train at Nelson started on its journey toward Blackwater it was run into in the ⁴⁴⁸ rear by another train going in the same direction, resulting in a collision and a wreck of the passenger coach of the forward train; that after the wreck rescuers found Robert Anderson in the wrecked coach, badly mangled, and that he died a few minutes after his removal from the wreck. The conductor of the train deceased was on testified that the latter paid his fare from Marshall to Nelson. It was admitted by defendant at the trial that the railway and trains mentioned were the property of the defendant, that said trains at the time

of the collision were being operated by defendant's servants, and that Robert Anderson died as the result of injuries caused by said wreck.

The evidence further showed that the train Anderson was on was a regular train, running several hours behind its schedule time at Nelson; that according to the defendant's regulations, it was the duty of its servants operating said train, when it stopped at Nelson, to send a signal-man to the rear, and by the use of a signal flag, and by placing torpedoes on the track, warn approaching trains of the presence of this train at Nelson. The conductor of the forward train testified that he sent a brakeman back with a flag for the purpose of signaling the following train, but there was no evidence that he did signal said train. The brakeman was not present to testify at the trial. The engineer of the rear train testified that he saw no flag and heard no torpedoes as he approached Nelson, and his testimony and that of witnesses for the plaintiff showed that a few yards west of the Nelson depot the railway makes a sharp curve through a deep cut, so that an engineer going east could not see a train at the depot until he approached very close.

At the close of the evidence the defendant requested the court to give an instruction in the nature of a demurrer to the evidence, which substantially told the jury that under the pleadings and all the evidence in the case the plaintiff was not entitled to recover and the jury ⁴⁴⁹ will find for the defendant. This request was denied and the court refused to give the instruction.

At the request of the plaintiff the court gave the following instructions:

"1. The jury are instructed that if they believe from the evidence that on or about June 5, 1902, Robert Anderson was a passenger on one of defendant's trains, and that in consequence of the negligence of the defendant's servants, agents and employes whilst running, conducting or managing said train of cars, another train of cars going in the same direction upon defendant's said railroad ran into and collided at the station of Nelson with the car in which said Anderson was, and he was thereby killed, and that said collision occurred and his death resulted from the carelessness and negligence of defendant's servants in running, conducting or managing said train on which he had taken passage, or the train colliding therewith, and that plaintiff is his

widow, and this suit was begun within six months after his death, they will find the issue for the plaintiff and assess her damages at the sum of five thousand dollars.

"Even if the jury should find from the evidence that Robert Anderson got on defendant's train at Marshall and only paid his fare to Nelson, still if the jury believe from all the facts and circumstances in evidence that he determined to continue his journey to Blackwater and remained on said train for that purpose, the fact that he only paid his fare from Marshall to Nelson is no defense to this suit.

"2. If the jury believe from all the evidence in the case that the death of Robert Anderson was the result of mere accident or misadventure, and that the same was not caused by any negligence on the part of defendant or its servants, then they must return a verdict for the defendant."

⁴⁵⁰ The defendant requested the court to instruct the jury as follows:

"1. If the jury find from the evidence that the accident by which plaintiff's deceased husband was killed was not occasioned by, or did not result from, the negligence, unskillfulness or criminal intent of any of the agents, servants or employes of defendant, whilst running, conducting or managing the locomotive and train of cars, which collided with the car on which her said husband was seated, or whilst running, conducting or managing the locomotive and train of cars on which her said husband was a passenger, but that such accident was caused and brought about by the rear brakeman of the train on which plaintiff's deceased husband was a passenger, in failing to properly guard such train from being run into, by a train following it, then if the jury find for the plaintiff, they are not bound to assess her damages at just the sum of five thousand dollars, no more nor less, but may assess the same at any sum not exceeding the sum of five thousand dollars.

"If the jury find for the plaintiff, then in assessing her damage, they can only assess such damages at such sum as will compensate her for the pecuniary injury necessarily resulting to her from the death of her husband; the jury cannot allow her anything on account of any pain, sorrow or mental anguish which she may have suffered on account of her said husband's death.

"And in arriving at the pecuniary value of her husband's life to her, they should take into consideration his

age at the time of his death; and also the probable length of time that he may have lived after the date of his death; and also his power, ability and capacity to earn money, and acquire property at the time of his death; also his moral, social and domestic habits.

“And if after considering all these matters, under the evidence you should find that the pecuniary value ⁴⁵¹ of his life was worth nothing to the plaintiff, then your verdict will be for the defendant.

“But if after considering all these matters, you should find that the pecuniary value of his life was worth something to plaintiff, then you will find for the plaintiff and assess her damages at such sum only as will, under all the evidence in the case, compensate her for the pecuniary loss which may have necessarily resulted from her husband’s death.

“2. The court further instructs the jury, that it is alleged in plaintiff’s petition, as the groundwork of her action, that the plaintiff’s husband, Robert Anderson, was a passenger upon defendant’s train at the time he received the injury which resulted in his death, and the burden of proving that he was such passenger is upon the plaintiff. And unless you believe and find from the preponderance of the evidence that he was, at the time he was killed, on board of the train, as such passenger, as hereinafter defined, then the plaintiff cannot recover herein, and the jury will find for the defendant. And if the jury find from the evidence that plaintiff’s said husband had taken passage on its train at Marshall, and had paid his fare to said station to Nelson, and after the arrival of said train at Nelson he remained on board the train, talking to a friend, without notifying the conductor of said train that he wished to go farther on said train, and that the conductor of said train did not know that he remained aboard said train after it arrived at Nelson, then the plaintiff’s husband, Robert Anderson, was not a passenger on said train.”

Which instructions so requested by the defendant were by the court refused, to which action of the court timely objections and exceptions were preserved. Whereupon the cause was submitted to the jury and they returned a verdict finding the issues for the plaintiff and assessing her damages at the sum of five thousand dollars. Defendant within the proper time filed ⁴⁵² its motion for a new trial, which

was by the court overruled. Judgment was entered in accordance with the verdict, and from this judgment defendant in due time and proper form prosecuted this appeal to this court, and the record is now before us for consideration.

The record in this cause discloses numerous assignments of error on the part of appellant. We will treat of such complaints in the order suggested by the brief, and give them such consideration as their importance merit and demand.

1. It is insisted that the petition in this cause is fatally defective, and that the court erred in refusing to sustain defendant's objection to the introduction of any evidence. This insistence is predicated upon the contention of the defendant that the averments in the petition of the negligence complained of are too general, and do not meet the requirements of the law.

We have carefully considered the petition upon which this proceeding is predicated, and we are unable to agree with learned counsel for appellant that this petition is fatally defective or fails to state a good cause of action. The recovery in this cause is sought under the provisions of section 2864 of the Revised Statutes of 1899, which substantially provides that where any passenger shall die from any injury resulting from or occasioned by the negligence and unskillfulness or criminal intent of any officer, agent, servant or employé whilst running, conducting or managing any locomotive, cars or train of cars, the owner of such railroad shall forfeit and pay for every passenger so dying the sum of five thousand dollars. Then follow the provisions of said section designating the persons who may sue for and recover such forfeiture.

The petition in this case alleges with sufficient particularity every essential element necessary to support ⁴⁵³ a recovery under the provisions of the section above cited. It expressly avers that at a certain time Robert Anderson, husband of the plaintiff, was a passenger for transportation over defendant's railroad, and that while said Robert Anderson was a passenger on defendant's train of cars, and whilst said train was standing on defendant's railroad track at the station of Nelson, another train of cars drawn by a locomotive, also headed east and on the same railroad track of defendant, approached at high speed and ran into the rear end of and collided with the first above-mentioned train upon which

plaintiff's said husband was a passenger, with great force and violence, completely wrecking and demolishing the car in which the said Robert Anderson was situated, and wounding and bruising the said Robert Anderson, from the effects of which he then and there died. Then follows a specific allegation that the aforesaid cars, trains of cars and locomotives at the time aforesaid belonged to and were being run, conducted and managed by officers, agents, servants and employés of the defendant, and the injury resulting in the death of said Robert Anderson aforesaid was occasioned by the negligence and unskillfulness of said officers, agents, servants and employés whilst so running, conducting and managing such cars, trains of cars and locomotives.

We are unable to conceive, under the uniform rulings of this court, in what particulars the acts of negligence complained of should have been more specific. If plaintiff's husband was a passenger upon the train of cars of the defendant, then he was entitled to be safely transported to the point he purposed going, and if he was killed by reason of the train on which he was traveling being run into and wrecked by another of defendant's trains, and such collision was occasioned by the negligence or unskillfulness of the officers, servants or employés in running, conducting and managing said train, it was not essential to allege the particular acts ⁴⁵⁴ of any particular servant or employé which occasioned the collision, but it is only necessary to allege generally the collision, and that such collision was occasioned by reason of the negligence and unskillfulness of those operating and managing the train, and that the injuries and death of plaintiff's husband were the result of such negligence and unskillfulness.

In view of the recent expressions of this court applicable to this subject, and the questions of pleading involved in the case at bar, we deem it unnecessary to burden this opinion with a review of all the authorities touching this proposition presented for consideration. In *Rinard v. Omaha etc. R. R. Co.*, 164 Mo. 270, 64 S. W. 124, a recovery was sought for the killing of plaintiff's husband, caused by a collision of two trains upon defendant's road near Galt in Grundy county, Missouri. The collision of the two trains in that case was alleged in a very similar manner to the allegations of the collision of the case in hand, which was followed by a charge in the petition that the collision was the result of

and occasioned by the negligence of the officers, agents, servants and employés of defendant whilst running, conducting and managing said locomotives, cars and trains aforesaid. The sufficiency of the petition in that case was challenged, and such challenge was fully considered, and in treating of it this court thus stated the proposition and announced its conclusion upon the question presented: "It is next insisted that the motion to require the plaintiff to make each count of the petition more definite and certain, 'by specifying the officer, agent, servant or employé of defendant whose alleged negligence occasioned the death of plaintiff's husband, and also by specifying in what respect and upon what particular train such officer, agent, servant or employé was negligent,' should have been sustained. In *Gurley v. Missouri Pac. R. R. Co.*, 93 Mo. 445, 6 S. W. 218, Black, J., delivering the opinion of this court, held that 'the acts done or omitted, which constitute the negligence complained of, should be stated with a reasonable ⁴⁵⁵ degree of particularity.' And in *Sullivan v. Missouri Pac. R. R. Co.*, 93 Mo. 445, 6 S. W. 218, 97 Mo. 113, 10 S. W. 852, it was insisted that the petition was bad under the rule laid down in the *Gurley* case, but the same learned judge said: 'The rule of that case is, that it is good and sufficient pleading to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. In this case the petition sets out the circumstances as a matter of inducement, to the unnecessary extent of stating the names of the conductor and engineer in charge of the train; it states that Sullivan was run upon and killed by the designated train, and that his death was occasioned by the negligence of the defendant's servants while running, conducting and managing the locomotive and train of cars. The petition is clearly within the rule of the case before cited.' In *Pope v. Kansas City R. R. Co.*, 99 Mo. 400, 12 S. W. 891, the negligence charged was general. The sufficiency of the petition was challenged. Brace, J., said: 'The objection urged against it, however, that it does not specify the particular act of negligence which it is claimed caused the injury, is answered by the case of *Sullivan v. Missouri Pac. R. R. Co.*, 97 Mo. 113, 10 S. W. 852; *Johnson v. Missouri Pac. R. R. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790.' These cases have been cited approvingly and followed in *Dickson v. Missouri Pac. R. R. Co.*, 104 Mo. 491, 16 S. W. 381; *Shaw v. Missouri Pac. R. R.*

Co., 104 Mo. 648, 16 S. W. 832; *LeMay v. Missouri Pac. R. Co.*, 105 Mo. 361, 16 S. W. 1049. In all these cases the negligence was charged in general terms, and followed substantially the language of the statute: Rev. Stats. 1889, sec. 4425. The negligence charged in the case at bar is as specific as that charged in the *Sullivan* case (97 Mo. 113, 10 S. W. 852), or in any of the cases that have followed it, and is a substantial compliance with the requirements laid down in the *Gurley* case (93 Mo. 445, 6 S. W. 218)."

To the same effect is *Malloy v. St. Louis etc. R. R. Co.*, 173 Mo. 75, 73 S. W. 159. That was also a case in which the injuries complained of resulted from a collision between the car upon which the plaintiff was riding as a passenger and another car upon the track of the defendant. ⁴⁵⁶ In that case the collision alleged and the negligence charged in the petition was that the defendant "did, by the servants in charge of said car and its servants in charge of another of the cars, so carelessly manage and control said cars as to cause and suffer the same to collide." The complaint was urged in that case that the petition was not sufficiently broad, and this court very clearly and tersely responded to such complaint in the following language: "Certain it is that the collision was caused by the negligence of some one or more of the defendant's servants who were in charge of the cars, in one capacity or another, and directly connected with their movements. It follows that the petition is as broad as is necessary to support a recovery in this case, and that as it was not incumbent upon the plaintiff to charge the specific negligence of any particular servant, so it was not necessary for the plaintiff to show which servant so in charge of the cars was negligent, for the defendant was liable for the negligence of all such servants."

2. It is earnestly urged that the court erred in refusing to give defendant's instruction in the nature of a demurrer to plaintiff's evidence and in refusing to instruct the jury to find the issues for the defendant at the close of all the evidence. The basis of that contention is predicated upon the theory that there was a failure of proof upon the case stated in the petition. In other words, that the testimony elicited upon the trial of this cause failed to show that plaintiff's deceased husband was at the time of his death a passenger upon defendant's train of cars. It is earnestly contended and ably argued that, by reason of the testimony of the conductor that plaintiff's husband had only paid his fare from Marshall to Nelson, when the train reached Nelson and stopped a reason-

able length of time for the passengers on the train to alight, the relation of ⁴⁵⁷ passenger and carrier as between plaintiff's husband and defendant ceased.

We are unable to agree with counsel for appellant upon this insistence. Conceding, for the purpose of the discussion upon this proposition, that the court and jury were bound to accept the conductor's statement that plaintiff's husband had only paid his fare to the station of Nelson, yet were not the facts and circumstances detailed in evidence sufficient to warrant the court in submitting the question as to whether or not, after reaching Nelson or before reaching there, he concluded or determined to remain on the train and continue his journey to Blackwater, and that his remaining on the train was for that purpose? The testimony clearly shows that the home of the deceased was at Blackwater; his family was there and he had only left that place for Marshall a few hours previously and was at the time of the collision returning from the last-mentioned place on a train going toward his home. The coach in which the deceased was traveling stopped at Nelson twenty-five or thirty minutes before the collision; the testimony fails to show that he made any effort to alight from it, and if he did alight from the car he must have returned, for he was found fatally injured in the coach in which he was traveling immediately after the collision.

It is conceded by appellant's counsel that if plaintiff's husband had stepped off the car and then stepped on again at Nelson, he would then have been entitled to protection as a passenger, whether the conductor knew he was on the train or not. However, it is contended that if he remained on the train for the purpose of continuing his journey to Blackwater, it devolved upon him to notify the conductor, or for the conductor to have knowledge of his purpose to continue such journey before he was entitled to protection as a passenger. We are unable to give our assent to the views of counsel for appellant upon this proposition as to the law which should govern the relation of carrier and passenger. It ⁴⁵⁸ was ruled in *Barth v. Kansas City etc. R. R. Co.*, 142 Mo. 535, 44 S. W. 778, that when the train of a common carrier stopped at a station and passengers were permitted to alight, and the iron gate to the platform was opened, it was an invitation to the passengers to take passage thereon. If it be true that, when a common carrier stops its train of cars at the platform at one of its stations, such act upon its part is an invitation

to passengers to take passage on the train, is it not equally true that an invitation is extended to those persons who are on the train and desire to extend their journey farther than was originally contemplated, to remain on the train, and if in fact they do remain on the train for such purpose, are they not, in the eyes of the law, entitled to the same protection as passengers as those who enter the train for the first time at such station?

There is no rule of law which requires a passenger, if he has only paid his fare to a certain point of destination, to leave the train at that point, but if he desires to continue his journey, it is manifestly his right to remain in the car and when demanded of him, pay his fare to the place of destination. It is but common knowledge that persons traveling upon railroad trains very frequently do not alight and stop at the point of destination originally contemplated when they enter the car, but proceed to some other point where business may call them, and under such circumstances they simply remain on the train and proceed with their journey, and, in our opinion, they are no less passengers in contemplation of law than if they had alighted from the train at the station originally contemplated, transacted business and re-entered the coach for the purpose of continuing their journey. The question in this case is not whether plaintiff's husband had been afforded reasonable time to leave the train at the station to which he had paid his fare, but whether or not, if he purposed to go farther, he was in duty bound, in order to preserve his protection as a passenger, to alight from the train and then ⁴⁵⁹ immediately re-enter it. We are of the opinion that this would be a useless and meaningless performance, which the law does not impose upon any citizen in order to preserve his protection as a passenger upon the train of a common carrier.

The defendant in this case was a common carrier, and plaintiff's deceased husband at the time of the collision was in the coach used by defendant for the purpose of transporting passengers; he resided at Blackwater, and his family was there, and at the time of this collision the train had started to carry such passengers as were on it to other points of destination along its line. Under this state of facts the presumption must be indulged that plaintiff's husband was lawfully in such coach. This principle was expressly ruled in *Pennsylvania R. R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec.

339. It was there said that "everyone riding in a railroad car is presumed *prima facie* to be there lawfully as a passenger, having paid, or being liable, when called on, to pay, his fare, and the onus is upon the carrier to prove affirmatively that he was a trespasser." To the same effect is *Louisville R. R. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 9 N. E. 357, decided by the supreme court of Indiana. It was there said that the authorities abundantly prove "that one who is on a train used for carrying passengers is, in the absence of countervailing evidence, presumed to be rightfully there as a passenger." A similar ruling was made in *Gillingham v. Ohio River etc. R. R.*, 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243, 14 L. R. A. 798.

While it may be said that the jury in the trial of this cause were not bound to accept the testimony of the conductor that plaintiff's husband had only paid his fare to Nelson, yet, as before stated, conceding that they should accept such testimony as true, still, if deceased remained in the defendant's coach for the transportation of passengers, for the purpose of proceeding to some other point on the line of defendant's road, and with the intention of paying in money his usual fare for such transportation to such other point, he was as ⁴⁶⁰ much a passenger in contemplation of the law as though he had entered the train for the first time at the station of Nelson.

Upon the facts as developed in this case the court would not have been warranted in declaring as a matter of law that there was no evidence tending to show that plaintiff's husband was not a passenger on defendant's train at the time he was killed. It was not essential, in order to authorize the submission of this cause to the jury, to show by positive or direct evidence that plaintiff's husband was a passenger at the time of the collision, or that it was his purpose to continue his journey farther on from Nelson station; but if the facts and circumstances detailed in evidence were such as indicated the purpose and intention of deceased to proceed farther on his journey from Nelson station, then the court would not have been authorized in disregarding the legitimate inference the jury were warranted in drawing from the circumstances detailed in evidence. Take the facts in this case, about which there is no dispute, and we are unable to see how to escape the conclusion that they authorized the submission of the cause to the jury. In the first place, the

train stopped at Nelson station twenty-five or thirty minutes; there is an absence from the record of any testimony showing that the deceased alighted from the train, nor was there anything in his conduct or actions indicating that he desired or intended to get off the train. He remained in the passenger coach designed for the purpose of transporting passengers, and the conductor testified that at the time of the collision the train upon which deceased was traveling had started to move; still no effort on the part of the deceased to alight from this train; his home and family was at Blackwater, the place that he had left a few hours previously, to go to Marshall; the collision occurred while the train that he was upon was moving in the direction of his home; after the collision he was found in the coach where passengers should be. The ⁴⁶¹ actions and conduct of the deceased in this coach clearly manifested an intention and purpose on his part to remain in said coach as a passenger and pay his fare when demanded of him, and he did remain in it until it started to leave the station to which the conductor says that he had paid his fare. The coach on defendant's train was for the purpose of carrying passengers, and if the deceased desired to proceed to his home at Blackwater he had the right to remain in said coach for that purpose, and he was not in any sense a trespasser in contemplation of law. The instruction in the nature of a demurrer to the evidence was properly denied by the court.

3. Complaint is urged that the court erred in refusing defendant's instruction numbered 2. Counsel in their brief refer to this instruction as number 3, but the record discloses that the legal propositions are all embraced in instruction numbered 2. We have given such instructions so refused our careful consideration and have reached the conclusion that there was no error in the court denying appellant's request. This instruction is reproduced in full in the statement of this cause, and the second subdivision of such instruction substantially announces as a legal proposition that if the deceased had taken passage on the train at Marshall, Missouri, and had paid his fare to the station of Nelson, it was essential after the arrival of said train at Nelson for the deceased to notify the conductor that he wished to go farther on said train; then follows the further statement that if he remained on board the train talking to a friend, without notifying the conductor of said train that he wished to go farther on said

train, and that the conductor on said train did not know that he remained aboard said train after the arrival at Nelson, then and in that case he was not a passenger. In the first place, there was no testimony that the deceased was talking to a friend on the train, and in the second place, ⁴⁶² as heretofore indicated, if the deceased was in the passenger coach and proposed to proceed farther upon his journey, he had the right to remain in such coach, and it was not essential that he should expressly notify the conductor that he wished to go farther on said train.

It will not be seriously denied that if persons at the station of Nelson had entered said coach, they were passengers from the time of their entrance into the same, whether the conductor had any knowledge of their entrance or not, or whether they had a ticket or had paid their fare to the conductor. It was only necessary that they enter the coach either with a ticket authorizing their transportation, or with the intention of paying the usual fare for the same, and we are unable to see any well-grounded legal distinction between the person who enters the coach from a station for the purpose of going to some other point on the line of road, and the person who happens to be in the coach and remains there with the purpose of proceeding farther, and with the intention of paying his fare to the point he desired to go.

4. It is further insisted that the court erred in its refusal of the first subdivision of instruction numbered 2. That portion of the instruction required the jury to find that the deceased was a passenger in said train, as was defined by the terms embraced in the second subdivision of instruction numbered 2.

We have indicated that the second subdivision of instruction numbered 2 was erroneous and did not properly declare the law; hence it follows that the first subdivision of instruction numbered 2, which had for its basis the erroneous instruction, was also properly denied by the court. Again, it is insisted that the refusal of instruction numbered 2 left this case submitted to the jury without any requirement that they should find the deceased was a passenger, and without any guide as to what facts constituted him a passenger.

The appellant has manifestly overlooked what in ⁴⁶³ fact the jury were required to find in order to entitle plaintiff to recover. It will be observed that the defendant, in its instruction requested upon the measure of damages, practically

conceded and assumed by the terms of that instruction that deceased was a passenger on its train of cars; but aside from this the instructions given by the court required the jury to find every essential fact necessary to entitle plaintiff to recover. Instruction numbered 1 as given to the jury by the court required the jury to find that the plaintiff's deceased husband was a passenger on one of defendant's trains. That the deceased was a passenger up to the time the train reached the station of Nelson is conceded by appellant and is testified to by the conductor; hence the crucial question of fact to be found by the jury was whether or not he remained a passenger and was a passenger at the time the train was starting from Nelson station in the direction of Blackwater, and the jury in the closing part of instruction numbered 1 given on the part of the plaintiff, were required to find every essential fact necessary to constitute him a passenger. They were told that "if the jury believe from all the facts and circumstances in evidence that he determined to continue his journey to Blackwater and remained on said train for that purpose, the fact that he only paid his fare at Marshall to Nelson is no defense to this suit." While it may be said that the instruction is unhappily worded, and should have stated that the finding of the facts embraced in it would constitute deceased a passenger, yet the instruction required the finding of every essential fact necessary to make him a passenger, and the true meaning and import of it was that if they found that state of facts they would find that he was a passenger, and the fact that he only paid his fare to Nelson would constitute no defense to this suit. In other words, no other meaning can be given that instruction, it being conceded that he was a passenger up to the time the train reached Nelson, than that ⁴⁶⁴ if the jury should believe from all the facts and circumstances in evidence that he determined to continue his journey to Blackwater, and remained on the train for that purpose, he was a passenger. This was clearly the effect of that instruction; hence it must be ruled that under that instruction the jury were required to find that the deceased was a passenger, as well as all the essential facts necessary to constitute him such passenger, and this question having been fairly submitted to the jury there was no error in the refusal of the instruction requested by the appellant.

5. This brings us to the consideration of the only remaining proposition involved in this cause, that is, the conten-

tion of the appellant that the court erroneously refused defendant's instruction numbered 1 as to the measure of damages.

This suit was brought under section 2864, *supra*, and under the evidence introduced upon the trial the court very properly confined the recovery to that section. Instruction numbered 1 upon the measure of damages requested by the appellant, the refusal of which is now complained of, was entirely foreign to the section of the statute upon which this suit is predicated. Defendant's contention is that the death of plaintiff's husband was occasioned by the negligence of the brakeman, and that he was not a servant, such as is contemplated by the statute, engaged in the operation and managing of trains, therefore plaintiff was not entitled to recover in this action the definite fixed sum of five thousand dollars as a forfeiture under section 2864. In support of this contention our attention is directed to the case of *Culbertson v. Metropolitan St. R. R. Co.*, 140 Mo. 35, 36 S. W. 834. A careful analysis of that case will demonstrate that it has no application to the case at bar. The petition in this case proceeds upon only one theory, and that is, it is alleged that plaintiff's deceased husband was a passenger upon defendant's train and that his death ⁴⁶⁵ was occasioned by the negligence and unskillfulness of the agents, servants and employes of the defendant whilst so running, conducting and managing said train of cars and locomotives. In the *Culbertson* case, relied upon by appellant, there were different acts of negligence alleged and relied upon for recovery. Some of the acts complained of in that case would fall within the provisions of the section fixing a definite penalty and others brought the case under a provision of the statute in which no definite penalty clause was fixed, and upon that question, Gantt, J., speaking for this court, simply announced the rule. He said: "It has been uniformly ruled in this state that where different acts of negligence are alleged and relied upon and some of them bring the case within the penalty clause of section 4425 and others bring the case within section 4426, it is error to instruct solely for the penalty: *Crumpley v. Hannibal etc. R. R. Co.*, 98 Mo. 34, 11 S. W. 244; *King v. Missouri Pac. R. R.*, 98 Mo. 235, 11 S. W. 563; *Rapp v. St. Joseph etc. R. R. Co.*, 106 Mo. 423, 17 S. W. 487."

That is not this case. That the brakeman is a servant who has duties to perform in operating and managing a train,

such as the use of brakes, giving signals, etc., and whose negligent performance of such duties may easily produce fatal results, is too plain for discussion. Hence, it must be held that he was a servant engaged with others in operating and managing the train upon defendant's railroad: *Malloy v. St. Louis etc. R. R.*, 173 Mo. 75, 73 S. W. 159; *Rinard v. Omaha etc. R. R.*, 164 Mo. 270, 64 S. W. 124.

We have thus indicated our views upon the propositions disclosed by the record in this cause. There is no dispute that the collision which resulted in the death of plaintiff's husband was occasioned by the negligence of defendant's employes; the testimony plainly shows that fact and it is practically conceded, and we see no escape from the conclusion that the court properly submitted this cause to the jury and that the evidence is sufficient to support the finding of the jury; that the ⁴⁶⁶ plaintiff's husband determined to become a passenger from Nelson to Blackwater, and was on the train for that purpose when killed. His home was at Blackwater; his family was there, and he had left his home that afternoon for Marshall; the local freight train which provided a coach for passenger service, stopped at Nelson station twenty or thirty minutes; the conductor had given the signal to start, and the train had in fact started toward Blackwater before the collision occurred, and the plaintiff's husband was on the moving train in the regular passenger coach, and we are of the opinion that it was manifestly a correct and legitimate inference to be drawn by the jury that plaintiff's husband was on the train for the purpose of going to Blackwater, which was his home and natural destination.

Entertaining the views as herein indicated, it results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered.

All concur.

A Complaint Charging Negligence in general terms is good upon demurrer: *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196, 3 Am. St. Rep. 638; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 Am. St. Rep. 203; *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698, 61 Am. St. Rep. 578. See, too, *Omaha etc. R. R. Co. v. Crow*, 54 Neb. 747, 69 Tenn. St. Rep. 741; *Johnson v. Southern Ry. Co.*, 53 S. C. 203, 69 Am. St. Rep. 849.

Who are Passengers is the subject of a monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75-104. The question is further considered with special reference to street railways in the recent note to *Duchemin v. Boston etc. Ry. Co.*, 104 Am. St.

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Rep. 584-589. Where it appears that the plaintiff boarded one of the defendant's cars, and rode therein to the place where it collided with another of the defendant's cars to the plaintiff's injury, the presumption arises, although the payment of fare is not proved, that there was an implied contract creating the relation of carrier and passenger between them: *Reynolds v. Transit Co.*, 189 Mo. 408, 107 Am. St. Rep. 360.

KANSAS CITY v. HYDE.

[196 Mo. 498, 96 S. W. 201.]

EMINENT DOMAIN—Extension of Street—Evidence.—In an action under an ordinance to condemn land for the extension of a street terminating at the boundary line of an owner's land, and thus forming a cul-de-sac, evidence of a contemporaneous ordinance for the widening of another street, so that the street as extended and the street as widened will meet and form one highway, is admissible. (p. 769.)

EMINENT DOMAIN—Judgment.—In an action under an ordinance to condemn land for the extension of a street terminating at the boundary of an owner's land, thus forming a cul-de-sac unless another street is opened as contemplated by a contemporaneous ordinance and proceedings thereunder, the court should withhold final judgment until judgments are reached in both proceedings, each proceeding depending for its success upon the other. (p. 770.)

EMINENT DOMAIN—Evidence.—If the opening or extending of a particular street under the right of eminent domain is but a part of a general scheme, the court is entitled to know what such scheme is, in order to appreciate the value of the particular street in question. (p. 770.)

EMINENT DOMAIN—Evidence.—If the opening or extending of a street under the right of eminent domain is but a part of a general scheme, such scheme may be shown by contemporaneous ordinances, or by the best evidence of which the fact is susceptible. (p. 770.)

EMINENT DOMAIN—Opening Streets—Attack on Ordinance. While the passing of a city ordinance to establish, widen or extend a street is the exercise by the city of a delegated governmental power, legislative in its character, and, therefore not subject to judicial direction, yet after the ordinance has become an established fact, if an attempt is made to apply it to the injury of the property rights of a citizen, he may, if he can, show that its passage was obtained by fraud, or other unlawful means, for an unlawful purpose. (p. 771.)

EMINENT DOMAIN—Unlawful Purpose.—A city council has no power to condemn private property for a street, in order to give it over to a railroad company to be used for switching purposes, and such an act is a legal fraud. (p. 772.)

EMINENT DOMAIN—Private Use.—A common council of a city has no authority to establish a street, or system of streets, at the expense of the property owners in the district, for the use of a private individual or a number of individuals, and the willful doing of such an act is a legal fraud. (p. 772.)

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EMINENT DOMAIN—Unlawful Purpose.—It is not lawful for a city, in the exercise of the right of eminent domain, to create a street in the name of the public, for the purpose of vacating it in the interest of whom it may concern. (p. 774.)

EMINENT DOMAIN—Public Use.—A city council has power to condemn land for a public use, but it has no power to condemn for a private use, and in this connection "public" means everybody, and if the use is not for everybody it is a private use, or if condemned for an individual, or any number of individuals in such manner as will practically exclude the general public, it is the giving of the property to a private use, a destruction of its public service character, and an unlawful act and fraud. (pp. 775, 776.)

EMINENT DOMAIN—Conclusiveness of Ordinance Condemning Land.—The recitals in an ordinance having for its purpose the condemnation of private property to a public use are not conclusive, and the court may go behind them and ascertain the real purpose of the ordinance, by the best evidence obtainable, whether oral or documentary. (p. 776.)

EMINENT DOMAIN—Unlawful Ordinance—Method of Attack.—If a city passes an ordinance having for its ostensible purpose the condemnation of private property for a public use, the property owner is not driven to a suit in equity, to reform the ordinance or attack its integrity or validity, but may do this in the condemnation proceedings. (p. 776.)

EMINENT DOMAIN—Public Use—Question for Court.—It is for the court, and not for the jury, to determine in condemnations whether or not the purpose is to take private property for a public or a private use, and the question may be brought to the attention of the court by a motion to dismiss. When this is done it is the duty of the court to proceed and take the evidence in support of the motion. (p. 777.)

Lathrop, Morrow, Fox & Moore, for the appellant.

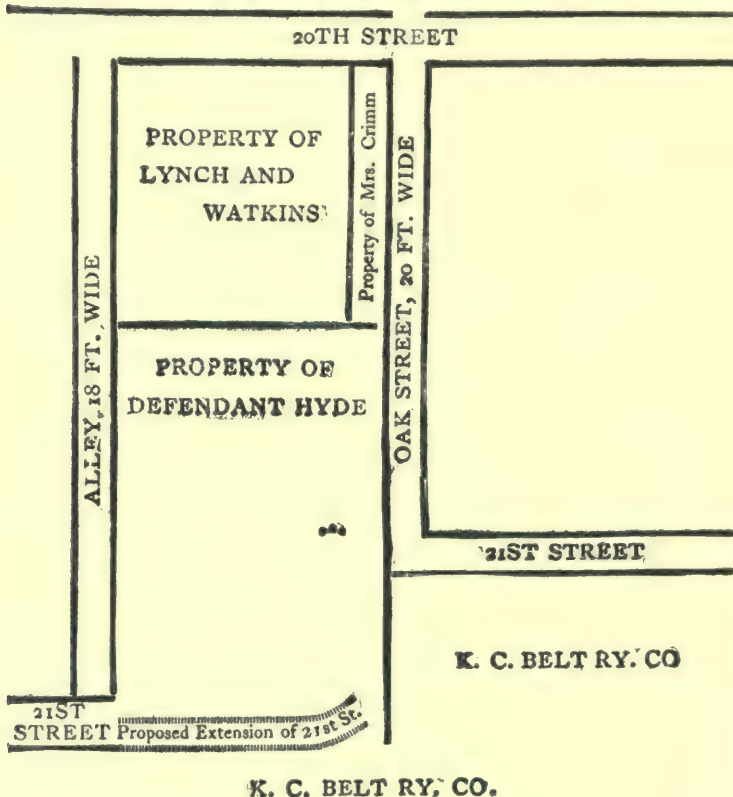
E. C. Meservey and J. H. Thacher, for the respondent.

502 VALLIANT, J. In re Twenty-first street: This is a proceeding under an ordinance of the city to extend Twenty-first street into certain property of the defendant Hyde, and for that purpose to assess his damages for the property to be taken or damaged, and to assess the benefits over a district prescribed by the ordinance, in which district is included remaining property of defendant. The jury assessed the defendant's damages at five thousand dollars and his benefits at two thousand five hundred and seventy-seven dollars and ten cents, and from the judgment of condemnation that followed on those assessments the defendant has appealed.

Defendant Hyde owns a tract of land nearly square in shape, containing about sixty thousand square feet, bounded on the east by Oak street twenty feet wide, west by an alley eighteen feet wide, and on the south by the right of way of the Kansas City Belt railway. Twenty-first street, sixty

feet wide, coming from the west, terminates on the west line of defendant's property, its south line being nearly coincident with the south line of defendant's property.

The following diagram gives a general idea of the location.



503 Twenty-first street, as will appear from the diagram, does not extend across defendant's property, but it ends on the west against defendant's west line, and begins again going east at defendant's east line, and not then on a line with its own west end, but considerably north of it.

The ordinance in question does not aim to unite the two disconnected ends of Twenty-first street, nor to carry the street entirely through defendant's property, but to terminate it in defendant's property at a point ten feet west of his east line; nor does the ordinance aim to carry the street

to its full width even as far as it purposes to go, but to the width only of thirty ⁵⁰⁴ feet. Another feature of the route marked out by the ordinance is that, after going sixty-eight feet along the south line of defendant's land, it changes course to the northeast to the terminus named and that, too, at an angle which, even if the course were extended to defendant's east line, would not connect it with that end of Twenty-first street.

Appellant contends that it appears on the face of the ordinance, when applied to the physical facts above stated, that the public has no interest in this proceeding, that the extension of Twenty-first street as proposed would simply create a cul-de-sac in defendant's property which would be of use to no one, and that we think is correct. But to meet that objection the city undertook to prove that there was another fact to be considered which would show that this extension was for a public use and would serve the public, namely, that there was pending at the same time and in the same court another proceeding the purpose of which was to widen Oak street and bring it down to connect with this extension of Twenty-first street and to the right of way of the Kansas City Belt Railway Company. But on the objection of defendant the testimony offered by the city on that point was excluded. The idea advanced was that this case would have to stand or fall by its own strength and could not be helped out by another proceeding, the result of which was only problematical.

We have now under consideration the appeal of this same defendant in the Oak street case, both cases having been submitted for our judgment at the same time, and in that case to meet the objection of the defendant, that the widening and extending of Oak street would only carry it to an unprofitable end, the city offered to prove that it was at the same time moving to extend Twenty-first street so as to connect it with the widened and extended Oak street, but on like objection by the defendant that evidence was excluded. In spite ⁵⁰⁵ of the ruling of the court, however, the evidence in its full force got to the jury and must have had its effect, because the jury could not, with reason, have assessed any benefits in this case if there was no purpose shown to connect the two streets.

The court erred in excluding that evidence. Assuming that it was to the public interest that these two streets should

be connected in the manner that they would be if both of those ordinances were carried into effect and that the common council so determined, yet, since proceedings to widen or extend both streets cannot be embraced in one suit, it would be impossible to carry the scheme into effect if each proceeding had to rest alone on its own facts without taking into account the purpose of the other. If each proceeding depends for its success on a condition that does not already exist, but that can be brought about only by a successful prosecution of the other, and if neither can proceed until the other is finished, then the one defeats the other and both must fail. That cannot be the law. The danger suggested in the possible failure of the other proceeding can be avoided without any difficulty by the court in its control of its judgment; it can withhold its final judgment or its ruling on a motion for a new trial or otherwise suspend final action until judgments are reached in both cases.

Nothing that it is necessary for the court to know in order to reach a correct conclusion in a given case can be said to be irrelevant or immaterial.

If the opening or extending of a particular proposed street is but a part of a general scheme, the court should know what the scheme is in order to appreciate the value of the particular street in question.

That scheme may be shown by contemporaneous ordinances if it has been put into that record form, or it may be shown by the best evidence of which the fact is susceptible, if it has not been made a matter of record.

⁵⁰⁶ Whilst the passing of an ordinance to establish, widen, or extend a street is the exercise by the city of a delegated governmental power, legislative in its character and, therefore, not subject to judicial direction (*Albright v. Fisher*, 164 Mo. 56, 64 S. W. 106; *State v. Gates*, 190 Mo. 540, 89 S. W. 881), yet after the ordinance has become an accomplished fact, if attempt is made to apply it to the injury of the property rights of a citizen, he may, if he can, show that its passage was obtained by fraud or other unlawful means or for an unlawful purpose. In *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743, this court, per Black, J., said: "The rule of law is well established that the courts will not inquire into the motives of the legislature in enacting a law, even where fraud and corruption is alleged: *Cooley's Constitutional Limitations*, 5th ed., 225. But the rule is somewhat

relaxed as to municipal bodies. Speaking of such bodies it is said: 'We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby': 1 Dillon on Municipal Corporations, 4th ed., sec. 311." That doctrine has been iterated by this court in other cases: Knapp, Stout & Co. v. City of St. Louis, 156 Mo. 343, 56 S. W. 1102; State v. Gates, 190 Mo. 540, 89 S. W. 881.

At the trial of this case the defendant offered to prove that one of the men who owned the property adjoining his on the north was, at the time of the passage of these ordinances, the speaker of the lower house of the common council, to whose property a switch could not be run from the Kansas City Belt railway unless the streets were extended and widened as in these ordinances was proposed; that he, through his partner, had approached defendant with a proposition that if he (defendant) would sell him a right of way to the Belt railway, the ordinances would not be passed, but defendant declined and the ordinances were passed; that the purpose of the ordinances was not to widen or extend the streets for use as public highways, but solely ⁵⁰⁷ for the purpose of affording the speaker of the lower house and his business partner access by means of a switch track to the Belt railway, and that when widened and extended, as proposed in these ordinances, and turned over to the railway to be covered with switch tracks, the public would be practically excluded from the use of those streets. The court, on objection of the plaintiff, rejected the evidence and exception was saved. The rejection of that evidence raises the serious question in this case. If it is a fact that the purpose of the council in passing the ordinances was that these streets, when widened and extended as proposed, were to be given over to railway switch tracks, then the common council was proceeding to condemn private property for a purpose for which it had no right to condemn.

When we say that the validity of a city ordinance may be attacked on the ground of fraud in its procurement, we do not necessarily mean that actual bribery or corruption must be shown, but it is sufficient if the fraud charged is of that character that has been defined to be the willful doing of an unlawful act. The common council has authority to establish, extend and widen streets for the purpose of public highways, and, when established, extended or widened, it has authority,

within certain bounds, to allow railway tracks to be laid in the streets and trains to pass over them. But those streets are established for public use and the cost of establishing them is charged as a special tax on the benefit district affected. The common council has no authority to establish a street or a system of streets at the expense of the property owners in the district for the use of a private individual or a number of individuals. And if the council should undertake to use the power that has been intrusted to it for the public benefit, to serve private interests, it is an abuse of the power, a violation of the trust, a willful doing of an unlawful act, a legal fraud.

⁵⁰⁸ It has been decided by this court that an ordinance of the city of St. Louis essaying to grant a railroad company the right to lay its tracks in a street that was so narrow that when the tracks were laid and trains operated on them the street was practically unsafe for a public highway, was illegal and of no effect: *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698, 24 L. R. A. 516.

As was held in the case of *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743, above mentioned, the city has the power to vacate a street when it deems it no longer of public use and, in the absence of fraud, it is no ground for holding the vacating ordinance illegal because the effect is to give the use of the ground to an adjoining manufacturing concern, or even if it was done for that purpose. The controlling idea in that case is, that if, without fraud, the city authorities are well satisfied that the street is of no use to the public and could be advantageously used by the adjoining manufacturing concern, the ordinance vacating it is not illegal.

But in the case at bar the common council come saying, we need this ground for a public highway, we are going to condemn it for the use of the public, and we are going to make those who own property lying within a certain district pay for it; we are going to make this defendant, whose property to the value of five thousand dollars we will take pay, as for the benefit it will do him, more than half the sum we give him. Surely, if for nothing more than showing the questionable extent of his benefits, the defendant ought to be allowed to show the purpose to which the proposed streets are to be put, if that purpose is already a part of the general scheme. If along with these two ordinances the common council had passed an ordinance authorizing the Belt Rail-

way Company to so occupy the proposed streets, when completed, with switch tracks as to give certain individuals switch connection for their property with the Belt railway, that would be a fact that would necessarily influence the jury in the assessment ⁵⁰⁹ of the benefits which the defendant would be required to pay, and it might be an important fact for the court to know when the time should come to pass on the question of the validity of the ordinance, and, if such was the purpose, the common council would have been more candid to have so avowed it; but if such was in fact the purpose, though not so avowed, it is just as important for the court to know it and the defendant has the right to prove it.

What is called Oak street is now only twenty feet wide; it terminates in that part of Twenty-first street that lies east of the defendant's property; it stands at such an angle to the Belt railway as seems to make it impracticable to run a switch track into it. The property of the firm, in whose interest alone, as the defendant contends, this proceeding is being prosecuted, lies adjoining on the north defendant's property, and is separated from Oak street by a strip ten feet wide belonging to Mrs. Crimm. The scheme as shown by the ordinance in the Oak street property is to take Mrs. Crimm's ten feet strip and a strip of like width off the east side of defendant's property, thus making Oak street thirty feet wide and giving the firm mentioned a front for the full length of its property on that street, then the sharp angle that would otherwise hinder the laying of a track from the Belt line into Oak street is reduced by the turn of the course of the proposed extension of Twenty-first street to the northeast. If the purpose is, as defendant offered to prove that it was, to shape these streets for the convenient introduction of the switch track mentioned, the plan proposed would facilitate that purpose. Then if we contemplate what Oak street would be thirty feet in width and a railroad track through it, the question would arise as to whether that street was any longer susceptible of being used as a public highway. In the case of *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698, 24 L. R. A. 516, above mentioned, the street was forty feet wide, from building line to building line, and ⁵¹⁰ twenty-four feet from curb to curb, and this court held that the railroad tracks amounted to a practical exclusion of the public from the street and that the ordinance was therefore void.

If there was now no scheme to turn these streets over to the use of the Belt Railway Company, if they were now already extended, widened and established as proposed, and if the common council was now proposing to grant the Belt Railway Company the right to lay its tracks through Oak street, if we should adhere to what we said in the Lockwood case, we would have to hold that the city council could not so drive the public off that highway. And it does not alter the case that there are other lots along the line that might be rendered more available for business purposes if they were afforded connection by switch tracks with the Belt road. The common council can no more create a street for the especial benefit of a given number of people than it can for that of one individual; if it is to be a street it must be a highway for the public, and no use of it can be granted inconsistent with the use of the general public. And whilst it is competent, as we have seen in the Glasgow case above mentioned, to vacate a street which is no longer of any use to the public, yet it is not competent to create a street in the name of the public for the purpose of vacating it in the interest of whom it may concern.

In *Ligare v. City of Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, 28 N. E. 934, the city council had passed two ordinances, one to widen Archer avenue, the other granting a railroad company the right to lay its tracks in the street when it should be so widened. And the court said: "It is to our minds clear that both ordinances before us in this case are but parts of a single and entire scheme. They were adopted on the same day, and the latter expressly refers to, and is by its terms dependent upon, the adoption and enforcement of the former, and it requires that the entire cost and expense of enforcing both ordinances, and all ⁵¹¹ damages which may be adjudged against the city by reason of their being adopted and enforced, shall be paid by the railroad companies." In that case the city council was entirely candid in the expression of its purpose and was careful not to impose the burden of cost, expenses and damage on the persons whose property was to be taken or on those owning other property in the vicinity. The court went on to say: "Moreover, the attempt to widen Archer avenue for the limited distance and in the peculiar manner described in the first ordinance is manifestly to meet a local want in that respect, and the second ordinance expressly shows that that local want is space for laying down

additional railroad tracks, and nothing else." Then after showing how completely the street, when widened, would be occupied by railroad tracks, the court, continuing, said: "Hemmed in by the wall on one side and by the buildings or inclosures on private property on the other, no rational being would, at the risk of the inevitable dangers from passing cars, use this part of the street as a common highway, unless under stress of most extraordinary circumstances. It is not material that the public are not, by the words of the ordinance, forbidden to use this part of the street—the effect of the grant is inevitably an exclusion of all but these railroads from its use, and the law deals with results and not with mere forms in such matters. . . . It is so familiar that we need not stop to demonstrate it, that cities, villages and towns are only empowered to lay out, open and improve streets for such public use as that persons and property within the municipality may be legitimately assessed or taxed for payment thereof, and that persons and property within a municipality cannot be legitimately assessed or taxed for the right of way or the making or improving of a road, for a railroad company alone. . . . We do not deny that the city has power to widen streets, generally, and that when it has undertaken to do so the motives that may have actuated those ⁵¹² in authority are not the subject of judicial investigation; but the purpose for which a thing is done is very different from the motives which may have actuated those by whom it is done, and is, in the present instance, a legitimate subject of judicial investigation, for the right to exercise the power of eminent domain is in all cases limited by the purpose for which it shall be exercised—as thus, private property may be condemned for public use, but it may be shown that the use in fact is not public, but private. . . . A railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city and . . . a city cannot, under authority to condemn property for streets, condemn property for a railroad track, for the principle must be the same."

The facts of the case at bar illustrate forcibly the necessity for the admission of evidence of the kind offered by the defendant.

To the city council the state has delegated the power to condemn land for a public use, it has no power to condemn for a private use; "public" in that connection means everybody; if the use is not for everybody it is a private use; if

to an individual, or to any number of individuals, is given the right to use the property in such manner as will practically exclude the general public, it is a giving of the property to private use and a destruction of its public service character.

Now, suppose an influential individual, to whom a slice of his neighbor's property would be very convenient, should ask the city council to condemn that property for his use and the council should pass an ordinance as requested declaring that it condemned the property for the use of the individual; of course the ordinance would be void, on its face. But suppose the council, intending the condemnation to be really for the sole benefit of the individual, in order to give it validity should say in the ordinance that the property was to be condemned for a public street, would such a false recital ⁵¹³ in the ordinance be conclusive, would it put the man whose property was to be taken, and the people in the district who were to be taxed to pay for it, beyond the protection of the constitutional guaranty that their property should not be taken for private use? Could the city council by a false recital in the ordinance give it a validity which it would not have if it recited the truth? And when the city comes to ask the aid of the court to carry the ordinance into effect, is it possible that the court must be a mere tool to do the will of the council with no power to inquire into the truth of the matter? What protection has a citizen for his constitutional rights if the courts cannot look through a sham and see the truth, and how can the courts learn the truth if they must take the recitals in the ordinance as conclusive and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence and how humiliating would be the attitude of our courts if they were so powerless. But our law is not so lame and our courts not so impotent. The courts in such case will hear the evidence and find the facts. If the truth lies only in an unwritten agreement or understanding it can be proven only by oral testimony, and that being the best evidence of which the fact is susceptible the court must receive it and weigh it.

Defendant in such case is not driven to a suit in equity to reform the ordinance or assail its integrity. This is a summary proceeding, no pleadings are prescribed by the charter or by statute, and the party has a right to demand that the court hear the evidence and find whether or not the purpose

of the proceeding is to condemn his property for a public use or for the use of an individual or individuals.

If, as the defendant offered to prove, the real purpose for which these ordinances were passed was to make a way for a switch track or switch tracks to property of an individual or any number of individuals, ⁵¹⁴ then it was a purpose for which the city council had no authority to condemn property and the passage of the ordinances was an abuse of its power, and the court should adjudge the ordinance void.

But even if switch tracks are not intended and will not be laid in the streets, still on what possible theory can it be said that this defendant will be benefited by the opening of this street through his land? It gives him no connection that he has not already, and it cuts him off from his connection with the right of way of the Belt railway.

The only change in his situation besides that of depriving him of a large slice of his property will be to put him at the mercy of the city council if he should ever want a switch track into his premises connecting with the Belt railway.

It is said in behalf of respondent that no pleadings were filed alleging that this was a proceeding to condemn private property for a private use, and that therefore there is no such question in the case. Under the provisions of the city charter prescribing the procedure in such case, formal pleadings are not required. Nevertheless, the defendant in this case did file what is called a motion, averring that the ordinance was invalid for several reasons specified, among which was that it was a proceeding to take his property not for a public, but for a private, use and prayed that the suit for those reasons be dismissed, which motion the court overruled without hearing evidence and defendant excepted.

It is true as contended by respondent that the jury was not impaneled to try any questions, except those relating to the damages and benefits, and therefore, except as bearing on those questions, the jury had nothing to do with determining whether this was a proceeding in good faith to condemn property for a public street, but that was a question addressed to the court, on which the court ought to have heard the evidence offered, and if satisfied that it was a proceeding to condemn the ⁵¹⁵ property of the defendant for the use of one individual or individuals it ought to have rendered judgment for defendant dismissing the proceeding. The court could have tried that issue before impaneling the jury or during the jury

trial or afterward as it might see fit to do, since there is no particular procedure prescribed in the charter or elsewhere.

For the reasons above given the judgment is reversed and the cause remanded to the circuit court to be proceeded with according to the law as hereinabove expressed.

All concur.

A City has no Right to Authorize the Use of Its Streets for railroad purposes, when such use necessarily destroys them as public ways, and deprives abutting owners of access to their property: Lockwood v. Wabash R. R. Co., 122 Mo. 86, 43 Am. St. Rep. 547; Ligare v. Chicago, 139 Ill. 46, 32 Am. St. Rep. 179.

When Two Ordinances for the Widening of a Street are passed on the same day and the last one expressly refers to and is by its terms dependent upon the adoption and enforcement of the first, and requires that the entire expense of enforcing both, and all damages which may be adjudged against the city, shall be paid by certain railroad companies in whose interest the ordinances are passed, they will be treated as a single and entire scheme: Ligare v. Chicago, 139 Ill. 46, 32 Am. St. Rep. 179.

Uses for Which the Power of Eminent Domain cannot be exercised are discussed in the monographic note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 809-839.

CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

WILCOX v. COUNTY OF PERKINS.

[70 Neb. 139, 97 N. W. 236.]

OFFICIAL BONDS—Irregularities—Defense.—Although an official bond of a county officer as executed is irregular in being joint, instead of joint and several, as required by statute, this is not an objection thereto of which the obligors thereon can avail themselves as a defense thereto. (p. 780.)

FRAUD—Directing Verdict.—Although fraudulent intent is a question of fact, yet it does not necessarily follow that such question of fact must in every case be left to the jury for determination, and if, from the uncontradicted evidence, all reasonable men must reach but one conclusion, it is proper for the court to direct a verdict as matter of law. (p. 782.)

OFFICERS—Settlement of Accounts—Conclusiveness.—If a full and complete settlement of a county officer with the county commissioners, who are authorized to make it, has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition in making such settlement. (pp. 782, 783.)

Wilcox & Halligan, for the plaintiff in error.

B. F. Hastings, J. M. Stewart and T. C. Munger, for the defendants in error.

140 **HOLCOMB, J.** County of Perkins, defendant in error, in its corporate capacity, prosecuted an action in the district court against defendant Wilcox, formerly county clerk, and the other defendants who were sureties on his official bond, because of Wilcox's alleged failure to fully and properly account for, and pay over to the county, certain fees claimed to have been collected in the discharge of his official duties, which fees were then due and owing to the county. The action was an ordinary one on the official bond of Wilcox for an alleged breach of its conditions respecting his duties to account for fees received while in office.

The answer of the defendants denied the allegations of the petition, and pleaded affirmatively that, prior to the institution of the action, the principal, Wilcox, had made a full and complete settlement with the county board of plaintiff county, touching and covering the matters mentioned in the petition; that the same was fair in all respects, and that such settlement was conclusive on the county and, for that reason, it was estopped from questioning the same. To the answer a reply was filed, in which ¹⁴¹ it is alleged that the settlement pleaded as a defense is of no effect and not binding on the county, for the reason that the defendant, Wilcox, had fraudulently omitted from his report certain fees that had been by him collected, and falsely and fraudulently represented that the report he presented to the county board was a correct report of all the fees received by him while in office, when, in truth and in fact, certain fees were omitted, which omission was falsely and fraudulently made to deceive the county commissioners; that they were deceived and, because thereof, the alleged settlement was of no binding effect. A trial was had to the court and a jury, wherein, after the admission of evidence, on a peremptory instruction, a verdict was rendered for a specified sum in favor of the plaintiff. The defendants prosecute error.

The bond sued on was a joint obligation, instead of joint and several as required by statute, and for this reason it is contended, exceptions having been properly preserved by demurrer to the petition and an objection to the introduction of any evidence, that the petition fails to state a cause of action and therefore no recovery can be had. The objection is believed to be untenable. This court has held in *Clark v. Douglas*, 58 Neb. 571, 79 N. W. 158, that an irregularity in this respect, in the form of an official bond prescribed by the statute, is not an objection thereto, of which the obligors upon the instrument can avail themselves as a defense thereto, and that the bond is good to the extent it complies with the statute in that regard. The case cited is decisive of the question in the present controversy and the objection is therefore without merit.

The principal point, however, relied upon as ground of error, as stated by counsel for plaintiffs in error, is in respect of the peremptory instruction of the court to the jury to return a verdict for the county. It is argued that on the face of the pleadings a settlement is admitted, to vitiate

which the reply alleged that it was obtained by the fraud of the plaintiff, and that fraud, under our statute, is a question of fact which, under all circumstances, should ¹⁴² be submitted to a jury for its determination. Counsel contend that under no theory of the evidence did the court have the right to take the case from the jury and instruct them to bring in a verdict for the plaintiff, for any amount. No bill of exceptions containing the evidence is preserved; consequently, we may assume that if, under any possible state of the evidence, the instruction was proper, then we must so hold in the present case. While by section 20, chapter 32 of the Compiled Statutes (Annotated Statutes, 5969), entitled "Frauds," it is provided that the fraudulent intent, in all cases arising under the provisions of this chapter, shall be deemed a question of fact and not of law, it may very well be doubted whether this section has any application to alleged fraudulent acts, such as are pleaded in the reply in the case at bar. The statute of frauds is in relation to fraudulent conveyances and contracts relating to real estate and to goods, chattels and things in action. The fraud here charged is a false and deceptive statement of fees received, for the purpose of obtaining an unfair advantage and withholding from the county moneys collected as fees rightfully belonging to it. If the fact of the false statement were established, then the fraudulent intent, in the absence of explanation on the ground of mistake or misunderstanding, it would seem, would inevitably arise. Conceding, however, that the fraud alleged in the case at bar is a question of fact to be determined by a jury within the meaning of said section 20, it does not follow that the trial court's action, in peremptorily instructing the jury to return a verdict for plaintiff, is necessarily erroneous. It has heretofore been, by this court, judicially determined that fraudulent intent, even though a question of fact, may be, by the evidence, so indisputably established as to warrant it being ruled upon as a question of law: *Bender v. Kingman & Co.*, 62 Neb. 469, 87 N. W. 142, on rehearing, 64 Neb. 766, 90 N. W. 886. On the first hearing, in the case cited, it is held that while by reason of section 20, referred to, the intent of the vendor in the alleged fraudulent conveyances is always a question of fact, it does not follow that such question ¹⁴³ of fact must, in every case, be left to the jury; that if from the uncontradicted evidence all reasonable men must reach but one conclusion, then it is proper

for the court to direct a verdict. To the same effect is the announcement of the rule on a rehearing and reinvestigation of the question: *Bender v. Kingman & Co.*, 64 Neb. 766, 90 N. W. 886. See, also, *Hedman v. Anderson*, 6 Neb. 392; *Davis v. Scott*, 22 Neb. 154, 34 N. W. 353. Not having the evidence before us we may assume that it was of such a character as to leave no substantial controversy regarding any question of fact, that there was nothing for the jury's determination, and that the court was therefore justified in giving the peremptory instruction complained of. Portions of the briefs of counsel are devoted to a discussion of the nature and effect of the settlement had between the county, through its commissioners, and Wilcox, as county clerk. It is said, on the one hand, that such adjustment and settlement was purely a ministerial act, and would in no wise prevent a recovery for any sum found to be due the county and not accounted for. On the other hand, it is contended that such settlement has become final and conclusive on the county unless impeached for fraud or mutual mistake. *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376, and *Hazelet v. Holt County*, 51 Neb. 716, 71 N. W. 717, give support to the contention that a settlement made by a county officer with the board of county commissioners, relative to the accounts of the former with the county, has only the effect of furnishing prima facie evidence of a discharge of liability, which may be overcome by other competent evidence showing a failure to account fully and properly for all fees received, and that an action may be maintained to recover such unaccounted for fees, and without impeaching such settlement for fraud or mutual mistake. The decisions cited in respect of the matter now under consideration probably go further than by the application of sound legal principles is warranted. Such settlement should be regarded as something more valuable and effective than a merely formal act, neither signifying nor accomplishing anything. It would seem to be more ¹⁴⁴ nearly related to the transactions of parties competent to act and who sustain relations contractual in their character. When once a settlement is entered into, it should be, it seems, regarded as final unless, for sufficient reasons, it may be avoided on legal or equitable grounds. As suggested by Maxwell, C. J., in *Ragoss v. Cuming County*, 36 Neb. 375, 54 N. W. 683: "There should be an end to litigation, and an officer who has faithfully performed the duties of his office and made a full

settlement with the tribunal authorized to settle the same should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same."

And in *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023, 32 L. R. A. 223, it is observed in the course of the opinion of the court: "Any settlement is all right and entitled to stand in favor of an officer who has faithfully performed the duties of his office, when in the settlement there is neither fraud, nor mistake, nor imposition."

In *County of Douglas v. Bennett*, 61 Neb. 660, 85 N. W. 833, it is held: "Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same has been made, such settlement is full and conclusive, unless there is fraud, mistake or imposition in making the same."

This case is controlling in the disposition of the question now being discussed and we adhere to the same. No error appearing in the record, the judgment of the district court is affirmed.

Irregularities in Official Bonds which do not discharge the sureties therein from liability are discussed in the monographic note to *Estate of Ramsay v. People*, 90 Am. St. Rep. 190-206. For subsequent cases on this question, see *Town of Tumwater v. Hardt*, 28 Wash. 684, 92 Am. St. Rep. 901; *State v. Idaho*, 4 Idaho, 468, 95 Am. St. Rep. 137.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. ETTENHEIMER.

[70 Neb. 144, 97 N. W. 227.]

ESTOPPEL.—One Who Successfully Attacks Appellate Proceedings upon the ground that they are not authorized by law and wholly void is estopped thereafter to assert that they are in any respect valid. (p. 784.)

ESTOPPEL—Undertaking—Bond.—A person who executes an appeal bond under circumstances estopping him from asserting its invalidity for want of consideration cannot, in an action on the bond, avoid liability on the ground that his opponent is estopped to assert that there was any consideration for the bond. (p. 785.)

ESTOPPEL Against Estoppel sets the matter at large. (p. 786.)

APPEAL BONDS—Validity as Contract.—An appeal bond given in pursuance of a statute afterward declared unconstitutional, though not valid as a statutory bond, may yet be valid as a common-law contract. (p. 787.)

ESTOPPEL—Application.—Principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of a statute under which they are had, as well as where they are sought to be impeached on other grounds. (p. 787.)

POWERS OF ATTORNEY to Two or More.—One of several persons who are appointed attorneys in fact by a power of attorney may act for the principal, when the power contains no provision requiring more than one to join in its execution. (p. 787.)

R. S. Mockett and O. B. Polk, for the plaintiff in error.

W. J. Lamb, for the defendant in error.

147 SEDGWICK, J. Ettenheimer recovered a judgment of restitution before a justice of the peace in a suit for forcible detainer. His opponent took an appeal to the district court, and gave the bond upon which this action is brought. The case was docketed in the district court as an appeal, and was treated by both parties as being properly before the court. It was again tried in the district court, and there was a verdict **148** and judgment in favor of defendant. The plaintiff then brought the action to this court: Ettenheimer v. Wallman, 63 Neb. 647, 88 N. W. 859. It was held that the district court had no jurisdiction of the appeal, and that the judgment of the justice of the peace was not affected thereby. The judgment of the district court was reversed, and the appeal from the judgment of the justice was dismissed. The plaintiff then brought this action upon the bond.

It was held upon the former hearing (70 Neb. 144, 97 N. W. 227), that the plaintiff was estopped to prosecute the action, and the judgment of the district court in his favor was therefore reversed. The reason given for this holding was that one who successfully attacks appellate proceedings, upon the ground that they are not authorized by law and wholly void, is estopped afterward to assert that they are in any respect valid.

If the proceedings in the district court were entirely void, because there was no law authorizing an appeal, as held in *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401, and *Ettenheimer v. Wallman*, 63 Neb. 647, 88 N. W. 859, it is not apparent upon what theory it may be said that the plaintiff attacked the appellate proceedings. He might have treated the attempted appeal as absolutely nugatory. He might have compelled the issuing and execution of a writ of restitution on the judgment of the justice of the peace, notwithstanding the attempted appeal. This would have been a successful at-

tack upon the appellate proceedings. But, instead of so doing, both parties appear to have treated the appeal as valid. It might with better reason be said that the plaintiff acknowledged the validity of the appeal.

It is insisted by plaintiff that the action of this court was upon its own motion, following the decision in *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401, and that the plaintiff urged other grounds for the reversal of the judgment of the district court. But, whatever may be said of plaintiff's subsequent action in this court, it is certain that when the defendant asserted his right to appeal, and to give the bond now in suit and procure a stay of execution, and so retain possession ¹⁴⁹ of the premises, the plaintiff acquiesced in that action and treated the defendant's appeal as valid, at least until the time of the trial in the district court. There can be no doubt that the defendants herein were at that time estopped to deny their liability upon the bond, under the holding of this court in *Stevenson v. Morgan*, 67 Neb. 207, 108 Am. St. Rep. 629, 93 N. W. 180, and *McVey v. Peddie*, 69 Neb. 525 96 N. W. 166.

In both of these cases, the actions were upon bonds identical with the one involved here. In the former, the court, after discussing the distinction between cases in which the contract involved must depend for its consideration solely upon the requirements of the statute and those cases in which the contract "rests upon a consideration of its own," said:

"The basis of distinction between these two lines of cases is the consideration. If it exists, the instrument may be enforced like any other contract and the annulment of, or departure from, a statute providing for it is not fatal. If, on the other hand, the consideration is absent, the instrument, like any other nudum pactum, affords no basis for recovery. In the case at bar the principal obligor on the bond was enabled by means of it to retain possession of the premises. At the time of the trial below, in February, 1901, he had occupied them for nearly three years following the execution of the bond. As one condition of the bond sought to be enforced was payment of rent, it will be seen that the obligor's promise was supported by a sufficient consideration, and this, without taking into account the fact that he also obtained pro forma, at least, a review of the justice's judgment in the district court. Indeed, it cannot be doubted that if the instrument in controversy be denied the character of a bond at all and be

treated simply as an agreement to pay rent in consideration of the occupancy of the premises, recovery must be allowed."

Many of the authorities are reviewed and applied, and we are entirely satisfied with the conclusion reached. It is approved and followed in *McVey v. Peddie*, 69 Neb. 525, 96 N. W. 166. There ¹⁵⁰ is no distinction between these two cases and the one at bar, except in the fact that in this case the proceedings afterward taken in the district court were declared void. If the defendant obtained no other benefit of his attempted appeal, he, at least, was enabled to present the question to this court, and in the meantime retained the possession of the premises in dispute. The object of the undertaking was to protect the plaintiff against two sources of possible injury: 1. He would be subjected to expenses in the district court, which would be unnecessary if the judgment already rendered should finally stand as the law of the case; 2. He would, while the proceedings were pending, be deprived of the possession of the premises which had been awarded to him by the judgment of the justice. The condition of the undertaking was likewise twofold—to pay costs, and to pay rent. Each several liability was supported by a distinct consideration. He had the use of the premises for which, by his undertaking, he agreed to pay.

We do not see how the fact that neither party relied upon an estoppel, in the pleadings in this case, operates in favor of the defendant. The plaintiff, in his petition, sets out the facts in regard to the institution of the action of forcible detainer, and the trial and judgment in his favor in justice court, the giving of the bond and attempted appeal to the district court, the plaintiff's acquiescence in the same and the hearing thereon in the district court in pursuance of the attempted appeal. He also alleged that, afterward, the supreme court dismissed the proceedings.

The answer of the defendant denied these allegations and set forth other matters in defense, without alleging an estoppel against the plaintiff. The reply was a general denial. Under these issues, the defendant could not, upon the trial, insist upon an estoppel against the plaintiff, without confessing the estoppel which first arose against himself.

"Estoppel against estoppel commonly sets the matter at large": *Bigelow on Estoppel*, 5th ed., 360. Mr. Bigelow ¹⁵¹ cites, among other authorities, *Branson v. Wirth*, 17 Wall. (U. S.) 32, 21 L. ed. 566, in which the court say: "Even if

it were otherwise, and if the government could, in any aspect of the case, claim the benefit of the legal estoppel, it would be prevented from doing so by its own patent granted to Egerton. That would present the case of estoppel against estoppel, which, Lord Coke says, setteth the matter at large. No one can set up an estoppel against his own grant. Whoever else, therefore, might set up the estoppel against Egerton's title to the lot in question, the government could not do so."

The defendant had the use of the premises from the time he gave the appeal bond. This use of the premises belonged to the plaintiff. The defendant gave the bond, among other things, for the purpose of obtaining this advantage, which he did obtain thereunder. He cannot say that he had no right to stay the execution. If the conduct of Ettenheimer was such as to have estopped him against other parties, it cannot have that effect in favor of these defendants, who are estopped to deny their liability. Being estopped to deny their liability, they are also estopped to urge anything that would have that effect.

The fact that the statute under which it was attempted to take the appeal was unconstitutional and void does not change the rule. "The principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached upon other grounds": *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187.

2. It is objected that the bond was not executed so as to bind the company. The name of the company is signed, "per A. W. Miller, Agt." A power of attorney was in evidence which appoints "R. S. Mockett and A. W. Miller and E. P. Hovey," attorneys in fact for the company, to execute bonds. It also contains the clause: "It being the intention of this power of attorney to fully authorize and empower the said R. S. Mockett and A. W. ¹⁵² Miller or E. P. Hovey to sign the name of said company."

It is insisted that this power should be construed to authorize R. S. Mockett to act in connection with A. W. Miller, or in connection with E. P. Hovey, and does not authorize Mr. Miller to act alone for the company. We cannot so construe it. There is no provision that the three agents, or any two of them, must act together. The bond appears to be duly executed.

The former judgment of this court is vacated, and the judgment of the district court affirmed.

If a Bond is Given on an Appeal from a judgment in forcible entry and detainer, recovery may be had thereon, although the statute under which the bond was given has subsequently been declared unconstitutional, provided the obligor has thereby been enabled to retain possession of the premises: *Stevenson v. Morgan*, 67 Neb. 207, 108 Am. St. Rep. 629.

An Unsuccessful Plaintiff in replevin who has seized goods belonging to the defendant is estopped, together with his surety, in an action upon the recognizance, from alleging, or being benefited by, the fact that it was entered into before a magistrate other than the one who signed the writ of replevin: *Douglas v. Unmark*, 77 Conn. 181, 107 Am. St. Rep. 25.

PUSEY v. PRESBYTERIAN HOSPITAL.

[70 Neb. 353, 97 N. W. 475.]

LANDLORD AND TENANT.—Tenancy from year to year is not created against the contrary intent of both landlord and tenant, by the mere payment of rent, and such payment is but evidence of the intent of the parties. (p. 790.)

LANDLORD AND TENANT.—Payment of Rent as Renewal.—Payment and acceptance of money as rent, after the expiration of a fixed term, does not, of itself, renew the term, but is merely evidence of an intent to renew. (p. 790.)

LANDLORD AND TENANT.—Statute of Frauds.—Leases for More than One Year cannot be made except in writing and if by an agent, he must be authorized by writing. (p. 790.)

L. F. Crofoot and E. H. Scott, for the plaintiff in error.

W. Switzler and C. St. Clair, for the defendant in error.

353 AMES, C. This is an action for forcible detainer begun in justice's court and brought here by proceedings in error from a judgment in favor of the defendant rendered upon appeal in the district court.

The sole question of importance is, whether the findings and judgment appealed from are supported by the evidence. The facts are not appreciably in dispute. The defendant was lessee of the premises for the term of five years, beginning on the seventeenth day of December, 1896. The rent reserved was thirty dollars a month, payable monthly, and an obligation of the lessee to make certain repairs. The repairs were made and the monthly installments accruing during the term

were paid as stipulated. On or about the thirteenth day of January following, the superintendent of the defendant sent to one N. P. Dodge, an agent charged with the collecting ³⁵⁴ of rents for the lessor, a check for thirty dollars, together with a receipt or "voucher" reciting the sum mentioned to be in payment of "rent for January." Dodge executed and returned this document, and retained and cashed the check without present objection. Subsequently, under a date not given, but apparently within a few days, Dodge wrote and transmitted to the defendant the following letter:

"Board of Directors, Presbyterian Hospital, Omaha, Neb.

"Gentlemen: The lease of the hospital for the term of five years expired on January 1, last. As the rent under the terms of the old lease was merely nominal, in consideration of your making extensive improvements on the building, the trustee of the property will expect an increased rental in future. He realizes that you have performed your part of the covenants in the lease and he would undoubtedly be pleased to rent it to you for a further period, to be agreed upon between us. Hoping you will give this matter your earliest attention, I remain,

"Very truly yours,

"N. P. DODGE, JR."

Soon afterward one McClelland, the president and principal owner of the defendant corporation, called upon Dodge and stated that "he was negotiating for a change of management or sale of the Presbyterian Hospital (the defendant), and these negotiations were not closed, and that until they were he would be unable to enter into any negotiation for a new lease." This discussion concerning a new lease and concerning the amount of rent to be reserved, if one should be entered into, was continued between Dodge and representatives of the defendant until March 20th, and afterward, and on that date the plaintiff served the following notice upon the defendant:

"To the Presbyterian Hospital of Omaha:

"You are hereby notified to quit and deliver up to me the premises now occupied by you, situate at 2564 Marcy street, and described as follows, to wit: lot 7, block 2, Marsh's addition to the city of Omaha, in Douglas county, Nebraska, and ³⁵⁵ building situate thereon, at the expiration of three days

from the date of service hereof upon you, your rent being in arrears.

“Dated Omaha, March 20, 1902.

“F. S. PUSEY, Trustee.

“By N. P. DODGE, JR., His Agent.”

A previous written notice to vacate was served on the defendant on February 1st. Except the check above mentioned, no payment as rent or on account of use and occupation was paid or tendered, and it does not appear what authority Dodge had from his principal in the transaction, except that it seems to be assented to by both parties that he was authorized to collect rents accruing for the plaintiff from this and other property. No arrangements having been made, the plaintiff on or about the 1st of April began this action in a justice's court, where he procured a judgment of restitution, which was reversed on appeal by the district court.

The sole contention upon the merits, by the defendant in error in this court, is that payment and receipt of the thirty dollar check above mentioned had the effect, by operation of law, to renew the former lease, if not for its full term of five years, then, at least, for one year and from year to year.

We cannot think so for two reasons: First, because leases for a term of more than one year cannot be made except in writing, or by an agent authorized by writing, and it is not shown that Dodge was authorized to make leases, even by parol; second, the payment and acceptance of money as rent, after the expiration of a fixed term, does not, of itself, renew the term, but is merely evidence of an intent to renew, from which, in the absence of evidence to a contrary effect, a contract to renew may be inferred: *Montgomery v. Willis*, 45 Neb. 434, 63 N. W. 794; 18 Am. & Eng. Ency. of Law, 2d ed., 193; *Wilcox v. Montour Iron & Steel Co.*, 147 Pa. 540, 23 Atl. 840; *Atlantic Nat. Bank v. Demmon*, 139 Mass. 420, 1 N. E. 833; *Johnson v. Foreman*, 40 Ill. App. 456.

Now, it is clear as daylight, from this record, that neither ³⁵⁶ the representatives of the defendant nor Dodge, whatever were his powers as agent, supposed, at any time during the pendency of their negotiations for the execution of a new lease, that one had already been effected by the transaction of January 13, 1902, and if they did not so suppose, it is impossible to infer that they had that intent at that date

and had forgotten it so soon. It is quite evident, to our minds, that the idea never entered the head of either party until after the beginning of this action.

Defendant further contends that the judgment of the district court should be affirmed, because the first clause of section 1021 of the code, as it was published when this action was begun, was unconstitutional and void, and that a landlord was therefore remitted to the common-law demand and notice, for the purpose of forfeiting a term for nonpayment of rent, and that no such demand or notice is proved in this case. But we do not find it necessary to pass upon this question, because we think it is clear that no term was in existence when this proceeding was begun, and therefore no steps to effect or declare a forfeiture were requisite. At the date mentioned, the defendant was simply holding over after the expiration of its term, and for such cases section 1020 of the code provides the remedy which was availed of in this case.

It is recommended that the judgment of the district court be reversed and a new trial granted.

Hastings and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and a new trial granted.

The Mere Fact of a Tenant holding over after the expiration of his term is not sufficient, without proof of some other affirmative act on his part, to show an election to renew the lease for an additional term under a stipulation in the lease giving the privilege of such renewal: *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 96 Am. St. Rep. 412.

A Tenant for one year or more does not, by implication, become a tenant for another year, where, before the expiration of his term, he procures the landlord's receipt for one month's rent, commencing at the expiration of the term. The new tenancy is one by agreement, for one month only: *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 560, and note.

MARVEL v. MARVEL.

[70 Neb. 498, 97 N. W. 640.]

TRUSTS BY PAROL—Statute of Frauds.—A parol agreement entered into at the time of executing a conveyance of real estate in good faith, that the grantee shall hold the property in trust for the grantor, and, when sold, pay the proceeds to him, is void, as an attempt to create an express trust, by parol, and the land and its proceeds when sold are the property of the grantee. (p. 794.)

STATUTE OF FRAUDS—Conflict of Laws—Contracts.—Evidence by Which Contracts Shall be Proved is no part of the contracts themselves, and is governed, therefore, by the rule of the jurisdiction where the action is tried, and not that in which the contracts were made. (p. 794.)

E. J. Hainer and J. H. Smith, for the plaintiff in error.

W. L. Stark and J. H. Grosvenor, for the defendant in error.

499 DUFFIE, C. In October, 1878, the plaintiff, George Marvel, conveyed a tract of about three and a half acres of land, situated adjacent to the village of Waynesville, in the state of Illinois, to his brother, Wiley Marvel, the defendant. The land is known as the "Mill property." In the year 1881 the plaintiff removed to the state of Nebraska. His brother sold the land on the twenty-fourth day of December, 1884, for four hundred dollars, and the plaintiff brought this action in the district court for Hamilton county to recover the proceeds of that sale. This district court found generally for the defendant, and the plaintiff has prosecuted error to this court. His theory of the transfer of the land to his brother is stated in his brief as follows:

"Property was dull sale and he had small capacity to dispose of it. His brother, Wiley Marvel, finally said to him that if he (Wiley) had the mill property he could get some money out of it for him (George), and acting on this suggestion, on October 9, 1878, George Marvel and wife conveyed the mill property to Wiley Marvel, under the express agreement that Wiley should in turn sell the property and pay the proceeds to George. The conveyance was made wholly without consideration. Wiley Marvel entered into occupation of the mill property immediately on delivery of the conveyance to him, using it to pasture stock, and on December 24, 1883, sold it for four hundred dollars. No part

of this sum was paid over to George Marvel, though often requested."

The defense is: 1. The statute of frauds; 2. That there were other transactions between these parties, from which the plaintiff was owing the defendant, at the time the defendant sold the land, more than the amount received for the land, so that in an accounting in equity there was nothing due the plaintiff.

There was no written evidence of a contract on the part of the defendant to hold the title in trust for the plaintiff and to dispose of the same for his benefit. There ⁵⁰⁰ is no allegation in the petition that any fraud or deceit was practiced upon the plaintiff, by the defendant, to procure a conveyance of this land. The doctrine, therefore, established in *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, *Gregory v. Bowlsby*, 115 Iowa, 327, 88 N. W. 822, *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, and *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9, does not apply.

The plaintiff makes no such claim, but, on the other hand, says in his brief: "This is not an action to establish any right of George Marvel in the land described in the pleadings. It is simply an action brought to recover the price for the conveyance of the lands, in accordance with the terms of the trust which Wiley Marvel assumed. The title to the premises passed irrevocably to Wiley Marvel by the deed of George Marvel and wife. It is not sought to disturb that title in any respect."

The plaintiff relies upon the principle announced in *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584. He says that the proceeds of the land should be paid by the defendant to the plaintiff; that is, the plaintiff has a claim against the defendant for that amount. It seems to be held in *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584, that although "the land was conveyed to the defendant upon an oral trust, invalid under the statutes of frauds and of uses and trusts, yet it was lawful for him to perform it"; and if he sells the land and retains the money, he has performed the trust so far that he may be compelled to fully perform it by paying over the proceeds in accordance with the oral agreement. It seems to hold that when the trustee has sold the trust estate, a suit against him for

the proceeds does not in any manner involve the trust character of the estate which was sold. It concedes that the title of the so-called trust could not be impeached, and that he could not be required to reconvey to his grantor. It acknowledges that the court is powerless to compel him to proceed one step in the execution of his trust by making a sale of the land, and yet holds that he cannot retain the proceeds of the ⁵⁰¹ sale of the lands to which they concede he holds a perfect and indisputable title; that one who has no standing in court to question his title to the land, or to claim any beneficial interest in it for himself, may have the assistance of the court to impress a trust upon the proceeds of the sale, if one is made.

This rule would defeat the purpose of the statute of frauds in every case in which the supposed trustee has sold the lands and kept the proceeds. It establishes an arbitrary rule that the statute shall not apply in such cases; and we cannot concur in such a doctrine.

Another question relating to the statute should be noticed: The statute of Illinois relating to the creation of an express trust in land was pleaded by the defendant. That statute is not as broad as our own, and some decisions of the supreme court of Illinois relating to that statute are called to our attention as authority for maintaining this action. It is said that, as the agreement was made in Illinois, the laws of that state must govern the contract so far as its nature, application and interpretation are concerned. While this is true in relation to the *lex loci contractus*, it is equally true that the *lex fori* must govern the course of procedure in giving redress upon the contract. The evidence by which a contract shall be proved is no part of the contract itself, and is governed, therefore, by the rule of the jurisdiction where the action is tried and not of that in which the contract was made. This is well illustrated in *Leroux v. Brown*, 14 Eng. L. & Eq. 247, in which it was held that an action cannot be maintained in the courts of England upon a parol contract made in France, which was not to be performed within one year from the making thereof, although the contract was valid by the laws of France. The case turned upon the question whether the statute made void such contracts. If it made them void, then, inasmuch as the law of France governed the contract, the suit could be maintained, but if the statute applied to the

remedy merely, then, inasmuch as the law of England governed ⁵⁰² the course of procedure, no recovery could be had. Lord Brougham said in *Bain v. Whitehaven & Furness Junction R. Co.*, 3 H. L. Cas. 1: "Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not—that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it."

The cases all agree that the statute requiring an express trust to be evidenced by writing does not render a trust void, but requires, only, that the proof of the creation of such a trust shall be evidenced by writing. The statute does not strike at the contract itself, but at the manner and method of proving such a contract, and the proof must conform to the laws of the state where the action is tried.

But, conceding the law to be as claimed by the plaintiff, we cannot see that the second defense is not made out by the evidence. It will be remembered that the defendant held the land for five years after it was conveyed to him by his brother, and then, having sold it, retained the proceeds for fourteen years before this action was begun. The evidence shows conclusively that there were at this time, and at about the time of the conveyance of the land, other transactions between the parties from which the plaintiff became indebted to the defendant. The defendant's right to retain the proceeds of the land, on account of those transactions, was not questioned by the plaintiff for many years after the transactions occurred, and there is substantial evidence in the record from which the trial court might have found that the defendant's claim against the plaintiff equaled the plaintiff's claim against him, and were so considered by both parties for many years. We do not think that the evidence is so wanting upon this point that it can be said that the judgment of the trial court is clearly wrong.

⁵⁰³ We think that the judgment of the district court should be affirmed, and so recommend.

Ames and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

If Land is Conveyed to One on a Parol Trust invalid by the statute of frauds, the terms of which were that he should hold such land and sell it and pay the proceeds to a particular person, and he in fact accepts the conveyance and sells the land, and thus executes such trust, he will not be permitted to retain the proceeds, but may be compelled to pay them as he agreed to do: *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, and see the cases cited in the cross-reference note thereto.

HYDE v. HARTFORD FIRE INSURANCE COMPANY.

[70 Neb. 503, 97 N. W. 629.]

MORTGAGES—Insurance—Equitable Lien.—If a mortgage contains a covenant that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy in his own name, and does not assign it nor make it payable to the mortgagee, and a loss occurs, such covenant creates an equitable lien in favor of the mortgagee to the extent of his mortgage interest upon the money due under the policy, even though the mortgage contains a provision that the mortgagee, in default of insurance by the mortgagor, may effect insurance at the expense of the mortgagor. (p. 799.)

MORTGAGES—Insurance—Assignment.—If a mortgagee assigns his mortgage, containing a covenant on the part of the mortgagor to keep the premises insured and that the mortgagee may procure such insurance upon the failure of the mortgagor to insure, and in his assignment guarantees the payment of the mortgage indebtedness, and subsequently the assignor of the mortgage becomes the owner of the premises and insures them in his own name to the full amount of the insurable interest of the mortgaged property, and a loss occurs while he is guarantor of the mortgage debt, the assignee of the mortgage has an equitable lien on the proceeds of the policy to the extent of his interest in the loss. (p. 800.)

MORTGAGES—Insurance—Statute of Limitations.—The fact that the statute of limitations has barred a personal action against the assignor of a mortgage on his guaranty of its payment, when suit is commenced by the assignee to establish a claim to the proceeds of a policy of insurance on the property taken out by such assignor after becoming the owner of the property, does not release or impair the assignee's equitable lien upon such proceeds. (p. 802.)

H. F. Rose and Flansburg & Williams, for the appellants.

Ames & Ames, for the appellee.

504 DUFFIE, C. December 26, 1885, one Van Aukin, being the owner of lots 313 and 314 in the village of Orleans, Harlan county, Nebraska, made to the appellant, L. H. Kent, his note for \$1,000, due December 26, 1890, and secured the same by mortgage upon the lots above named. The mortgage contained the following stipulation: "And we hereby agree

to keep the buildings upon said premises insured from the date of this mortgage until it is paid, for the sum of one thousand five hundred (\$1,500) dollars, and make the policy payable and deliver it to said mortgagee or his assigns, and if we fail to keep said buildings insured as above agreed, said mortgagee or his assigns may so insure them, and the premiums therefor shall be added to and made a part of the principal sum hereby secured and shall bear the same rate of interest."

Before the maturity of the note, L. H. Kent sold the same to Mary T. Hyde and indorsed the same as follows: "I hereby guarantee the payment of this note and all coupons attached." He also assigned the mortgage, which assignment was duly recorded in Harlan county. In December, 1892, Mary T. Hyde brought an action in the district court for Douglas county, seeking to recover the amount of the note from Kent on his guaranty of payment, but no summons was properly issued or served upon Kent until April, 1896, and the judgment went in favor of Kent, the court holding that the statute of limitations had barred the action. After his sale of the note to Mrs. Hyde, Kent purchased and became the owner of the mortgaged premises, his deed reciting that he took the same subject to the mortgage. After becoming the owner in fee of the mortgaged premises, and on the fifteenth day of August, 1895, Kent insured the buildings on said lots in ⁵⁰⁵ the sum of \$2,000, \$1,000 of which were in the Hartford Fire Insurance Company, the policy being payable to himself. November 6, 1895, the buildings covered by the policy were totally destroyed, and December 30, 1895, the company paid him \$1,000, the full amount of the policy. At the time of making payment the company took from Kent a bond of indemnity, to the effect that he would save the company harmless in case it were compelled to pay the amount of the policy to another party. July 18, 1898, Mary T. Hyde, the owner of the note and mortgage, departed this life in the state of Connecticut, and Arthur A. Hyde, plaintiff and appellee, is the duly appointed executor of her estate. December 12, 1899, the plaintiff commenced this action against the insurance company, claiming, as the owner of the mortgage, to have an equitable lien upon the amount due upon the policy issued to Kent, and asking judgment against the company for the sum of \$1,000, with

interest from November 11, 1895. Upon the suggestion of the company that Kent had been paid the amount of the policy, he was made a party defendant to the action, and Kent and the company filed their separate answers, setting up the facts above set forth, and in addition thereto the company set out the bond of indemnity made to it by Kent at the time of payment to him of the loss under the policy, and concluded with a prayer as follows: "Wherefore this defendant prays to be dismissed hence without day and to recover its costs herein expended, or, in the alternative that the court finds, on the hearing, that there is a subsisting liability on account of the cause of action set forth in the petition on the part of this defendant and defendant Kent to plaintiff, then, as between the defendants, the liability of defendant Kent be held primary and that of this defendant secondary only; and for such other, further and different relief as to the court may seem just and equitable."

The case was tried upon a stipulation of facts which, in addition to the matters above stated, contains the following: 506 "It is agreed that, at the time of the destruction of the buildings situated upon the premises herein described, the same had been and were by said L. H. Kent insured in the sum of \$2,000, and that the value of said buildings did not exceed the sum of \$2,000; that all of said insurance was collected by said L. H. Kent and retained by him."

It was further stipulated that, at the time the buildings were burned, Kent was personally liable upon the Van Aukin note by reason of his guaranty, and that said note was not five years past due, and that at the time of the loss of the buildings and the payment of the amount of the policy to Kent, the insurance company had actual knowledge of the existence of the mortgage to the plaintiff's testatrix, and that the same was wholly unpaid. Upon the hearing the court entered a decree, finding that the insurance company had due notice of the provisions of the mortgage, and that, by its terms, the loss under the policy in controversy was payable to the mortgagee; that Kent, in obtaining the policy of insurance mentioned in the petition, had due notice of the mortgagee's rights and should be held to have insured for her benefit; that the defendant insurance company paid the policy to Kent, and that Kent, at the time of the loss and payment of the money, was personally liable to the plaintiff

for the debt mentioned in the petition: "That, by reason of the premises, the obligation of the defendant, the Hartford Insurance Company, to the plaintiff is that of principal debtor, but that such liability to the plaintiff, as herein found, is, as between said insurance company and the estate of Lewis H. Kent, that of surety only, and the primary and ultimate liability therefor is upon the estate of said Lewis H. Kent; and the said fire insurance company, in case of its payment of the sum due to plaintiff, as found by this decree, is entitled to exoneration and to be reimbursed by the estate of Kent for any sum so by it paid, including interest and costs." From this decree the defendants have appealed.

507 It is well established that if a mortgage contains a covenant or condition that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy in his own name and does not assign it or make it payable to the mortgagee, and a loss occurs, such a covenant creates an equitable lien in favor of the mortgagee to the extent of his mortgage interest upon the money due under the policy, and this, too, even if the mortgage contains also a condition that the mortgagee, in default of an insurance by the mortgagor, may effect an insurance at the expense of the mortgagor: *Nichols v. Baxter*, 5 R. I. 491; *In re Sands Ale Brewing Co.*, 3 Biss. (U. S.) 175, Fed. Cas. No. 12,307; *Carter v. Rockett etc. Ins. Co.*, 8 Paige Ch. (N. Y.) 436; *Thomas' Admrs. v. Von Kapff's Exrs.*, 6 Gill & J. (Md.) 372; *Giddings v. SeEVERS*, 24 Md. 363; *Providence County Bank v. Benson*, 24 Pick. (Mass.) 204; *Miller v. Aldrich*, 31 Mich. 408; *Chipman v. Carroll*, 53 Kan. 163, 35 Pac. 1104, 25 L. R. A. 305. Some of these cases hold that a covenant to insure made in a mortgage is a covenant which runs with the land, and, wherever that holding obtains, it is plain that a subsequent purchaser of the land would be bound by the covenant, and any insurance obtained by such subsequent purchaser would inure to the benefit of the mortgagee. There are other cases holding that the agreement to insure is personal in its character, and does not affect the land or run with it, and is merely collateral and incidental: *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42, 4 Am. Rep. 641; *Dunlop v. Avery*, 89 N. Y. 592. In the states where this doctrine is held it is probable that a grantee of the land would not be bound by his grantor's agreement to insure for the benefit

of an existing mortgagee, and that any insurance obtained by him would inure to his own benefit, in the absence of circumstances which would make it his duty to protect the mortgagee. In the case at bar Kent was the mortgagee. For his own benefit, and the benefit of any party to whom he might assign the mortgage, he had inserted therein an agreement upon the part of the mortgagor to insure the buildings on the ⁵⁰⁸ property to the amount of \$1,500 and to keep them so insured until the mortgage was fully paid. This agreement was intended as additional security, and to protect the mortgagee against a species of waste which accident might produce. It is apparent that the lots upon which the buildings stood were inadequate security for the amount of the loan, and that the buildings, or, in case of their destruction, the insurance provided for, constituted the principal security. The note secured by this mortgage Kent sold to a good faith purchaser, and, by his indorsement, guaranteed the payment. After this, and while still liable upon his guaranty, he purchased the mortgaged premises and became the owner of the fee. He then took out insurance payable to himself to the full value of the buildings. Upon their destruction by fire he claimed and obtained payment from the companies. The Hartford company, with full knowledge of the plaintiff's claim and with such apparent appreciation of its justice as to require Kent to indemnify against it, paid him the loss. Whether or not the agreement to insure was a covenant which would run with the land in this state, where a mortgage does not convey the legal title, but is a mere security, we need not discuss. The facts are that Kent, after having sold a mortgage requiring the mortgagor to insure as further security and to protect against waste which a fire should occasion, and providing that the mortgagee might do so in case the mortgagor failed to carry out his agreement, purchased the mortgaged property, and took out insurance in his own name, and for his own benefit, to the full value of the insured property, thus preventing the then holder of the mortgage from obtaining any insurance, and cutting off her right to protect herself in this way from a loss which must occur in case the buildings covered by the mortgage were destroyed by fire. We do not think that a court of equity can sanction the claim now made by Kent, that this insurance was entirely for his own benefit, and that he is entitled to the

entire proceeds. To do so would be to offer a premium on the conduct of a mortgagor who violates ⁵⁰⁹ his agreement to insure for the benefit and protection of his mortgagee. After executing a mortgage like the one in question, he could save to his family the insurable value of his improvements, by the easy process of refusing to take out a policy for the benefit of the mortgagee, and then, by transferring the title to his wife, or some other relative, enable them to effect an insurance to the full amount which the property will bear, and to recover the insurance in case of loss. It would also afford temptation to collusive action between the original parties to the mortgage, as the case under consideration fully illustrates. The mortgagee, after selling his mortgage, presumably for the full amount of his loan, arranges with the mortgagor to take a conveyance of the premises, to effect insurance on the improvements, and to divide the proceeds of the policy in case of loss. We do not wish to be understood as intimating that such an agreement was made in this case. There is nothing in the record to cast suspicion on the good faith of the parties, but we refer to what might be accomplished as a reason for holding that Kent, who transferred this mortgage to plaintiff and who made himself liable for its payment, should be held to have effected the insurance for her benefit. Kent, being the vendor of the mortgage and the guarantor of its payment, cannot, in equity, become the owner of the mortgaged premises, and, by securing insurance in his own name, claim the proceeds of the policy as against the holder of the mortgage, for the payment of which he had made himself liable. If, when he became the owner of the mortgaged premises, he had assumed and agreed to pay this mortgage, no one would question the right of the plaintiff to an equitable lien on insurance effected in his own name; and we can see no reason why the same rule should not apply when he made himself liable for the mortgage debt by his contract guaranteeing its payment.

Another fact which, to our minds, adds strength to the plaintiff's claim is this: When he transferred the mortgage to Mrs. Hyde, he not only transferred the mortgagor's ⁵¹⁰ agreement to keep the property insured for the security of the mortgagee, but also the further agreement to allow the mortgagee to make such insurance in case the mortgagor failed to do so. Can it be said that, under these circum-

stances, there is any principle of equity which will justify Kent in securing to himself insurance to an amount which prohibits further insurance for the benefit of the holder of the mortgage which he himself negotiated and for which he stands sponsor. We cannot agree that such a holding would be equitable or just, or that a court of equity ought to countenance a transaction bearing on its face so palpable a wrong to the appellee. The fact that the statute has barred a personal action against Kent on his guaranty of payment of the note does not in any way release or impair the plaintiff's equitable lien on the proceeds of the insurance policy taken out by Kent. This subject is fully discussed in *Connecticut Mutual Life Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, 58 L. R. A. 694.

We recommend an affirmance of the judgment.

Kirkpatrick, C., concurs.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A Mortgagee, Merely as Such, has No Interest, either in law or equity, in a policy of insurance effected by the mortgagor upon the mortgaged premises for his own benefit, in the absence of any covenant or agreement requiring the latter to insure for the benefit of the former: *Nordyke v. Gerg*, 112 Ind. 535, 2 Am. St. Rep. 219; *Helmer v. National Marine Bank*, 89 Md. 602, 73 Am. St. Rep. 212.

TESKE v. DITTBERNER.

[70 Neb. 544, 98 N. W. 57.]

WILLS—Agreement to Make Devise.—An agreement, upon sufficient consideration, to devise or bequeath property is valid and enforceable. (p. 804.)

WILLS—Agreement to Make Devise—Specific Performance.—An agreement, upon sufficient consideration, to devise or bequeath property may be specifically enforced, and equity will impress a trust upon the property which will follow it into the hands of personal representatives of the promisor, or grantees without consideration. (p. 804.)

WILLS—Agreement to Make Devise.—An agreement to devise or bequeath property need not be in express terms to make a will. A promise that the promisee shall receive the property or that it shall be left to him at the death of the promisor is sufficient. (p. 804.)

WILLS—Agreement to Make Devise—Violation.—If a person who has agreed to leave his property, or some part of it, to another

upon his death, conveys the property in question to a third person, without consideration, or with notice, the conveyance may be immediately set aside at the suit of the promisee who is defrauded thereby. (p. 804.)

WILLS—Agreement to Make Devise—Statute of Frauds.—Performance of services by one, under an agreement by another to make a devise or bequest to him, when of such a character that their value cannot be pecuniarily estimated and the court cannot restore the promisee to the situation held by him when the agreement was made, nor compensate him in damages, is sufficient to take such agreement out of the statute of frauds. (p. 806.)

CONTRACT for Personal Services—Specific Performance.—If, under a contract for personal services, the services have been fully performed, or there has been substantial performance of the services by the person agreeing to render them, the contract may be specifically enforced. (p. 807.)

WILLS—Agreement to Make Bequest or Devise—Performance by Promisee—Revocation.—If a person agrees to leave another property by will in consideration of personal services to be performed by the latter, such contract is not revocable as being testamentary in character, after such services have been performed. (p. 808.)

HOMESTEADS—Contract to Convey—Specific Performance.—A contract to convey homestead property, reserving to the homestead claimants the right to use and occupy the premises until their death or abandonment of the homestead, is an encumbrance of the title thereto, within the meaning of the homestead law, and such contract cannot be specifically enforced. (pp. 809, 810.)

HOMESTEADS—Agreement to Devise—Encumbrance.—An agreement to devise homestead property in a certain way and on certain conditions, thereby subjecting it to a trust in favor of the promisee, is an encumbrance of the homestead title, and such agreement is neither valid nor enforceable. (p. 810.)

HOMESTEADS—Conveyance or Agreement to Convey.—If a homestead, the legal title to which is in the husband, is occupied by himself, his wife and his family, it cannot be conveyed or encumbered, nor can a valid contract therefor exist, except when the instrument is signed and acknowledged by the wife of the homesteader as required by statute. (pp. 810, 811.)

HOMESTEADS—Agreement to Devise—Specific Performance. A parol agreement by a husband alone with a third person to devise the latter homestead property is in conflict to the homestead law, and cannot be specifically enforced, though substantially performed on his part by the promisee. (p. 815.)

WILLS—Agreement to Devise Land—Partial Specific Performance.—If a husband alone contracts to devise land to a third person, and part of such land is included in the promisor's homestead, the contract may be specifically enforced only as to such of the land as is not included in the homestead, upon substantial performance of his part of the contract by the promisee. (pp. 815, 816.)

W. V. Allen and W. E. Reed, for the appellants.

P. E. McKillip, W. A. McAllister, J. G. Reeder and R. W. Hobart, for the appellee.

545 **HOLCOMB, J.** In the last opinion filed by Mr. Commissioner Ames, it is shown that the agreement in ques-

tion is testamentary. We entirely agree, and do not consider it necessary to say more upon that head. The validity of such agreements, ⁵⁴⁶ when made upon consideration and free from objections that may be urged against all contracts, is beyond question. They have been upheld and enforced from an early period: Note to Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Bird v. Jacobus, 113 Iowa, 194, 84 N. W. 1062; Whiton v. Whiton, 179 Ill. 32, 53 N. E. 722. It is also well established that agreements of this character, in proper cases, may be enforced specifically. Equity will fasten a trust upon the property in the hands of the person who has promised to dispose of it by will, in favor of the promisee, which will follow it into the hands of personal representatives or grantees without consideration: Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Smith v. Pierce, 65 Vt. 200; Bruce v. Moon, 57 S. C. 60, 35 S. E. 415; Duvale v. Duvale, 54 N. J. Eq. 581, 35 Atl. 750, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440; Fogle v. St. Michael Church, 48 S. C. 86, 26 S. E. 99; Price's Admx. v. Price's Admx., 111 Ky. 771, 64 S. W. 746, 66 S. W. 529; Burdine v. Burdine's Exrs., 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992. Nor is it necessary that the agreement be in express terms to make a will. A promise that the promisee shall receive the property, or that it shall be left to him, at the death of the promisor, is sufficient: Kofka v. Rosicky, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207. Counsel make a vigorous assault upon the latter decision. So far as it relates to cases of imperfect adoption, it chooses between two conflicting lines of authority, each well supported by reason and by adjudications. It ought not to be disturbed simply because some other courts have taken a different view. But, in any case, so far as general agreements to dispose of property by will are concerned, when the letter or intent of the statute as to adoption is not involved, we think the soundness of the decision is open to question. These principles established, it follows of necessity that if the person, who has promised to leave his estate or some part of it to another, conveys the property in question to third persons, without consideration, or without notice, the conveyance may be set aside at suit of the promisee who is defrauded thereby: Kastell v. Hillman, 53 N. J. Eq. 49, 30 Atl. 535. And as clearly shown in the last opinion of

Mr. Commissioner Ames, the fact that the promisor is still living is no necessary ⁵⁴⁷ obstacle to relief against the conveyance. There can be no specific performance till he is dead. But the conveyance whereby he attempts to put compliance out of his power, in fraud of the promisee, creates an immediate right of action: *Synge v. Synge*, 1 Q. B. 466; *Duval v. Duval*, 54 N. J. Eq. 581, 35 Atl. 750, 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440.

It is contended further that no sufficient performance is shown to take the case out of the statute of frauds. To the writer this contention appears well founded and altogether correct, but a majority of the court is disposed to the contrary view and to hold that the contention cannot be sustained. It seems to me quite clear that the appellee can be amply compensated for the part of the contract performed by him, assuming its existence, and that there is no occasion for invoking the authority of a court of equity to decree specific performance on the ground that otherwise a fraud would be perpetrated upon him. I think there is far greater danger, by the establishment of a precedent of decreeing specific performance under conditions and facts similar to those disclosed by the record, of making it possible that a fraud may be perpetrated on the aged and the weak, and those closely connected by ties of blood, than of perhaps slight injustice to one who claims under so uncertain an agreement, which is only partially performed and for which, because of the particular facts and circumstances, ample compensation may be awarded by a money judgment. The authorities cited and relied upon by this court in *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207, are regarded as warranting the decree prayed for, under the pleadings and the evidence in support thereof. In *Rhodes v. Rhodes*, 3 Sand. Ch. (N. Y.) *279, the court said: "Where the services to be rendered were of such a peculiar character that it is impossible to estimate their value . . . by any pecuniary standard, . . . it is out of the power of any court, after the performance of the services, to restore Henry Rhodes (the promisee) to the situation in which he was before the contract was made, or to compensate him in damages. The case is clearly within ⁵⁴⁸ the rule which governs courts of equity in carrying parol agree-

ments into effect, where possession has been taken, or moneys laid out in improvements upon the land sold."

This statement was approved in *Van Tine v. Van Tine* (N. J. Eq.), 15 Atl. 249, and quoted from a note in 66 Am. Dec. (page 789) to *Johnson v. Hubbell*, 10 N. J. Eq. 332. It was repeated in substantially the same form in *Shahan v. Swan*, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222, and *Sutton v. Hayden*, 62 Mo. 101, also approved by this court in the *Kofka* case, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207. It is true several courts have criticised *Rhodes v. Rhodes*, 3 Sand. Ch. 279, and declined to follow it.

But it is held the question must be regarded as coming within the rule and settled in this state by *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207. There are numerous other recent decisions which are believed to be in accord therewith: *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Swanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 40 N. W. 173, 1 L. R. A. 596. On principle, none of us doubt the soundness of the proposition being discussed. Where the situation is such that the promisee cannot be restored to his original position, to permit the promisor to repudiate his agreement under cloak of the statute of frauds, having received a substantial and valuable consideration, would be highly inequitable. Courts of equity, from the very beginning, have striven to maintain the statute in its integrity as a preventive of fraud, while strenuously repressing its use as a means of working frauds. A defendant will not be allowed to shelter his own fraud behind the statute of frauds, nor to use that statute as an instrument of fraud and wrong. When the statute is invoked to sanction a palpable fraud upon one who has performed his agreement and cannot be restored to his original position, a court of equity must interpose its authority: *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Wilber v. Paine*, 1 Ohio, 251; *Hidden v. Jordan*, 21 Cal. 92; *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67; *Whitson's Admr. v. Smith*, 15 Tex. 33.

It is stated in the last opinion in this case (65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181) the plaintiff "has spent

many of the best years of his life in the performance in good faith of the testamentary agreement, ⁵⁴⁹ which the referee has found upon sufficient evidence to have been entered into between himself and his parents. It does not appear to us that for a repudiation of the agreement by his father he could be adequately compensated in damages." The grantee not only took with notice, but has no equities whatever. Her grantor is amply protected under the terms of the agreement. Repudiation of the agreement, assuming the facts to be as stated, is a fraud upon the plaintiff and will work an irreparable injury. A court of equity ought to interfere in such cases, if possible, and we think it has the power.

But we are told the agreement is one for personal service, and hence is not specifically enforceable. To this there are two answers. In the first place, the contract provides for the care and maintenance of the promisor, or the allowance to him of a stipulated sum in lieu thereof, at his option. This feature of the agreement removes the objectionable features involved in an ordinary contract for support. Second, the agreement for service, as has been hereinbefore held, was substantially performed. If the agreement were newly made and the plaintiff were seeking specific performance, there would be another matter. Here he has not only performed the services for many years, but has executed other portions of the contract, involving no little expenditure and labor. After performance, an objection of this character comes too late. The rule that contracts for personal service will not be enforced specifically, where full performance rests upon the will of the contracting party, is based on the consideration that the court cannot make an efficient decree for specific performance in such cases nor enforce its decree when made: 3 Pomeroy on Equity Jurisprudence, 2d ed., sec. 1405. When the service has been rendered, the reason of the rule fails and the rule ceases to operate. In almost all of the cases above cited personal services were the consideration of the contract.

It is also argued that a testamentary agreement, being testamentary, must needs be ambulatory and revocatory. ⁵⁵⁰ Until performance on the part of the promisee, this might be true. But after the promisee has substantially performed all things to be done on his part, the contract to leave the property to him at the death of the promisor ceases to be wholly executory, and revocation would be an intoler-

able fraud, which a court of equity could not permit: *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415. With the exception noted, the members of the court and of the commission, hearing oral arguments at the last submission of this cause, are all entirely agreed on the question hereinbefore discussed and decided. What has been said is to be regarded as applying to the doctrine of specific performance of contracts of the nature of the one under consideration as they relate to real estate generally. A very important feature of the case at bar, and one of the chief points of controversy, bears upon the operation of the homestead law and its effect on the parol agreement as pleaded and proved. The subject has demanded no little research, investigation and consideration. It is a fact established by the record that a portion of the real estate involved in the present litigation was, at the time of the making of the alleged agreement, the family homestead of the promisor and his wife, and occupied by them as such. Regarding the homestead, a question of prime importance arises, and that is, whether the agreement comes within the purview and inhibition of section 4 of the homestead act (Compiled Statutes, c. 36; Annotated Statutes, 6200-6216), which declares that the homestead cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. In speaking of the homestead, we wish to be understood as having reference to that part of the real estate in controversy which consists of the dwelling-house, in which the promisor, Frederick Teske, and his family, at the time resided, and its appurtenances and the land on which the same are situated, not exceeding one hundred and sixty acres in area, nor two thousand dollars in value. Regarding the proper interpretation and construction of homestead statutes similar in ⁵⁵¹ terms to ours, there is a sharp conflict in the authorities, and it is incumbent on us to adopt and hold to that doctrine which seems consistent with our former decisions, and in harmony with the purposes and object of our homestead act. While the agreement, as has been determined, is testamentary in character, yet its enforcement, by decreeing specific performance, must rest upon equitable rules and principles applied generally to executory contracts for the sale and conveyance of real property. If a person may bind himself by contract to bequeath by will a certain estate in land, then

by the application of the same principle, he may be bound by an executory contract to convey the same estate by deed. In either event the promisee obtains an equitable right or interest which is recognized by courts of equity. The right of the plaintiff to the specific performance of the contract relied upon rests upon the alleged fact that he has substantially performed his part of the agreement, and that thereby an equitable right to and interest in the land in controversy has arisen in his favor; that the enforcement of the agreement upon the part of the promisor, by a court in the exercise of its equitable jurisdiction, is the only method by which he can obtain full and complete satisfaction, and thereby avoid an injury which otherwise would be the result. It is upon these same considerations that the specific performance of contracts generally for the sale of real estate by courts of equity is decreed. It is quite obvious that if the agreement in the present case may be specifically enforced by resort to a court of equity as to the homestead of the promisor, then the doctrine is established in this jurisdiction that all executory contracts for the sale of real estate, even though a homestead, and in which the wife took no part, which are made subject to the rights and interest of the homestead claimants, may be specifically enforced, and the whole estate and legal title pass, when the homestead right and interest become extinguished by death of the parties or by abandonment. In those states in which this doctrine obtains, the homestead ⁵⁵² and reversionary estate are regarded as distinct and separate estates, the latter of which can be dealt with by the owner of the fee by contract, specifically enforceable, and which, it is held, does not violate the law granting and regulating the homestead right.

The argument is advanced, in the present case, that because the owner of the fee may, under the provisions of the homestead act, devise the homestead as he may elect, there exists no good reason for holding to the view that an agreement to will impinges on any of the provisions of the act and that such agreements should, therefore, be specifically enforced in a proper case by a court of equity. To this it may be said that section 17 of the homestead act simply provides for the course of descent of the homestead after the homestead estate becomes extinguished, by directing its

devolution on the heirs at law, subject to the right of disposition by will. In neither event does the course of descent and succession to the realty become fixed and certain till the death of the owner of the fee. As has been seen, the agreement to will loses its ambulatory and revocatory character after substantial performance by the promisee, while the disposition by will, under the provisions of section 17, is subject to revocation or annulment by proper conveyance of the homestead at any time before the death of the holder of the legal title. It can hardly be doubted that an agreement to devise property in a certain way, and on certain conditions, thereby subjecting it to a trust for the benefit of the promisee, is an encumbrance of the title, of the same nature and character as would be an agreement to convey the reversionary estate, reserving to the homestead claimants their homestead rights. Both agreements would rest upon the same general principles of law and equity for their enforcement and validity. To hold to the doctrine that such contracts are valid and enforceable is to restrict and limit the homestead estate to a mere matter of privilege of occupancy, and this, we are of the opinion, was not in contemplation by the legislature when it enacted the homestead law. Our views in this ⁵⁵³ respect are strengthened by a reading of section 16, which exempts to the homestead claimant, and protects against legal processes for the time stated, the full value of the homestead, and provides that the disposition of one homestead shall not be held to prevent the selection or purchase of another. Argument seems unnecessary in stating that the homestead, as viewed by the legislature, and which it provided for, was not simply the right to occupy as a place of abode, real estate, not exceeding the quantity and value mentioned, during the life of the homestead claimants. That which was evidently intended is that the physical property, including all and every interest and estate of the homestead claimants, should in no way be conveyed, encumbered or alienated, except by consent of both husband and wife in the manner pointed out by the act. If an agreement to will, which leaves the homestead right unaffected so far as the use and occupancy of the homestead is concerned, is specifically enforceable, then it must follow, by the application of like principles, that an agreement to sell, reserving to the homestead claimants rights of the same

character, is valid and may also be enforced, in a proper case, by a court of equity. And, carrying the doctrine to its logical conclusion, a conveyance absolute in form of the entire estate, by the owner of the legal title, would give to the grantee at least an equitable title to the reversionary estate, cognizable by a court of equity in a suitable proceeding when the homestead right becomes extinguished. This is clearly inconsistent with our prior expression as to the true rule which should govern in such cases. A construction of the act leading to the result indicated would deprive the law of much of the wholesome and beneficent aims and purposes intended by the legislature, and leave it a mere shadow of its former self as heretofore construed. If the reversionary estate is encumbered by contract, or conveyed to a third party by the holder of the title without the consent of the other claimant, every one must know that the homestead, that is, the property, is materially and substantially diminished in ⁵⁵⁴ value and has lost its character for salability. The homestead, as a species of property, has lost all value except for the right and privilege of use and occupancy during lives of the claimants. It could not then be sold and another homestead acquired with the proceeds, as is plainly contemplated may be done by the provisions of section 16. Many authorities of weight, and which are entitled to respectful consideration, are cited by appellee in support of his contention as to the validity of the agreement in so far as it affects the family homestead. Among these is *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, which is a leading case, and which, without question, fully supports the doctrine contended for. It is there held that a conveyance of land in fee to take effect at a future time, in which it is stipulated that the grantor shall have the possession and absolute use and control of the land during the life of himself and wife, is valid, and vests the fee in the grantee, although the land was a homestead and the wife did not join. The opinion further holds that the wife has no interest in the homestead except that derived from the power to prevent an alienation thereof, and that at the death of the husband, the wife surviving, she becomes a tenant for life, and at her death, or second marriage, all her homestead rights cease. That decision, it will be observed, although supported by authorities in many other jurisdictions, is not in

harmony with the doctrine heretofore expressed by this court on the same subject. In a later case—*Jerde v. Furbush*, 115 Wis. 277, 95 Am. St. Rep. 904, 91 N. W. 661—it is held that a conveyance of the homestead by the husband, without the wife's signature, conveys an equitable right to the legal title, enforceable on the extinguishment of the homestead by the death of the wife or otherwise. In the latter decision, *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, was, as we read the opinion, reluctantly followed to its logical consequences. It is said, in the course of the opinion, that the court, in the prior case (*Ferguson v. Mason*), followed judicial decisions made under statutes more or less similar to those of Wisconsin, citing a number of such decisions, in preference ⁵⁵⁵ to decisions to the contrary under like statutes, citing another line of decisions, in which is included from this state the case of *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842. After discussing the subject further, it is observed by the court: "The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law the same as if the idea involved were literally expressed in the statute. It relates to property. It has become, by the lapse of time, a rule of property, which, by well-settled principles, can only be rightly changed by a legislative enactment."

It is obvious that the court regards the later case as being ruled by *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. 420, solely by reason of the application of the doctrine of stare decisis, and it is followed with apparent hesitation.

On the other side it is held, in *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817, that the contract of the husband, without his wife joining therein, to convey his homestead is void for all purposes, and the husband is not liable in damages for its nonperformance. To the same effect is *Barton v. Drake*, 21 Minn. 299. The supreme court of Alabama, in *Alford v. Lehman, Durr & Co.*, 76 Ala. 526, holds that an attempted conveyance of the homestead, not executed in the manner provided by statute by both husband and wife, is a nullity, neither passing any estate to the grantee nor operating by way of estoppel against the grantors. After quoting from several other decisions of that court, it is observed by the court: "These decisions have failed to recognize any

distinction between the conveyance of the homestead premises, and the mere right of homestead, which is recognized by some respectable authorities, and in support of which the appellants' counsel have made a most earnest and forcible argument. It is manifest that, if the owner were permitted to encumber the fee or reversion of his homestead, as distinguished from the mere right of undisturbed occupancy—and by a mode of alienation dispensing with the voluntary ⁵⁵⁶ assent and signature of the wife—the provision of the constitution under discussion would have little more binding efficacy than a rope of sand, and its policy could be evaded by the husband with fatal facility. All that would be necessary, to effect such alienation, would be for the husband alone to convey or mortgage the premises one day, and abandon them the next; all of which might be done against the most earnest protest of an unwilling wife": See, also, *Phillips v. Stauch*, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374; *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431.

In so far as this court has heretofore expressed itself regarding the scope and effect of our homestead statute, its decisions have generally been favorable to a liberal construction of the act, such as would grant the fullest measure of protection to the rights and interests of the homestead claimants. The trend of the decisions has been toward a construction which would render an agreement or contract affecting the homestead, not executed in the manner provided by the act, void for all purposes. Generally, it is held, as we view the several utterances on the subject, that a contract relating to the homestead, not signed and acknowledged as required by the act, is a nullity, and incapable of creating any rights, or affording a basis for the granting of relief either legal or equitable in its nature, not only in the homestead estate, but in the property itself embraced in the homestead. It is very true that most of these decisions apply to contracts affecting directly the homestead right and estate, and yet, if the reversionary estate is to be regarded as separable from the homestead estate, and capable of alienation by contract, executory in form or substance, then there is no reason why the doctrine obtaining in Wisconsin, as announced in *Jerdee v. Furbush*, 115 Wis. 277, 95 Am. St. Rep.

904, 91 N. W. 661, should not be held applicable here, and a conveyance or contract to convey, purporting to convey all and every estate in the land, held to create an equitable right to the legal title, enforceable on the extinguishment of the homestead by the death of the wife ⁵⁵⁷ or by abandonment of the homestead. All of our prior utterances we are satisfied, are inconsistent with this view and with such a construction of the homestead act. The very first utterance of this court on the subject is to the effect that a mortgage on the homestead, signed by the husband alone, is void. It is said: "The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right cannot be waived except by the consent of both": *Bonorden v. Kriz*, 13 Neb. 121, 12 N. W. 831; *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209, 27 N. W. 117. It is held in *Swift v. Dewey*, 20 Neb. 107, 29 N. W. 254, that a mortgage of a tract of land including a homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances. To the same effect is *McCreery v. Schaffer*, 26 Neb. 173, 41 N. W. 996. *Larson v. Butts*, 22 Neb. 370, 35 N. W. 190, is a case wherein it is decided that a contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced because not signed and acknowledged by both husband and wife. "The title to a homestead," say the court in another case, "cannot be divested, or encumbered, by deed, unless such deed be executed and acknowledged by both husband and wife": *Betts v. Sims*, 25 Neb. 166, 41 N. W. 117. *Whitlock v. Gosson*, 35 Neb. 829, 53 N. W. 980, was a case where a mortgage had been executed on a homestead without the signature of the wife and under circumstances which appeal strongly to a court of equity for the granting of any relief which could be extended by the application of legal or equitable principles, and yet the court said, after quoting the statute, that it was a plain provision against encumbrance of any kind and refused relief altogether. *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842, cited by the supreme court of Wisconsin, was a case regarding the specific performance of a contract for the sale of a homestead and it is said in substance: It is the settled law of this state that the courts will not

especially enforce such contracts not executed in the manner ⁵⁵⁸ pointed out by the act, and it is also held that the value of the property would not change the rule. In this case the subject matter of the controversy was a house and lot occupied as a homestead in a city. The doctrine thus announced is clearly inconsistent with and in opposition to that obtaining in Wisconsin and other jurisdictions holding similar views. We may cite also *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216, *Prout v. Burke*, 51 Neb. 24, 70 N. W. 512, as being in entire harmony with the cases preceding. But the court has gone further and committed itself to the doctrine that such a contract creates no rights, either legal or equitable, but is a nullity for all purposes as declared by the statute. In *Meek v. Lange*, 65 Neb. 783, 91 N. W. 695, it is held that because of the provisions of section 4 of the homestead act, an executory contract for the sale of the homestead to which the wife is not a party is invalid and its nonperformance does not furnish a basis for recovery of damages for the loss of the bargain. In the opinion it is said: "The doctrine that the contract was totally void, and would support no action for damages, is certainly supported by text-writers and many decisions": Citing numerous authorities in support of the proposition. Of like effect are *Solt v. Anderson*, 63 Neb. 734, 89 N. W. 306; *Buettgenbach v. Gerbig*, 2 Neb. (Unof.) 889, 90 N. W. 654.

An examination of these several decisions and considerations of the homestead statute convinces us that the operation of the statute, and especially section 4, nullifies the parol agreement relied on by the appellee in so far as it relates to and affects the homestead property of the promisor, and that specific performance of the contract as to such real estate should not be decreed by a court of equity.

No valid objection, it would seem, from the foregoing discussion, can be urged against the authority of a court of equity to compel specific performance as to that part of the real estate involved in the present controversy not embraced within the family homestead: *Swift v. Dewey*, 20 Neb. 107, 29 N. W. 254; *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817.

⁵⁵⁹ An examination of the evidence leads to the conclusion that the findings of fact and the views as expressed with reference thereto in the last opinion, except as the home-

stead is affected, are sufficiently sustained, and for that reason should be adhered to. The former opinion is modified as herein indicated, and the parol agreement on which the action is based, in so far as it relates to the homestead, is held to be a nullity and of no force and effect. The judgment last entered is set aside and vacated, and the cause remanded to the district court for further proceedings in harmony with the views herein expressed.

It has been suggested that since the submission of this cause on rehearing, Frederick Teske, one of the appellants herein, has died. The rule is that where one of the parties dies between the date of submission of the cause in this court and the filing of an opinion thereip, judgment may be entered as of the day on which the cause was submitted: *Black v. Shaw*, 20 Cal. 68; *Danforth v. Danforth*, 111 Ill. 236; *Jeffries v. Lamb*, 73 Ind. 202; *Bank of United States v. Weisiger*, 2 Pet. (U. S.) 481, 7 L. ed. 492; *Bergen v. Wyckoff*, 84 N. Y. 659.

The judgment entered in this court on this rehearing will, therefore, be entered as of the first day of January, 1903.
Reversed.

A Contract to Make a Will, devising land, though resting in parol, may be enforced, if its terms are clearly established and the promisee has performed it on his part, at least where his performance consists in rendering personal services to the promisor which cannot be adequately compensated in money: See the monographic note to *McCoy v. McCoy*, 102 Am. St. Rep. 240, 241; *Russell v. Sharp*, 192 Mo. 270, 111 Am. St. Rep. 496, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

EX PARTE KAIR.

[28 Nev. 127, 80 Pac. 463.]

CONSTITUTIONAL LAW—Hours of Labor.—A statute imposing a penalty on anyone working more than eight hours per day in any mine, smelter or mill for the reduction of ores is not in conflict with constitutional provisions guaranteeing the right to acquire and possess property, and forbidding the imposition of excessive fines or cruel or unusual punishment, but is sustainable as a valid health regulation under the police power. (pp. 818, 819.)

LABOR LAWS—Health Regulations—Expert Evidence.—A statute imposing a penalty on anyone who works more than eight hours per day in any mine, smelter or mill for the reduction of ores is a valid health regulation, and expert or other evidence is not admissible in a prosecution under the statute to show that it is not injurious for persons to work more than eight hours per day in such places, as the court will take judicial notice to the contrary. (p. 819.)

POLICE POWER—Expert Evidence.—Validity of Laws enacted in the exercise of the police power of the state cannot be made dependent upon the views of experts as to the necessity of such enactment. (p. 822.)

HABEAS CORPUS.—If One is Imprisoned on a conviction under a statute entirely void, the remedy is by habeas corpus. (p. 825.)

A. Chartz, for the petitioner.

J. G. Sweeney, attorney general, for the respondent.

140 TALBOT, J. In the justice court at Dayton petitioner was convicted and sentenced to pay a fine of one hundred dollars, or serve an alternative of one day for every two dollars thereof in the county jail, on a charge of misdemeanor, for working more than eight hours in one day in a wet-crushing quartz-mill, contrary to the provisions of the

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act approved February 23, 1903, by the terms of which the period of employment of workmen in underground mines, smelters, and "all institutions for the reduction or refining of ores or metals," is limited to eight hours per day, under penalty which specifies a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail not exceeding six months, or both: Stats. 1903, p. 33, c. 10. Upon failure to pay the fine imposed, he was committed to the custody of the sheriff of Lyon county, and, by writ of habeas corpus, demands of this court his release, asserting that the statute mentioned is unconstitutional, and cannot be enforced to limit his liberty to contract or to work more than ¹⁴¹ eight hours per day, under section 1 of article 1 of the organic act of this state, which guarantees the right to acquire and possess property, and that it is also in conflict with the eighth amendment to the federal constitution, which directs that excessive fines and cruel and unusual punishments shall not be imposed.

In *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, we had occasion to give the act in question extended consideration, and held that it was constitutional, and enforceable against one who worked longer than eight hours per day in an underground mine. After more mature reflection, we are still satisfied with the reasoning and conclusions reached in that opinion, and it is unnecessary to repeat them to any great extent. We there held, as a matter of common knowledge, that prolonged labor in the places mentioned in the statute was injurious, and, if necessary to resort to that power, that the legislature were warranted in passing the act as a police or health regulation for the protection of the men employed in those places, and the benefit to the state. In the present case it is sought to avoid this reason or justification for the enforcement of the act by stipulation that the occupation followed by petitioner was not injurious, and by testimony that labor performed in wet-crushing quartz-mills is not unhealthful, except for the men working around pans and settlers.

Adhering to our opinion in *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, "we are not prepared to say that the mining, milling, and smelting of ores are not vocations so unhealthful and hazardous that they may not come

under the protecting arm of the legislature; but to recognize these conditions, and pass laws for their amelioration, and which may protect the health and prolong the lives of the men so employed, we think, is within the legitimate powers of the law-making branch of our government. If these matters were uncertain, when their existence is necessary to sustain the law the doubt should be resolved in favor of the statute, for, as held by this court in several decisions, its validity will be presumed until it is clearly shown to be unconstitutional."

As applicable here, we repeat a part of the language by ¹⁴² the supreme court of Utah which we quoted in that case, and which had been adopted by the supreme court of the United States as a part of the decision in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780: "Unquestionably the atmosphere and other conditions in mines and reduction works differ. Poisonous gases, dust and impalpable substances arise and float in the air in stamp-mills, smelters, and other works in which ores containing metals combined with arsenic or other poisonous elements or agencies are treated, reduced and refined; and there can be no doubt that prolonged effort, day after day, subject to such conditions and agencies, will produce morbid, noxious, and other deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable. The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining, and work in smelters and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the

health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still ¹⁴³ retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer."

It is a matter of common knowledge that the health of many men is impaired by labor in quartz-mills. If, by taking proof that others are not injured, the statute is to be declared void or inoperative as to them, we enter a wide field of uncertainty and speculation, and, instead of having the constitutionality of the act rest upon solid ground and a sure foundation, its enforcement would become subject to the more or less speculative opinions of interested parties and others, and to the conclusions of various justice courts and juries regarding the probability of injury to men working longer or shorter periods in the places mentioned; and witnesses could testify regarding the consequences to health from labor in these employments, and thereby indirectly regarding the necessity for legislative action and the validity of the statute, in each case as it arose. If exceptions based upon such proof are to be made to the enforcement of the act, they might depend not only upon the character of the mill and the distinguishing features of the work of the various men employed, but upon the age, constitution, vitality, and probable endurance of the different employés, the ingredients used in working the ores, such as quicksilver, cyanide, or other chemicals injurious to health, the quantity and effect of dust and fumes, the character of the ores, and whether they contained lead, arsenic, or other harmful substances, from day to day, or upon other conditions and uncertainties, which would multiply litigation, and lead to doubt and difficulty in securing the benefits intended by this legislation.

Although courts should be careful not to usurp the powers delegated to the law-making branch of the government, and

should not receive evidence regarding facts of which they are satisfied by judicial knowledge, and although all reasonable doubts should be resolved in favor of the action of the legislature and constitutionality of the statute, yet we are not prepared to say that there is any conclusive presumption ¹⁴⁴ in favor of any fact essential to support the validity of the enactment as being within the police power of the state, or that the court having proper jurisdiction may not receive proof regarding any controlling fact which is in doubt. A review of the decisions indicates that the courts have acted in cases similar to the one under consideration, generally upon judicial cognizance, or, if in doubt, have accepted the judgment of the legislature or received proof.

Chief Judge Parker, speaking for the court in *People v. Lochner*, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373, in an opinion filed one day after ours in the *Boyce* case, reviewed many of the authorities, pointed out the wide scope of the police power which the federal supreme court has often held to be vested in the legislature of the various states, notwithstanding the fourteenth amendment, cited with approval *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707, 43 N. E. 541, 31 L. R. A. 689, which upholds an act regarding barber-shops, and found, as a matter of judicial knowledge, that work in bakeries and confectioners' establishments was unhealthful, and for that reason sustained the New York statute restricting the hours of labor in those places.

Twenty days after the filing of the opinion in *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, and before publication of it had likely reached there, the supreme court of Missouri, after a careful consideration of the authorities—the case being on appeal—held that the act limiting labor to eight hours a day in underground mines in that state was constitutional; that the validity of the statute could not be made dependent upon the opinions of experts as to the necessity for such enactment; and that the testimony of physicians, mining engineer, and foreman, and of one who had worked thirty-four years in the mines, could not be received to prove that such underground work was not more injurious to health than laboring the same number of hours on the surface. Justice Fox (all the justices concurring) said: "Defendants sought to introduce testimony of expert

witnesses tending to show that the underground work contemplated by this act of the legislature was not attended with danger to the health of those engaged in the performance of such work. This testimony was excluded by the court, and, ¹⁴⁵ in our opinion, correctly so. The validity of laws enacted in the exercise of the police power of the state cannot be made dependent upon the views of experts as to the necessity of such enactment. If the constitutionality of all laws enacted for the promotion of public health and safety can be assailed in this manner, truly and sadly would it be declared that our laws rest upon a very weak and unstable foundation": *State v. Cantwell*, 179 Mo. 245, 78 S. W. 569.

In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253, plaintiff in error was convicted and fined one hundred dollars for selling packages of an article of food marked "Oleomargarine Butter," under a statute of that state prohibiting the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream, of any article designed to take the place of butter or cheese, and making it unlawful to sell the same. On the trial the accused offered to prove that the article was made from pure animal fat; that the process of manufacture was clean and wholesome—the article containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as "butterine"; that the only effect of butterine was to give flavor to the butter, and that it had nothing to do with its wholesomeness; that the article sold to the prosecuting witness was a nutritious article of food, in all respects as wholesome as butter produced from pure unadulterated milk or cream; that, for the purpose of manufacturing and selling this oleomargarine, he had invested large sums in real estate, machinery, and ingredients; that in his traffic in this article he made large profits, and, if prevented from continuing it, the value of his property employed therein would be entirely lost, and he be deprived of the means of livelihood. The rejection of this proof by the trial court, and the conviction and judgment against the accused, were sustained by the supreme courts of that state and of the United States; and Justice Harlan, in delivering the opinion for the latter tribunal, said: "It will be observed

that the offer in the court below was to show by proof that the particular article the defendant sold ¹⁴⁶ and those in his possession for sale, in violation of the statute, were in fact wholesome or nutritious articles of food. It is entirely consistent with that offer that many—indeed, that most—kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Every possible presumption, Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule: See, also, *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015. . . . And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislature's determination of those facts is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy, merely, and to sustain or frustrate the legislative will embodied in statutes, as they may happen to approve or disapprove its determination of such questions. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another branch of government."

Laws restricting the hours of labor in some form have been enacted in many of the states, and these statutes, when relating to vocations that affect the health or safety of the people employed, have generally been sustained by the courts as not in conflict with state or federal constitution, except in Colorado.

¹⁴⁷ Aside from these cases in the supreme courts of the United States and of Utah and Missouri sustaining similar

enactments directly limiting the hours of labor in places named in our statute, there are many able decisions maintaining this general doctrine, and upholding various acts similar in principle, among which are the vigorous opinion by Justice Field in *Ex parte Newman*, 9 Cal. 502, later adopted by the court in *Re Andrews*, 18 Cal. 678, and the numerous cases cited in *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707, 43 N. E. 541, 31 L. R. A. 689; *State v. Cantwell*, 179 Mo. 245, 78 S. W. 569; *Ex parte Northrup*, 41 Or. 490, 69 Pac. 445; *State v. Petit*, 74 Minn. 376, 77 N. W. 225; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47; *Sanders v. Commonwealth (Ky.)*, 77 S. W. 358; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589, 57 N. W. 1094, 22 L. R. A. 696; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

The decisions in California and New York holding statutes that limit labor on public works to eight hours to be unconstitutional are not considered applicable here, because such employment was not claimed to be unsafe or injurious to health. These cases are not only overthrown by *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. Rep. 124, 48 L. ed. 148, but by the very principle advanced to sustain them, for, if liberty of action and freedom of the individual to contract are to control when the employment is not unsafe or unhealthful, certainly the state ought to have the same right to regulate the terms and conditions in its own contracts and those of its municipalities as is accorded to individuals.

If we were not satisfied, as a matter of common knowledge, that prolonged labor in the employment restricted by the statute is injurious to the health of the workmen as a class, we would determine regarding the admissibility of evidence in this connection to enlighten the court and control the judgment and act of the legislature; but, being so satisfied, we do not deem it expedient to allow testimony in particular or exceptional cases to defeat the constitutionality of the act. It is not difficult to distinguish between employments which in principle are not unhealthful or injurious, as a class, and those which are, and a statute relating to the latter ought not to be nullified or rendered uncertain in its operation ¹⁴⁸ because some of the employés may possibly be exempt from injury. If the enforcement of the statute depended upon proof of injury to the workmen in every case, it could

be contended that the justice court would have power on the trial to hear the evidence and determine the fact; and, having jurisdiction, if it erred in finding or failing to find, or in accepting or rejecting, proof, its action would be reviewable on appeal, and not on a writ of habeas corpus, which would be a proper remedy if the act were entirely void, and its invalidity not dependent upon varying proofs in different cases: *Ex parte Edgington*, 10 Nev. 215; *Ex parte Crawford*, 24 Nev. 91, 49 Pac. 1038; *Ex parte Allen*, 12 Nev. 87; *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209; *Ex parte Kitchen*, 19 Nev. 178, 18 Pac. 886; *Ex parte Maxwell*, 11 Nev. 428; *Ex parte Winston*, 9 Nev. 71; *In re Peraltareavis*, 8 N. Mex. 27, 41 Pac. 538; *Ex parte Le Roy*, 3 Okla. 322, 41 Pac. 615; *In re Black*, 52 Kan. 64, 39 Am. St. Rep. 331, 34 Pac. 414; *Ex parte Adams*, 60 Ark. 93, 28 S. W. 1086; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Ex parte Belt*, 159 U. S. 95, 15 Sup. Ct. Rep. 987, 40 L. ed. 88; *State v. Noyes*, 87 Wis. 340, 41 Am. St. Rep. 45, 58 N. W. 386, 27 L. R. A. 776; *Ex parte Perdue*, 58 Ark. 285, 24 S. W. 423.

Naturally enough, many of the most ardent opponents of any limitation to the time for labor in unhealthful or unsafe pursuits are actuated more by anxiety to profit by the long hours of toil of others, than by any desire to labor so long themselves, while some of the world's most eminent minds have favored such limitation. Before the invention of many of the most ingenious labor-saving devices with which we are blessed to-day, and consequently when the effort required to support the world was much greater per capita than now, our ever-esteemed patriot, statesman and philosopher Franklin, proclaimed that by the proper or equal distribution of labor, no one would need to toil one-half so long as the time for which petitioner contends. President Harrison, in his annual messages of 1889, 1890, 1891, and 1892, urged upon Congress the necessity of requiring appliances to prevent injuries in the coupling and braking of cars engaged in interstate commerce, and legislation to that end was sustained recently by the supreme court of the United ¹⁴⁹ States in *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. Rep. 158, 49 L. ed. 363. Count Tolstoi favors the reduction in the hours of labor for employes in factories and mills, and President Roosevelt, in his message to Congress last December, advocated a restriction in the hours for trainmen. While

governor of New York he recommended and signed a bill which made an eight-hour day for the employés of that state. He and Presidents Grant, Cleveland, and McKinley favored the limitation to eight hours of labor on government works.

The fact that the vocations mentioned in the statute, including the one of milling ores, are injurious to the health of many of the men following them, if not to some extent to all, justified the action of the legislature; and we think that, in order to give due effect to its terms, it should be enforced against all coming within the classes specified.

The defendant is remanded to the custody of the sheriff of Lyon county.

FITZGERALD, C. J. I concur in the result stated in the foregoing opinion, and my reasons therefor will hereafter be filed.

This case having been submitted during the October term, Norcross, J., did not participate.

The Principal Case was again presented to the supreme court by petition for a rehearing, and in denying such petition the court adhered to its former ruling, namely, that a statute imposing a penalty on anyone working more than eight hours a day in any mine, smelter or mill for the reduction of ores is not unconstitutional on any ground, and especially as depriving the miner of liberty and property without due process of law. And that on an attack on the constitutionality of such act by the writ of habeas corpus, evidence that particular reduction works and mills, including the one in which petitioner worked, were healthful, as distinguished from the healthfulness of mills in general throughout the country, was not admissible. On the rehearing the court was referred to *People v. Lochner*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, reversing 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373, as controlling in the principal case. The decision referred to decides that there is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified as a health law to safeguard the public health or the health of the individuals following that occupation, and a state statute providing that no employés shall be required or permitted to work in bakeries more than sixty hours in one week, or ten hours per day, is not a legitimate exercise of the police power of the state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and as such it is in conflict with the

national constitution. In distinguishing between the case of *People v. Lochner*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, and the principal case, the supreme court of Nevada, on the rehearing, said of the former case:

“At the time the rehearing was ordered the press dispatches indicated that the supreme court of the United States had reversed the decision of the New York court of appeals in the *Lochner* case, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373, but the publication of the full text of the decision had not arrived. From a review of that case (25 Sup. Ct. Rep. 539, 49 L. ed. 937), it appears that the New York statute providing a ten hour day for bakers was upheld by the Oneida county court, by three of the five judges of the supreme court, and by four of the seven justices of the court of appeals of that state, and that it was finally declared unconstitutional by five of the nine justices of the supreme court of the United States. It will be seen that twelve of these judges deemed the act valid, and that ten of them considered it unconstitutional. The decisions being by a bare majority in every court through which the case passed, no question has ever presented a sharper diversity of opinion among able jurists than the validity of this statute concerning bakers. The same cannot be said regarding the acts limiting the hours of labor in mines and mills for the reduction of ores. The legislative enactment from which ours is copied was sustained by the full bench in Utah, and by seven of the nine justices of the supreme court of the United States in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, affirming *State v. Holden*, 14 Utah, 71, 96, 46 Pac. 756, 1105, 37 L. R. A. 103, 108.

“The supreme court of Missouri, in the *Cantwell* case (179 Mo. 245, 78 S. W. 569), unanimously upheld the law, making an eight hour day for underground miners in that state, and all agreed that testimony tending to show that the work was not unhealthful could not be received to overthrow the statute. The only decision found to the contrary is the strained one in *Re Morgan*, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L. R. A. 52, which led to so much trouble, suffering, and loss of life in Colorado. The opinions of the majority, as well as those of the minority, in the *Lochner* case, refer to and approve the decision in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, affirming *State v. Holden*, 14 Utah, 71, 96, 46 Pac. 756, 1105, 37 L. R. A. 103, 108, which sustains the Utah act similar to ours, and Justice Brown, who wrote the opinion of the court in the last-named case, concurred with the majority in the other. The court of last resort was careful to distinguish between the two.

“In the decision of the United States supreme court in *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, it is said: ‘Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment

of workmen in all underground mines or workings to eight hours per day, except in cases of emergency, where life or property is in imminent danger. It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the state. It was held that the kind of employment and the character of the employés in such kinds of labor were such as to make it reasonable and proper for the state to interfere to prevent the employés from being constrained by the rules laid down by the proprietors in regard to labor. . . . There is nothing in *Holden v. Hardy* which covers the case now before us. . . . The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden v. Hardy*.' And in the dissenting opinions Justice Holmes said: 'The law sustaining an eight hour day for miners is still recent.' And Justice Harlan: 'So, as said in *Holden v. Hardy*, "this right of contract, however, is itself subject to certain limitations, which the state may lawfully interpose in the exercise of its police powers." '

"The cases are distinguished on a question of fact, work in bakeries not being considered more unhealthful than in ordinary employments by the majority of the court, while evidently the opposite was held in regard to labor in mines and mills for the reduction of ores. Justice Peckham, in the opinion of the court, said: 'We think there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthful one to that degree which would authorize the legislature to interfere. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthful as some other trades, and is also vastly more healthful than still others. To the common understanding the trade of a baker has never been regarded as an unhealthful one. . . . It seems to us that the real object and purpose were simply to regulate the hours of labor in a private business not dangerous in any real and substantial degree to the health of the employés.'

"The conclusion of the supreme court of the United States was quite different regarding the effect of labor in quartz-mills, where, in adopting the language of the supreme court of Utah in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, it was said: 'Poisonous gases, dust, and impalpable substances arise and float in the air in stamp-mills, smelters, and other works in which ore containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined; and there can be no doubt that prolonged effort, day after day, subject to such conditions and agencies, will produce morbid, noxious, and other deadly effects in the human system. Some organisms and systems will resist and endure such conditions longer than others.' That the legislature may regulate and limit the hours of labor in employments

that are dangerous and especially unhealthful is no longer open to doubt. That underground mining, and the smelting, milling, and reduction of ores, are occupations of that kind and subject to reasonable legislative regulations such as this act provides, we think is well settled by these decisions in Missouri and Utah, and by the supreme court of the United States in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, and in New York, and by this court in *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47.

"The fact that controls the decision in the *Lochner* case—the finding of the majority of the court of last resort—that the trade of a baker is not more unhealthful than ordinary occupations, appears to be based on judicial knowledge, aided by statistics and general information, and not upon testimony. Essentially the same is true of the conclusion of this court in this case and in *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, and of the opinion reached in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, 14 Utah, 71, 96, 46 Pac. 756, 1105, 37 L. R. A. 103, 108, and followed and approved by the supreme court of the United States, holding that labor in mines, smelters and institutions for the reduction and refining of ores is so hazardous and unhealthful as to justify the legislature in limiting the hours of labor in those places. We held it as a matter of common knowledge that men sickened and died as a result of labor in underground mines and quartz-mills, and by way of example referred to the well-known fact that in one of the largest plants in the state the most of the men died in from a few months to two years from the effects of flinty dust from quartzite ores. Recently, and since the submission of this case, there casually appeared before this court, as a spectator during the argument of a water suit, a man in the advanced stages of miner's consumption, sallow, emaciated, and with hollow cough; an impressive exhibit of the frequent effect of work in underground mines. Testimony cannot be received to establish nor to overthrow these or other matters of judicial cognizance. If it could be taken to overturn the conclusion that labor in these places is unhealthful, for the same reasons it ought to be accepted to reverse the finding that work in bakeries is not more unhealthful than in ordinary employments.

"If evidence were to be considered for the purpose of showing that a particular mill or the labor performed by some of the workmen in the reduction of certain ores is not unhealthful, and that, therefore, it should be excepted from the operation of the act, testimony should also be admissible to prove that the conditions existing in a few particular bakeries in the state of New York made them especially injurious to the health of the employes therein, and that as to them the statute ought to be enforced, notwithstanding it has been declared unconstitutional as to the bakeries generally in that state. If, regardless of the reasons and difficulties indicated here and in the opinion, testimony were receivable to limit the

operation of the statute in exceptional cases, the evidence would have to be clear to render the act unconstitutional or ineffective as to them, and would have to be presented in the court having jurisdiction of the offense, and not on petition for writ of habeas corpus. If questions of fact not conclusively shown by judicial knowledge were to vary or restrict the control of the statute in some cases, the state and the defendant would be entitled to have them submitted to a jury in the court having jurisdiction of the offense, and the proper method for the correction of errors in that tribunal would be by appeal.

"We do not find the statute to be in conflict with the fourteenth amendment, nor with any provision of the state or federal constitutions, nor do we deem the fine excessive. We realize the importance of the question involved, and that it borders on the line that divides the right of the individual to work, contract, and act as he may please from the power of the legislature to restrain or limit him in this regard for his benefit, and that of the community by the enactment of laws for the protection of his health, safety, morals and the common welfare. After mature reflection we feel confirmed in the correctness of the conclusions reached in the opinion, and that the statute controls the employment followed by petitioner. If this will work unnecessary hardships without corresponding benefits in exceptional cases, application should be made to the legislature, and not to the courts, for relief.

"The petitioner is remanded, as ordered before."

"FITZGERALD, C. J., Concurring. I concur in the judgment reached by Justice Talbot in this case, and at some time in the not distant future hope to embody my views in an opinion to be filed."

"NORCROSS, J., Concurring. I concur in the judgment and in the opinion of Talbot, J., in so far as the same is not inconsistent with certain views of this case which I here express. I do not think that this court can say that as a matter of common knowledge prolonged labor in all classes of ore-reduction works is injurious to the health of the workmen of each respective class. That there is a difference in degree between the unhealthfulness of labor in underground mining, and in that of labor in smelters, quartz-mills, cyanide plants, and other ore reduction works, seems to be unquestioned. It would seem, also, that the legislature itself has placed labor in underground mines in a different class than labor in smelters and other ore-reduction works, for the prohibition against the employment of labor in underground mines for a longer period than eight hours is embodied in a separate section from the section containing a general provision concerning labor in smelters and all other ore-reduction works.

"When the court has said it will take judicial notice that labor in underground mines, smelters, and dry ore-crushing quartz-mills is unhealthful, I think it has gone as far as it can go in this respect,

considering the general knowledge respecting the various occupations which the court can take judicial notice of. The flinty dust which escapes from the battery in the dry ore-crushing quartz-mill, and which is largely responsible for the unhealthfulness of such mill, is largely, if not entirely, removed in the wet-crushing mill. In the cyanide process, which is comparatively a recent process for the extracting of the metals from ore, the conditions are naturally different from those which ordinarily exist in the quartz-mill. It is a matter of common knowledge that changes and improvements have been made in ore-reduction processes and are continually being made, and it is too much to say that these changes and improvements may not also affect the healthfulness of the employment. While I think it cannot be said that it is a matter of common knowledge that prolonged labor in wet-crushing quartz-mills (a large and distinctive class of ore-reduction mills) is generally productive of ill-health or disease, upon the other hand we cannot say that as a matter of common knowledge it is not unhealthful to a degree which would authorize the interference of the legislature.

“In the absence of authoritative knowledge to the contrary, we must presume that the legislature acted intelligently and in the interest of the public welfare, with the object in view of improving the conditions of health of a considerable class of people. The difficulty in determining what may be said to be common knowledge regarding the effect upon the health of employes engaged in any particular ore-reduction process is that there are many different processes of ore reduction, some of which are unquestionably unhealthful, while others may or may not be so; and yet, when the matter of ore-reduction processes are considered as a whole, they may readily be said to be unhealthful. Our attention has not been called to any statistics that would throw any light upon the relative healthfulness of labor in various ore-reduction processes. It has not been contended, either in the briefs or in the oral argument, that as a matter of common knowledge labor in wet-crushing quartz-mills was comparatively healthful. . . .

“But if we are to presume that labor in such quartz-mills generally is unhealthful to a degree that would warrant the interference of the legislature (and under the present state of intelligence upon the subject we must so presume), can evidence of conditions out of the ordinary be shown to make an exception in the application of the rule? I think not. I think the principle involved here is precisely the same as that involved in the case of *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 32 L. ed. 253, cited in the original opinion in this case (see page 140 of this volume), where a statement of the facts of that case will be found. Justice Harlan, in delivering the opinion of the supreme court of the United States in that case, said: ‘It will be observed that the offer in the court below was to show by proof that the particular article that defendant sold, and those in his possession for sale in violation of the statute, were in

fact wholesome or nutritious articles of food. It is entirely consistent with that offer that many—indeed, that most—kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. “Every possible presumption,” Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, “is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.” . . . And as it does not appear upon the face of this statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislature’s determination of those facts is conclusive upon the courts.’

“It will be observed in the *Powell* case that the court did not take judicial notice that many or most kinds of oleomargarine butter in the market contained ingredients that are or may become injurious to health, but simply that the court could not say, from anything of which it may take judicial cognizance, that such is not the fact, and that, ‘until the contrary is shown beyond a rational doubt, every possible presumption is in favor of the validity of the statute.’ Applying this reasoning to the case at bar, it is clear why this or any other court cannot act upon the evidence offered upon petitioner’s trial. I agree with counsel for petitioner that evidence may be offered in doubtful cases to establish the fact whether or not a certain occupation is or is not unhealthful, and, if unhealthful, whether or not it is unhealthful to a degree that would warrant the exercise by the legislature of the police power of the state. Such evidence, however, must be directed to the character of the occupation generally throughout the territory covered by the statute, and cannot be confined to an individual case or a district that might be exceptional. If in matters of this kind courts can act upon judicial knowledge, which amounts simply to taking notice of the existence of a fact recognized as of common knowledge, and hence the necessity of proof of the same not required, I see no good reason why they may not act upon facts established by competent proof.

“Taking judicial notice of a fact simply does away with the necessity of offering evidence to support that fact. While a court may refuse to hear evidence offered to contradict the existence of a fact which it can say it knows of common knowledge, I am unable to see upon what theory a court could refuse to hear evidence upon a fact of which it could not take judicial notice. To so hold would be the equivalent of saying that in some cases the rights of an individual, guaranteed him by the constitution, could be taken away from him,

because the court did not happen to take judicial notice of a fact or facts necessary to a determination of the case. 'If judicial knowledge fails to disclose whether a statute is a legitimate exercise of the police power, evidence should be introduced to enlighten the judicial mind': *Harvard Law Review*, Feb. 1904, p. 269.

"The question, then, presents itself in this case: When and where should proof of these facts be offered? Upon the hearing of this petition, counsel for petitioner, subject to objection, offered testimony for the purpose of establishing his theory of the case that labor in wet ore-crushing quartz-mills was not an unhealthful occupation. Counsel contends that this court should consider this testimony, and in support of his contention cites a number of decisions. In none of the decisions cited did the appellate court hear the testimony of witnesses. In some of the cases cited the court referred to the testimony taken at the trial, while in others the court simply referred to certain statistics and reports outside of the record, which procedure upon the part of the court is supported by ample authority. Courts take judicial notice of many facts, which, in order to apply, require an investigation of some authority. For example, courts will take judicial notice of the time of the rising of the sun or moon upon any particular day, but it will hardly be expected that any court will be able to apply this knowledge without first making a satisfactory investigation. So, in matters affecting the public health, reference may be made to authoritative tables or statistics: 16 Cyc. 922. Evidence upon an issue of fact necessary to a determination of the merits of a case should be offered upon the hearing of the case in the trial court. The testimony offered in this court upon the hearing of this proceeding was inadmissible, and to review it would be to no purpose.

"In the recent case of *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, relied on by counsel for petitioner, it will be observed that the New York statute was, by the opinion of the supreme court of the United States, held to be in violation of the fourteenth amendment of the constitution of the United States, because the court was able to say: 'To the common understanding the trade of a baker has never been regarded as an unhealthful one.' Had the majority of the court expressed a doubt upon the question, as did the minority, the statute would have been upheld; for the supreme court of the United States, in line with all appellate courts, has repeatedly held that questions of doubt must be resolved in favor of the statute.

"The question presented in this case is one of power in the legislature to enact a certain law. It is a fundamental principle that courts will not interfere to annul an act of the legislature, unless plainly and beyond reasonable doubt in violation of organic law. The constitution has made the legislature the exclusive judge of the wisdom, policy and expediency of laws. When a statute is questioned before the court, its sole province is to measure it by the limits fixed

by the state and federal constitutions. Tested by this rule and the facts as shown by the record, it cannot be said that the section of the act in question is void."

For Recent Decisions on the Constitutionality of statutes limiting the hours of labor of employes in particular vocations, see People v. Lochner, 177 N. Y. 773, 101 Am. St. Rep. 773, and cases cited in the cross-reference note thereto.

STATE v. NEVADA CENTRAL RAILROAD COMPANY.

[28 Nev. 186, 81 Pac. 99.]

RAILROADS—Value for Taxation.—The cash value of a railroad for the purpose of taxation must be determined by its net earnings, capitalized at the current rate of interest, taking into consideration any immediate prospect of an increase or decrease in its earning capacity, and if it appears that its actual cost, which is *prima facie* its value, was in excess of the necessary cost, the necessary cost is the proper standard. (p. 841.)

RAILROADS—Taxation—Net Income.—The net income of a railroad, for the purposes of taxation, is the difference between the gross receipts and necessary expenses under reasonably economical and prudent management. (p. 841.)

RAILROADS—Earning Capacity for Purposes of Taxation—Evidence.—On the question as to the earning capacity of a railroad for the purposes of taxation, classifications of items of expense by the railroad company in its accounts are not evidence in its favor, except as substantiated by the original entries of the transactions in its books. (p. 845.)

RAILROADS—Earning Capacity for Purposes of Taxation—Evidence—Waiver of.—If, on the question as to the earning capacity of a railroad for the purposes of taxation, its books of account are not placed in evidence, and the opposing parties seek to prove a result from them by the opinion of an expert, and each party objects to the opinion of the opposing witness, without objection as to the books themselves, the introduction of the books in evidence is waived. (p. 846.)

RAILROADS—Earning Capacity for Purposes of Taxation—Expenditures—Presumption.—On the question as to the earning capacity of a railroad for the purposes of taxation, it is presumed that charges for things essential to the operation of the road represent reasonable and economical expenditures. (p. 847.)

EVIDENCE.—Expert Evidence Cannot be Received in regard to matters of inquiry that may be presumed to lie within the experience and knowledge of all men of average education moving in the ordinary walks of life. (p. 848.)

EVIDENCE.—Expert.—If the facts can be placed before the jury in the ordinary way, and they are of such a nature that jurors generally are competent to form opinions and draw inferences from them, then the opinions of experts are not admissible. (p. 848.)

RAILROADS—Taxation of Earning Capacity—Evidence.—If, on the issue as to the earning capacity of a railroad for the purposes

of taxation, the question whether certain charges of expense are legitimate, and whether earnings other than those shown should not have been received is disputed, it is error to permit expert accountants who have examined the railroad books to give parol evidence of their opinion as to what the railroad's net earnings should have been based on an arbitrary classification and exclusion of debts and credits. (p. 850.)

RAILROADS—Value for Taxation.—On the issue as to the value of a railroad for taxation, evidence of an offer of a certain sum for the road made to its general manager by persons who had neither the intention nor the ability to buy for themselves, but who made such offer on behalf of others who are not shown to have been able to buy or to have known the value of the property, is not admissible. (p. 850.)

RAILROADS—Value for Taxation.—In estimating the value of a railroad for the purposes of taxation, taxes actually paid by the railroad company should be added to its operating expenses and deducted from its gross income. (p. 851.)

RAILROADS—Value for Taxation—Indebtedness.—In estimating the value of a railroad for the purpose of taxation, evidence of the value of its bonds secured by mortgage, and of the value of bonds issued by a county to aid in its construction, is admissible to show the cost of the road. (p. 852.)

RAILROADS—Value for Taxation—Cost—Presumption.—The presumption that a railroad, for the purpose of taxation, is worth its cost continues until it is shown that it is less by reason of insufficient earning capacity to pay net current rates of interest on its cost, or from other causes. (p. 852.)

TAXATION.—Presumptions are in Favor of the Validity of an official tax levy. (p. 853.)

RAILROADS—Value for Taxation—Evidence.—If a witness has not made computations of a railroad's earning balances for a number of years, as to which he is asked to testify, and does not know whether such balances are correct, nor what items they include, his testimony on that point is not admissible. (p. 853.)

T. Coffin and J. A. Street, for the appellants.

J. G. Sweeney, attorney general, H. E. Driscoll, district attorney, and H. Mayenbaum, for the respondent.

¹⁸⁷ TALBOT, J. This is an action by the state for the taxes for the year 1901 on ninety-three miles of main track and two miles of sidetrack and the other real property of the Nevada Central Railroad Company, all situated in Lander county. The assessor placed the valuation at \$158,100, and made the assessment at \$5,684.97, which, with the statutory penalties, aggregates ¹⁸⁸ \$8,063.43, the amount demanded in the complaint, and for which the verdict and judgment were rendered. After denying the allegations of the complaint, the answer sets up the defense that the assessment was out of proportion to and above the cash value of the property, and asserts that in the year 1901 the prop-

erty was not of any greater cash value in the aggregate than \$60,944.

It is also alleged that the tax levy in that county for the year 1901 is illegal because in excess of the rate authorized by law. Seeking to avoid penalties for delinquencies, the defendant made and pleaded a tender of \$1,835 for taxes upon this property. Upon the trial the state introduced the delinquent list and rested. Thereupon the defendant submitted in evidence the minutes indicating that the taxes levied by the board of commissioners for that year for county purposes aggregated \$1.57 on each \$100 of taxable property, and introduced testimony showing that the road was finished in February, 1880; that it has iron rails weighing only thirty-five pounds to the yard, instead of much heavier steel rails used by all up-to-date railroads; that the ties are in poor condition; that for the most part it is ballasted only with sage-brush dirt; that the cost of repairs in future years will be increased, and that the condition of business in the adjacent county will not tend to increase earnings; that, if the Southern Pacific Railroad cuts off the curve at Battle Mountain, and runs directly by the river as surveyed, and evidently contemplated by the purchase of rights of way, the Nevada Central will be compelled to build two or three miles of new track in order to connect; that the removable value of the material which constitutes the ninety-three miles of road and all the property under the levy was \$41,135.35 in 1901; that the rate of interest on different classes of loans in Lander county that year varied from six per cent to twelve per cent; that San Francisco savings banks paid three and one-eighth per cent; that money in New York was worth three and one-half per cent to five per cent, and that United States bonds paid less than two per cent per annum. There was testimony that so large an amount could not be placed in Lander county.

Subject to the objection and exception of counsel for the ¹⁸⁹ state, J. M. Hiskey, the secretary and auditor of the Nevada Central Railroad Company, as a witness on its behalf, was allowed to testify that he had examined the books and vouchers of the company, and that for the calendar year 1901 the expenses from operation were \$38,372.28, the earnings from operation \$37,737.29, the loss from operation \$634.99, and that, in addition to this loss, the company paid

\$953.03 for taxes on its personal property for that year. Counsel for the defendant asked the witness if the company were not liable for the amount of taxes that the jury would assess in this case. The objection to this question was sustained. We quote from the record an important part of the examination of A. J. Maestretti, a witness for the state, regarding the income and expenses of the road:

“Q. Have you examined the books of the Nevada Central Railroad Company for 1901? A. I have.

“Q. What is the result?

“Mr. Street: One moment; I desire to examine the witness as to his qualification as an expert accountant.

“Q. You have never kept books for a mercantile firm? A. I have not.

“Q. You never had any practical experience in bookkeeping, did you? A. No, sir.

“Q. You took a course in Heald's Business College, did you? A. Yes, sir.

“Q. In that course, did you have any instruction whatever in railroad bookkeeping? A. Yes, sir; the course was designed to cover all branches of commercial and business bookkeeping.

“Q. Respecting the result of your examination of the books of the Nevada Central Railroad Company for 1901, I will ask you to state now if you included in this result all actual receipts of the Nevada Central Railroad Company for that year?

“Mr. Mayenbaum: I object. That question is entirely improper.

“Mr. Street: We desire to show by this witness that in the result which he is now called upon to testify about that he included fictitious receipts of money or sums which were never received by the Nevada Central Railroad Company at any time, or at all. We desire also to show that he did not include in the result actual expenses paid out by the Nevada Central Railroad Company during the year 1901, but used his own judgment in excluding items of expense which were actually paid in the year 1901 by the Nevada
¹⁹⁰ Central Railroad Company in the operation of its railroad, and we ask to examine the witness on this matter before he testifies to the result, for the reason, if our information is

correct, the result would not be what is contemplated by the law, or competent in this case under any circumstances.

"Court: The question is not permitted.

"Mr. Street: We desire to note an exception to the ruling of the court on the ground that we have offered to show that this result about which the witness is asked to testify, and by the witness himself, included absolutely fictitious items of receipts never received by the Nevada Railroad Company in 1901, and in this result the witness did not include actual expenses of the Nevada Central Railroad Company incurred in its operation in the year 1901.

"Mr. Mayenbaum: You have stated that you examined the books of the company for 1901. I want you to tell me and tell the court and the jury what are the net earnings of that company in the operation of their railroad in Lander county for the year 1901. Just state to me the figures that you have arrived at as profits of the company for that year, and nothing else.

"Mr. Street: We desire to object and make the same objection and exception as to the preceding question, and, further, this question does not show that it is any result of the entire books and figures of the Nevada Central Railroad Company respecting the matter inquired of for 1901.

"Mr. Mayenbaum: I mean the result of the entire books of the company.

"Mr. Street: We repeat our previous objection and exception, with the permission of the court. A. The result of any investigation shows that the Nevada Central Railroad Company should have made a profit of \$10,645.28 for the year 1901.

"Mr. Street: We object, on the ground that the witness is not testifying as an expert.

"Court: The objection is overruled.

"Mr. Street: We take an exception on the ground stated in the objection. I also desire to add that he has not testified as an expert on the actual result of the books of the company, and we move to strike out the answer of the witness on the ground that it is incompetent, and does not come within the provision of the statute.

"Court: The motion is overruled.

"Mr. Street: We note an exception on the same ground."

191 Cross-examination by Mr. Street:

"Mr. Street: You did include in your computation from which you figure this result a lot of items for receipts you knew never were actually received by the Nevada Central Railroad Company? A. No, sir.

"Q. Will you state to the court or jury that you included nothing in the receipts you figured up except items of actual receipts—that means money actually received? A. I included only what was shown by the books and papers of the company which I examined.

"Q. Will you please answer my question clearly? A. There is one item which does not show actual cash receipts.

"Q. What is that item? A. It is a record of passes issued by the Nevada Central Railroad Company and used by the persons to whom they were issued.

"Q. So that the result you have testified to includes fictitious receipts which were not actually received in cash by the Nevada Central Railroad Company, does it not?

"Mr. Mayenbaum: We object. He testified to the profits, and only profits, of the company of that year, and has no knowledge only that shown by the books.

"Court: The question can be answered. A. The item of passes is one of the items charged, and, if this is a fictitious receipt, then it does include fictitious receipts.

"Q. Then there was no receipt of money shown at all by the Nevada Central Railroad Company for this item on its books? A. No, sir.

"Q. In your computation you used your own judgment in rejecting, and did not include in your result, a considerable number of actual items of expense of operation of the Nevada Central Railroad Company for the year 1901? A. I rejected items charged in the Nevada Central Railroad Company's books as items of expense in operation.

"Q. So the result you are testifying to is not the actual expense and earnings of the Nevada Central Railroad Company, is it, for the year 1901? A. No, sir; it is not the expense as shown by their books.

"Q. You are a railroad man? A. No, sir.

"Q. Have you worked on a railroad? A. No, sir.

"Q. In a railroad office? A. No, sir.

"Q. In machine shops? A. No, sir.

"Q. Never had anything to do with buying railroad supplies? A. No, sir.

"Q. You are by profession a lawyer? A. Yes, sir.

"Q. And you were formerly district attorney of Lander county? A. Yes, sir; ¹⁹² and before that I was a rancher for years.

"Q. In this so-called result, did you figure any taxes of the Nevada Central Railroad Company for 1901? A. No, sir.

"Q. You took upon yourself to exclude a voucher for taxes that you found, did you not? A. If I encountered any, I excluded them.

"Q. Do you know of a voucher or expenditure of the Nevada Central Railroad Company of \$953.03, paid November 30, 1901, by the Nevada Central Railroad Company, to T. H. Dalton, treasurer and tax receiver of Lander county, Nevada, for taxes on its item of personal property and certain land at Clifton, also its engines and cars? A. Yes, sir; I know of such a voucher.

"Q. And you did not include that in your result, did you? A. No, sir.

"Mr. Street: I desire to move to strike out the answer of the witness in his direct examination as to the result of his examination concerning the net earnings of the Nevada Central Railroad Company of 1901, for it is shown now conclusively by his own testimony that this result is not any result of the actual showing upon the books of the company at all; that the witness in reaching this result took upon himself the province of all the issues in this case, taking the province of the jury; and it is now shown conclusively that fictitious items of receipts were computed by him to reach his result. It is further shown that he purposely excluded actual items of expense actually paid by the Nevada Central Railroad Company in 1901, and the so-called result cannot be permitted to go to the jury in this case.

"Court: The motion is denied.

"Mr. Street: We desire an exception on all the grounds stated in the motion. We desire to have it explicitly understood that we do not waive any exceptions heretofore taken or objections heretofore made to the testimony of this witness. and we desire our objections to go to all of his testimony."

²⁰⁶ In order that a clearer understanding may be had of the essential facts, we have detailed important parts of the testimony relating to the main issue in the case—the true cash value of the road in 1901. It not being shown or contended that the prospective is greater than the present value, it depends largely upon the amount of earnings and expenses of operation. Following decisions in other states, this court long ago laid down the rule that the cash value of a railroad for the purposes of taxation—which means the amount at which the property would be appraised if taken in payment of a just debt from a solvent debtor—must be determined mainly by its net earnings, capitalized at the current rate of ²⁰⁷ interest, taking into consideration any immediate prospect of an increase or decrease in its earning capacity. The actual cost of the road may be shown, for, *prima facie*, that is the value. But if it appears that the actual cost was in excess of the necessary cost, the necessary cost is the proper standard. If it further appears that the net income of the road does not amount to current rates of interest on its necessary cost, and is not likely to do so; or if, in short, the utility of the road is not equal to its cost, then its value is less than its cost, and must be determined by its utility alone. If the road does not pay current expenses, and cannot be expected to do so, then it is worth no more than the value of its movable material, less the cost of taking it up and getting it to market: *State v. Central Pac. R. R. Co.*, 10 Nev. 47; *State v. Virginia etc. R. R. Co.*, 23 Nev. 283, 46 Pac. 723, 35 L. R. A. 759. In the latter case it was said that railroads are bought and sold so seldom, and the value of each road depends so entirely upon its surroundings, that in determining the amount we must resort to principles other than those governing ordinary kinds of property which have a market value. It is apparent that a most important question here concerns the amount the road earns or ought to earn, and the necessary expenses of operation. As held by this court in *State v. Virginia etc. R. R. Co.*, 24 Nev. 53, 49 Pac. 945, 50 Pac. 607, the net income of a railroad, when necessary to be determined for the purposes of taxation, is the difference between the gross receipts and necessary expense under reasonably economical and prudent management. The gross receipts to be considered for this purpose are not necessarily those in fact received, but such receipts as would be

received under a reasonably economical and prudent management; and the expenses to be deducted in order to determine the net income are not necessarily the expenses which were in fact incurred, but such expenses as would be incurred under a reasonably economical and prudent management. It is earnestly claimed for the state that it was competent for the witness Maestretti to give the result of the items in defendant's books which he deemed properly chargeable as the expenses of operation, and for him to reject or ²⁰⁸ ignore in his answer other items that he did not consider so chargeable, and that he could give the amount that, in his judgment, the company ought to have earned beyond its actual receipts, and state the net amount that the company ought to have made that year. It is said in the brief that there are many things, such as a four-in-hand or the castle on the mountain at Austin, that even a stupid witness would know were not necessary in the operation of a railroad. For the defendant it is asserted that everything charged as expenses in its books is presumed to be necessary for its operation, and that the witness for the state could not give his conclusions which might overthrow this presumption. Are these contentions consistent with correct legal principles? If, as said by this court (*State v. Virginia etc. Ry. Co.*, 23 Nev. 283, 46 Pac. 724, 35 L. R. A. 759), "it is reasonable to suppose that the owners of a road will operate it to their own best advantage; that they will obtain all the income possible, and keep the expenses of operation as low as possible," this does not raise any presumption, further than is shown by the transactions themselves as originally entered, that moneys paid out and items charged in the books were necessary for the operation of the road. Classification to expense or other accounts is in the nature of a written declaration in a party's own favor, made without the sanctity of an oath or the opportunity of cross-examination. It is as natural to conclude that a railroad company will pay interest on its bonds and meet its fixed charges, if not also that it will lay betterments, as it is to believe that it will meet its operating expenses. If it were the rule of evidence that a binding or other presumption would attach in favor of a railroad company for any items it may classify or charge in its own behalf to operating expenses, the same self-interest which, in the absence of any contrary showing, may be presumed to result in an eco-

nomical management, might prompt the charging of doubtful and uncertain items to the expense account if a suit for taxes were anticipated. Unless admitted without objection, the nature of the items should be shown, or at least lumped into different classifications, in order that the court may determine whether they are properly chargeable ²⁰⁹ as expense of operation: *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. ed. 868; *Abbott's Trial Brief*, Civil, 322. This need not result in much delay or difficulty. Prior to the trial the accountant testifying may take the total of moneys received from fares, freights, or other sources, and classify and ascertain the amounts of the different kinds of expense, such as that shown by the pay-roll for the usual employés of a road, for fuel, ties, and other material and supplies, which are admittedly or clearly necessary; and doubtful items can be separately listed or classified, and their amounts or totals brought to the attention of the court, and allowed to go to the jury or not, as the court, and not as the witness, may determine, unless a question of fact arise regarding the necessity for particular expenditures.

The error in allowing the answer of Mr. Maestretti giving his result regarding the net earnings to stand after he stated that he included such items as he deemed proper and rejected others which he thought improper is well illustrated by his failure to include the taxes as part of the operating expenses. It was equivalent to permitting the witness to tell the jury that the taxes ought not to be allowed as a part of the charges of operation for the year—a matter of law for the trial judge, and one previously determined by this court contrary to the opinion of the witness. The objection on the ground that it was a matter of law was promptly and properly sustained to the question put to Mr. Hiskey as to whether the company was liable for the taxes that the jury might assess for the year 1901. This witness was not permitted to testify for the defendant that the company was liable for its taxes, and, inferentially, that they were a necessary part of its expenses; but the witness for the state was permitted to give a result which, in effect, said to the jury that the taxes could not be allowed as part of the charges of operation. He included as a part of the receipts which the company ought to have earned the amount in fares that would cover the distance traveled on passes. Although these amounts should be included in

determining what the earnings of the company ought to be, unless the defendant showed that the passes were used by its ²¹⁰ employés, or in connection with the business of the road, and if the company wishes to be generous and carry passengers or freight for less than schedule rates, the ordinary value of the service rendered would be allowed in the estimate of what the road ought to earn, whether they should be so considered was a question of law. The witness, as an accountant, could estimate and give the amounts or totals of those or other items specified or classified, and then it would be for the court to determine which of these should be considered by the jury.

As to what other items the witness included or rejected in arriving at his result we are not informed, nor were the district court or the jury further enlightened. No doubt many of the transactions shown by the books were properly placed in his estimate; but whether others were improperly so, whether he allowed items for expenses that ought to have been rejected or rejected others that ought to have been allowed, as he did the payment by the company of the taxes on its personal property, and whether he classed as receipts anything that cannot be legally considered such, cannot be ascertained from his testimony or the record, because the items on which his result is based are not specified.

In this regard the testimony of Mr. Hiskey for the company is hardly more satisfactory. It is evident that his answer that the loss from operation that year was \$634.99 was based either upon his judgment as to the items allowable or upon the way they had been classified in the books, neither of which, as we have said, should control the province of the court in determining which are for the consideration of the jury when objection is made. Notwithstanding the wide discrepancy in their respective results, the estimate of a loss by the witness for the defendant and that the company ought to have netted over \$10,000 that year by the witness for the plaintiff, both may have been entirely correct in their additions, subtractions, and balances for which they had been called as expert accountants. So far as appears, they differed only in the items which they considered, and which were selected in the exercise of their judgment, instead of that of the court. If they had disagreed regarding the result or balances ²¹¹ from the same transactions, or if there had been a con-

flict in their testimony pertaining to anything tangible, it would have been for the jury to determine between them. As it is, the testimony relating to the important issue in the case is based upon the opinion of one witness for the state and the different opinion of a witness for the defendant, or the way the company classified its accounts, as to whether the various items in defendant's books for that year were legally allowable as receipts or expenses of operation—verily a foundation more uncertain and less stable than the air cushion that supports the abutment of the Brooklyn Bridge. As said in *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. 55, the law requires a party to establish his case by the best evidence of which it is susceptible. It is the first entries of transactions in day-books, journals, pay-rolls, stubs, and books of original entry, rather than the secondary entries, that make them admissible; and subsequent classifications of these into expense, ledger, or other accounts are not evidence in a party's own favor, except as they are shown to be substantiated by the original entries which control. If the witness had classified these, and given the totals and remainders of the different groups, designating them by reference to the books or to tabulations which he had made from the books, the items from which he derived his results would have been apparent and fixed; so that, if any of these were in doubt, the court could determine in regard to their relevancy, instead of leaving this judicial function to the witness. Not only was it error to permit the witness to give his opinion on questions of law, or, which was equivalent, a result based more or less upon his judgment in allowing or rejecting doubtful items, but it would have been improper for him to testify regarding the necessity for other items concerning which there was no doubt. That conductors, engineers, other ordinary employés, fuel, and ties were necessary in the operation of the road was a matter of common knowledge, concerning which the court and jury did not need the opinion of any witness. The presumption would arise that any money shown by the company's books to have been expended for these or for other purposes generally connected ²¹² with the operation of a railroad were prudently and economically expended, but if the costs for building a castle or the payment of interest on bonds were charged in the expense account, no presumption would arise from the fact that they were

so charged that they ought to be deducted from the earnings in estimating the annual net income. They would show for themselves the contrary, and no witness should be permitted to testify that, in his judgment, they ought to be allowed or rejected. Matters of law and of common knowledge are directly for the court and jury. Everyone knows that money expended for coal to generate steam to propel a locomotive and for the wages of an engineer is a legitimate charge in the operation of a railroad, and the presumption would arise that any money shown by the books to have been put out for these purposes was a necessary expenditure. If it were sought to overthrow this presumption, witnesses possessing special knowledge or skill could be called to give their opinion that the amount of coal necessary for propelling trains, or the market price of coal, or the ordinary wages for such engineers, were less than the charges made.

The books were not placed in evidence on the trial in the district court, but, as each party sought to prove a result from them through the examination and opinion of an expert, and each objected to the opinion of the opposing witness without making any objection to the books themselves, it is apparent that their introduction was waived. Without consent or waiver, it would have been necessary to lay the usual foundation for their introduction by proving that they contained correct and original entries of the transactions made at the time they took place, or from permissive memoranda, before they, or evidence of their contents, could be received. To have secured their introduction, it would not have been necessary to prove that the various items scattered through day-books or others of original entry had been carried to and properly classified in the expense or other accounts in the ledger, and such classification made by the defendant in its own behalf was not supported by any testimony as to its correctness, and was inadmissible, except so ²¹³ far as shown to be relevant by the transactions or charges themselves as originally entered. The mere classifications made by the defendant, or the conclusion of witnesses as to which items were properly allowable, were insufficient and incompetent to overthrow the presumption in favor of the correctness of the assessment made by the assessor under official oath, and presumably without interest between the state and the defendant, or to overthrow the burden cast upon

the defendant to prove its allegation of overvaluation. By the admission of the books or the waiver of their introduction only such original entries as are material to the issue are to be considered as affecting the result. Until the contrary was shown by proof, there would be a presumption that charges for anything essential to the operation of the road, such as coal, ties, and ordinary supplies, and wages for usual employés, represented reasonable and economical expenditures. When no dispute exists, and no objection is made, it may be convenient to allow expert accountants to state the net earnings as shown by the books, and this testimony could stand as effectually as parol evidence given of a conveyance of real property, or a written contract where no objection is made to the nonintroduction of the writing: *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 151; *Watt v. Nevada C. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52. If it were desired to supply the testimony of experts as to whether certain doubtful items were necessary for the operation of the road, or were for betterments, fixed charges, or useless expenditures, they should have been specified, so that the court and jury could have properly considered them. The witness Maestretti did not claim to be an expert other than as an accountant, but, if it had been shown that he or the witness Hiskey were the most experienced and eminent of railroad managers, it still would have been incompetent for either of them, whether on behalf of the state or the defendant, both of which should be governed by the same rules that apply to other litigants, to give their opinions on matters of law, which are for the court, or regarding commonly known facts concerning which the court and jury could determine as well as they. The duty of the ²¹⁴ accountant is to save the time of the court by striking totals and balances of such items as are relevant, but not to give his judgment as to what those items are without bringing them to the attention of the court. Section 427 of our practice act, being section 3522 of the Nevada Compiled Laws, is specific enough to exclude this opinion testimony. It provides that there shall be no evidence of the contents of a writing other than the writing itself, except: "First--When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made. Second--When the original is in the possession of the party against whom the evidence is offered,

and he fails to produce it after reasonable notice. Third—When the original is a record or other document in the custody of a public officer, or officer of a corporation. Fourth—When the original has been recorded and a certified copy of the record is made evidence by statute. Fifth—When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the evidence sought by them is only the general result of the whole.” The rule at common law, or in states without this statutory enactment, is the same: 1 Greenleaf on Evidence, 93; *Burton v. Driggs*, 87 U. S. 125, 22 L. ed. 299. The words “only the general result of the whole” naturally limit the answer of the witness to the whole of the accounts and vouchers or to the whole of particular accounts, tabulations, or items that are specified, and do not indicate that he may use his judgment in rejecting part of these without designating them. In *State v. Rhoades*, 6 Nev. 352, this court held that it was proper to ask an expert who had investigated the accounts in the state treasurer’s office: “What was the result of your examination as to the amount of money which should have been in the treasury on the tenth day of September, 1869?” In this question the word “should” had quite a different meaning and limitation than it had in the answer of the witness Maestretti. The amount that should have been in the state treasury was simply the difference shown by the books between all the receipts and all the disbursements, and did not imply that the witness was to exercise his judgment in excluding anything. It is ²¹⁵ a well-established rule that the opinions of experts cannot be received in regard to matters of inquiry that may be presumed to lie within the experience and knowledge of all men of average education moving in the ordinary walks of life. When the facts can be placed before the jury, and they are of such a nature that jurors generally are competent to form opinions and draw inferences from them, then the opinions of experts are not admissible: *Rogers on Expert Testimony*, 26; *Franklin Ins. Co. v. Gruver*, 100 Pa. 266; *White v. Ballou*, 8 Allen, 408; *Hovey v. Sawyer*, 5 Allen, 554; *Perkins v. Augusta Banking Co.*, 10 Gray, 312, 71 Am. Dec. 654; *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402; *Monroe v. Lattin*, 25 Kan. 361; *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635; *Baltimore R. R. Co. v. Leonhardt*, 66 Md. 70, 5

Atl. 346; State v. Anderson, 10 Or. 448; New England Glass Co. v. Lovell, 7 Cush. (Mass.) 319; Shafter v. Evans, 53 Cal. 32; City of Chicago v. McGiven, 78 Ill. 347; Naughton v. Stagg, 4 Mo. App. 271; Cook v. State, 24 N. J. L. 843; Dillard v. State, 58 Miss. 368; Gavisk v. Pacific R. R. Co., 49 Mo. 274; Concord Railroad Co. v. Greeley, 23 N. H. 237; Nashville R. R. Co. v. Carroll, 53 Tenn. 347; Linn v. Sigsbee, 67 Ill. 75; Veerhusen v. Chicago R. R. Co., 53 Wis. 689, 11 N. W. 433; 16 Cyc. 852; 3 Wigmore on Evidence, sec. 1918, and cases there cited.

Judge Campbell, in *Evans v. People*, 12 Mich. 27, said: "It is an elementary rule that, where the court or jury can make their own deductions, they shall not be made by those testifying." Lord Mansfield, in *Carter v. Boehm*, 3 Burr. 1905: "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusions; and wherever the facts can be stated it is not to be departed from": *Cornell v. Green*, 10 Serg. & R. 4. In *Campbell v. Rusch*, 9 Iowa, 337, it was said: "In answering this question the witness was not communicating facts, but his own conclusions, drawn ²¹⁶ from the language used in the written instrument. This was not permissible. It was the special duty of the jury under the instructions of the court to draw conclusions, and for the witness to state facts. The exceptions to the rule are to be found in these cases where a witness speaks of matters of science, trade, and a few others of the same character, but they cannot be extended to cases like the present." Again, in *Lime Rock Bank v. Hewitt*, 50 Me. 267, and *Lawson's Expert and Opinion Evidence*, 166: "It was wholly inadmissible for the witness to state his inferences and presumptions arising from what appeared upon the books. By the well-established rules of law these were for the jury."

The exception to the rule as provided by the statute and the decision lies in allowing the accountant to state the result of arithmetical calculations that could be made by the court. When accounts are numerous, the convenience and expedition of trials demand the admission of the testimony

of competent witnesses who have perused the entire mass and will state summarily the net result. Regarding this there is a collation of decisions in 2 Wigmore on Evidence, section 1230. In *Adams v. Board*, 37 Fla. 266, 20 South. 266, it was said: "The witness in answer to the question detailed at length divers facts that he asserted to be shown by the records examined by him. There was no error in excluding this evidence. The contents of records cannot be shown by parol where the record itself is extant and accessible." In *State v. Brady*, 100 Iowa, 191, 62 Am. St. Rep. 560, 69 N. W. 290, 36 L. R. A. 693, a tabulated statement prepared by an agent of railroad companies from the records showing the sales of tickets at a station during the year was held to have been properly admitted.

It was shown on the trial that an offer of \$200,000 for the road had been made to the general manager in 1900 by residents of Austin, or that he was asked whether the company would sell it for that amount. The witnesses who testified that they made the offer did not have that amount of money, and did not make it with any ability or expectation of buying the road for themselves, but pursuant to a statement made by a man named J. F. Mitchell, who was not present ²¹⁷ nor called as a witness, but who had previously said to J. A. Miller that "he had parties—good, responsible parties—to take it at \$200,000." There was no proof that Mitchell or the others to whom he referred had this amount of money, or were able to buy the road, nor that they knew anything regarding its value, nor that the general manager or anyone with authority in reply to the offer said anything in the nature of a declaration against interest. Objection and exception were made to testimony of the offer on the ground that it "did not tend to prove the value in 1901." Counsel for the state suggested that the exception is too narrow. It may have been intended to object only for the reason that the offer was made in 1900, instead of 1901; but it is stated more broadly as not tending to prove the value of the road in the latter year, the one in which it was essential to determine the valuation as a basis for the taxes sought to be recovered. If the offer were sufficient to prove the value of the road in 1900, in the absence of any contrary testimony that value would be presumed to continue during 1901. However, we believe that under the circumstances shown the offer was not

sufficient to show the value in 1901, or at any other time, and that the objection ought to have been sustained. In *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. 55, it was said: "The evidence of the plaintiff as to the offer made him for the property should have been rejected, because, among other reasons, the person making the offer may not have known the value of the property"; and, quoting from *Fowler v. Commissioners*, 6 Allen, 92: "The value of an offer depends upon too many considerations to allow it to be used as a test of the worth of property." We do not wish to be understood as holding that cases may not arise in which it is permissible to prove an offer, or the declarations of a party in interest or authority in reply to one; but when, as here, it is not shown that persons who made them had the means to meet them, or knowledge of the value of the property, we see no principle upon which they may be considered admissible: *Sharp v. United States*, 191 U. S. 341, 24 Sup. Ct. Rep. 114, 48 L. ed., 211.

The district court erred in refusing defendant's instruction **218** No. 7, following: "You are instructed that in ascertaining the net income, if any, of the Nevada Central Railroad, for the year 1901, or the net loss, if any, you should add any taxes actually paid by the company for that year to the other necessary expenditures of the road and deduct the same from the receipts of the road for that year; and in order to determine whether there will be any net income whatsoever, or to determine the loss from operation of the road, if a loss is shown, you must consider and deduct from the receipts of the road for 1901 such an amount for the taxes for 1901 as you agree ought to be paid by the railroad company upon the property described in the complaint, which, in brief, consists of ninety-three miles of main railroad track and two miles of sidetrack." It was held in *State v. Virginia etc. R. R. Co.*, 23 Nev. 283, 46 Pac. 723, 35 L. R. A. 759, that in determining the annual net income of a railroad the taxes should be deducted as a part of the expenses of operation: *State v. Nevada C. R. R. Co.*, 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042. In compliance with this rule, the instruction ought to have been given. But in determining the value of the road on the basis of its earning capacity capitalized at current rates of interest, it should be given the benefit of the payment of its taxes only once, so that in ascertaining what the cur-

rent rates of interest are the net yield on other investments after the payment of taxes on them should be taken as a guide. For instance, there was proof on the trial that six per cent or eight per cent was paid on mortgages in Lander county. If the tax on these was paid by the mortgagee, and not by the mortgagor, they would be properly deducted from the interest rate in arriving at the net yield of the investment and the true earning value of the money placed in such mortgages. It could be shown whether the income from investments other than government bonds, which command a lower rate by reason of exemption from taxation, would be reduced by the usual tax rate.

Exception was taken to the evidence introduced on behalf of the state that the articles of incorporation of the Nevada Central Railroad Company provided for seven thousand five hundred shares of stock of a par value of \$100 a share, and that the company ²¹⁹ had made a mortgage in 1888 for \$750,000 on all its property to the Central Trust Company of New York, and that Lander county in 1879 issued \$200,000 in bonds to aid the building of the road. As said before, a railroad is different from ordinary property having a market value, and its cost may be shown. Under the circumstances the giving of the mortgage was in the nature of an admission that the property was worth the amount of the loan, and the value of the corporate shares and the amount of the bonds issued by the county to aid in the construction of the road had a tendency to show that these sums were a part of its cost, for the same presumption would attach that these moneys were economically used in its construction that prevails in regard to its operation. Presumably its cost is its value until the time a lesser or different value is shown. The presumption that the road is worth its cost continues until it is shown that it is less by reason of insufficient earning capacity to pay net current rates of interest on its cost, or from other causes.

Defendant further contends that the levy of one dollar and fifty-seven cents for county purposes on each \$100 of valuation made the whole levy void under the following provision of the revenue act: "The board of county commissioners in each county of this state are hereby authorized and empowered to levy annually, on or before the first Monday in March, an ad valorem tax for county purposes not exceeding the

sum of two dollars on each one hundred dollars' value of taxable property in the county and such special taxes as may be authorized and required by law; provided, the total tax levy in any one year for all purposes shall not exceed five dollars on each one hundred dollars' value of taxable property in any county or part thereof; provided, no levy in excess of one dollar and fifty cents on each one hundred dollars' value of taxable property therein shall be so levied in any county of this state for county purposes unless the county is indebted for liabilities contracted prior to January 1st next preceeding the making thereof and not bonded or funded." It was not shown that the county was not indebted for liabilities contracted prior to 1901, and the presumption is in favor of official action and the levy. This makes it unnecessary to ²²⁰ determine whether such levy would have been invalid if it had been shown that no such prior indebtedness existed.

The defendant sought to have their witness Hiskey state the amount of the receipts and earnings of the road for the previous ten years, as shown by the balances standing on the books. The testimony was properly excluded, because the witness had not made the computations, and did not know whether they were correct, or what items they included, and did not bring them under the rule we have hereinbefore stated.

When the case is tried again, the court can determine whether there is evidence to cover or warrant the modification to instruction No. 5. We have examined the other specifications treated in the elaborate and interesting briefs, but find no error in regard to them.

The cause is remanded for a new trial.

The Value of Railroad Property for purposes of taxation is to be determined largely by reference to present and prospective profits, and not alone by the cost of construction: Cincinnati Southern Ry. v. Guenther, 19 Fed. 395; People v. Pond, 13 Abb. N. C. 1; People v. Keator, 67 How. Pr. 277; People v. Hicks, 40 Hun, 598. In ascertaining the present value of railroad for purposes of taxation, it is said in State v. Illinois Cent. R. R. Co., 27 Ill. 64, 79 Am. Dec. 396, an important element is the amount of net profits, if the property is devoted to the use for which it was designed, and is in a condition to produce its maximum income; but in connection with this, there should be considered what prudent men would give for the property as a permanent investment with a view to present and future income.

BELL v. DISTRICT COURT.

[28 Nev. 280, 81 Pac. 875.]

WRIT OF PROHIBITION is an Extraordinary Remedy, and should be issued only in cases of extreme necessity, and not until it appears that the petitioner has applied to the inferior tribunal for relief. (p. 857.)

PROHIBITION—Remedy by Appeal.—Prohibition does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. (p. 857.)

THE WRIT OF PROHIBITION is not a Writ of Right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. (p. 857.)

WRITS OF PROHIBITION, Like All Other Prerogative Writs, are to be Used with Caution and Forbearance, for the furtherance of justice, and the securing of order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. (p. 857.)

WRIT OF PROHIBITION—When Granted.—The writ of prohibition should not be granted, except in cases of usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition. (pp. 857, 858.)

WRIT OF PROHIBITION—Constitutional Law.—If persons are sought to be removed from office for malfeasance under a statute authorizing the filing of a complaint by a private individual, the hearing of the matter by summary proceedings, and also providing that, if an appeal is taken from an order of removal, the officer removed shall not occupy the office pending the appeal, and it is claimed that such statute is unconstitutional, the petitioners' remedy by appeal is not adequate, and they are entitled to a determination of the constitutionality of the statute on a writ of prohibition to restrain the further prosecution of the removal proceedings against them. (pp. 858, 859.)

CONSTITUTIONAL LAW—Title of Act.—A statute entitled "An act relating to elections," and providing for the removal of officers for malfeasance by summary proceedings on complaint of a private individual, is in violation of a constitutional provision requiring each law to embrace but one subject, and matter properly connected therewith, which shall be briefly expressed in its title, since such removals from office have no proper connection with the subject of elections. (p. 861.)

P. M. Bowler, Jr., for the petitioners.

G. S. Green, for the respondent.

201 NORCROSS, J. This is an original proceeding to obtain a writ of prohibition restraining and prohibiting respondent, the district court above named, and Honorable M. A. Murphy, judge thereof, from further proceeding, other

than to make an order of dismissal, in a certain action in said court pending, entitled "A. Summerfield, Complainant, v. William Bell, J. E. Davidson, and James Russell, Defendants. Accusation." The issuance of the writ is demanded upon the grounds: 1. "That said court has no jurisdiction of the parties, or the subject of said action"; 2. "That said court has no jurisdiction of the parties, or of the subject of said action in the manner and form therein assumed to be exercised by said court."

The defendants in said action, petitioners herein, are regularly elected, qualified, and acting officers of the said county of Esmeralda, as follows: The said William Bell and James Russell are the justice of the peace and constable, respectively, of Goldfield township, and the said J. E. Davidson is the district attorney of the county. The action sought to be prohibited by this proceeding was instituted by the complainant, A. Summerfield, a citizen and taxpayer of said county, for the purpose of removing said petitioners from office for alleged malfeasance. The proceeding was brought under the provisions of sections 59 to 62 of an act entitled "An act relating to elections," approved March 12, 1873 (Stats. 1873, p. 209, c. 121; Comp. Laws, 1642-1645), which sections read as follows:

"Sec. 59. If any person now holding or who shall hereafter ²⁹² hold any office in this state, who shall refuse or neglect to perform any official act in the manner and form as now prescribed by law, or who shall be guilty of any malpractice or malfeasance in office, shall be removed therefrom as herein prescribed.

"Sec. 60. Whenever any complaint in writing, duly verified by the oath of any complainant, shall be presented to the district court, alleging that any officer within the jurisdiction of said court has been guilty of charging and collecting any illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office as prescribed by law, or has been guilty of any malpractice or malfeasance in office, it shall be the duty of the court to cite the party charged to appear before him on a certain day, not more than ten nor less than five days from the time when said complaint shall be presented, and on that day, or some subsequent day not more than twenty days from that on which said complaint is pre-

sented, shall proceed to hear, in a summary manner, the complaint and evidence offered by the party complained of, and if, on such hearing, it shall appear that the charge or charges of said complaint are sustained, the court shall enter a decree that said party complained of shall be deprived of his office, and shall enter a judgment for five hundred dollars in favor of the complainant and such costs as are allowed in civil cases.

"Sec. 61. It shall be the duty of the clerk of the court in which such proceedings are had to transmit, within three days thereafter, to the governor of the state, or board of county commissioners (as the case may be) of the proper county, a copy of any decree or judgment declaring any officer deprived of any office under this act; and it shall be the duty of the governor or such board of county commissioners (as the case may be) to appoint some person to fill said office until a successor shall be selected or appointed and qualified; and it shall be the duty of the person so appointed to give such bond and security as are prescribed by law and pertaining to such office.

"Sec. 62. In case judgment of the district court, as herein **293** provided, shall be against the officer complained of, and an appeal taken from the judgment so rendered, the officer so appealing shall not hold the office during the pending of such appeal; but such office shall be filled as in case of a vacancy."

It is contended by petitioners that the foregoing sections of the act, under which the said proceedings were instituted, are violative of the state constitution, and hence void, and that therefore the court had no jurisdiction in the premises. Upon the other hand, counsel for respondent takes the position that prohibition is not an appropriate remedy to determine the constitutionality of an act or provisions thereof, and that therefore this proceeding should be dismissed, without passing upon the merits of the legal questions presented. Unquestionably this proceeding would be improper, if petitioners have a plain, speedy, and adequate remedy in the ordinary course of law; but no authorities are cited by counsel that go so far as to hold that an appellate court will refuse to grant relief by prohibition simply because to do so would necessitate the passing upon a constitutional question.

In the case of *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59, which was a proceeding in

prohibition, it is manifest from the majority opinion of the court that a constitutional question would have been passed upon if necessary to a determination of the case, while the dissenting opinion of Belknap, J., was predicated upon his view of the unconstitutionality of the act therein brought in question.

The case of *Ex parte Roundtree*, 51 Ala. 42, referred to in the *Walcott-Wells* case, was a proceeding wherein a writ of prohibition was issued to the judge of the fourth judicial circuit of Alabama to prohibit him from proceeding in a case in the law and equity court of Morgan county; the issuance of the writ being based upon the unconstitutionality of the act creating the court.

Among other cases in which the constitutionality of statutes have been passed upon in proceedings in prohibition may be cited the following: *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811; *Connecticut River R. Co. v. 294 Franklin Co.*, 127 Mass. 50, 34 Am. Rep. 338; *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

In the case of *Walcott v. Wells*, this court said: "The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage and injustice are likely to follow from such action. It does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. The writ should not be granted, except in cases of usurpation or abuse of power, and not then, unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject matter of the controversy, and only errs in the exercise of its jurisdiction,

this will not justify a resort to the extraordinary remedy by prohibition."

It appears from the petition herein that petitioners applied to the lower court for relief, and that the questions herein presented were urged upon that court upon motions to quash and to dismiss the proceedings. If the proceedings in the lower court would be void because of the unconstitutionality of the sections of the act under which it is instituted, I think it is a case for the proper interference of this court by prohibition, unless it appear that there is another plain, speedy and adequate remedy. If decision is rendered against petitioners in the proceeding in the lower court, a decree is entered removing them from office, and judgment for five hundred dollars in favor of the complainant may be imposed, as well as costs, as in civil cases. If appeal is taken from such judgment, no ²⁹⁵ matter how meritorious the appeal may be, there is no way by which the judgment, at least so far as the decree of removal is concerned, may be stayed pending the appeal; for the statute particularly provides that an appellant "shall not hold the office during the pending of such appeal." Petitioners are charged with gross misconduct—acts which are cognizable as crimes and punishable as such; in fact, malfeasance in office itself has all the attributes of crime. These accusations, grave as they are, are not, under the sections quoted, required to be made under the solemnity of an investigation of a grand jury and presented by a body of that character, but may rest upon the accusation of "any complainant." After summary hearing and a judgment and decree which may impose a great financial hardship, the accused is deprived of holding office and of receiving its emoluments pending the appeal, and the duties of the office are performed and the salary enjoyed by another person appointed as in the act provided. Not only this, but in a case like that of the district attorney, his appointed successor may become his legal prosecutor.

If the entire proceedings are without authority in law, and void because of the unconstitutionality of the sections of the act providing for this code of procedure, certainly the remedy to be obtained by the slow process of appeal, which could only follow a vain, fruitless, and perhaps expensive, trial, could not be considered an adequate remedy. But more injurious to the defendant than loss of office and money would

be the obloquy fastened upon him by such a decree, which an appeal in such a case could not remedy. It is hard to conceive of a greater legal wrong which might be imposed upon a person charged with a grave and serious offense than to compel him to undergo trial by a court or under a procedure wholly void in law. Even if guilty, his conviction would not be a bar to further trial before a competent court and under a lawful proceeding. If innocent, he would be subject to possible conviction, against which he never could obtain adequate relief; for if the lower court had no jurisdiction to consider the merits of the case, the appellate court would not, and all that could properly be accomplished ²⁹⁶ by an appeal in such a case would be a dismissal of the cause, with no opportunity for a new trial, or a further chance to overcome the effect of the wrongful conviction. For cases of this character, no other remedy could be adequate, and reason and justice dictate the restraining of such a trial by writ of prohibition: *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341; *People v. Spiers*, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509.

Are the sections of the "act relating to elections" under which the proceeding was instituted unconstitutional? It is urged by counsel for petitioners that they are in several particulars, and the following specifications are made wherein the organic act of the state is declared to be violated: The subject of the sections in question is not mentioned in the title of the act, and has no proper connection with the subject that is mentioned, "elections," but, upon the contrary, is foreign thereto, in violation of article 4, section 17; that the proceeding, in reality being a prosecution criminal in its nature, can only be prosecuted in the name of and by the authority of the state, and the authorization of a prosecution in the name of an individual is violative of article 6, section 13; that the authorizing of such a proceeding otherwise than upon presentment or indictment of a grand jury is violative of article 1, section 8; that the provision requiring a summary proceeding deprives the accused of the right of trial by jury, in violation of article 1, section 3.

All of the constitutional questions specified have been very ably presented by counsel, but I shall only discuss the first mentioned, for I deem it clearly decisive of the case, making it unnecessary to pass upon the other interesting questions submitted.

The purpose of section 17 of article 4 of the state constitution, which provides that "each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," etc., has been so frequently considered by this court and so well settled that it would accomplish no useful purpose to enter upon a further discussion of a matter so thoroughly covered by former opinions. As was said in the ²⁹⁷ case of *State v. Stone*, 24 Nev. 308, 53 Pac. 497, "that a compliance with this provision of the constitution is essential to the validity of every law enacted by the legislature has been so often decided by this court that it is not worth while to cite the cases." The subject of the act in question is "elections." Its purpose and object is the orderly electing of public officials by the qualified voters of the state. The trial of an officer, after he has been so elected, for malfeasance in office, his removal, and the appointment of his successor because of such removal, has no proper connection whatever with the subject of elections. But counsel for respondent says: "Sections 59 and 60 are no more 'incongruous' to the title of the act than sections 52 to 57, inclusive, and they have been the settled law of this state for many years." Sections 52 to 57, inclusive, relate to contests for members of the legislature. A comparison of sections 59 to 62, inclusive, with sections 52 to 57, inclusive, of the act in question, only serves to show more clearly the distinction between what matters have a proper connection with the general subject of the act and what have not. It is manifest that the purpose of an election contest is to determine who has been legally elected in case of controversy. Such contest necessarily relates to the election. Its ultimate object is to determine which of the contesting parties has been duly elected. While it may result in determining that the person holding the office has not been elected thereto and should be ousted therefrom, and that the contestant, or person for whom the contest is instituted, should be invested with the office, such ouster upon the one hand and investiture upon the other is based primarily upon the true result of the election. The removal of an officer for malfeasance in office has no necessary relationship to the question of his election. Probably in the great majority of cases the malfeasance in office, like the malfeasance charged against petitioners, has not even the

remotest relationship to the election of the officer. If the office is an elective one, the election at which the officer became entitled to hold the office is a thing of the past before the malfeasance is committed. An officer appointed to fill a vacancy existing in an elective office may as readily ²⁹⁸ commit a malfeasance in office as he could had he been elected to the office, and so an officer holding an office that is only appointive may be just as liable to commit such an offense. The object of legislation like that attempted to be accomplished by the sections of the "act relating to elections," herein in question, is to protect the public from corrupt and neglectful officials by removing them from office: *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *Ponting v. Isaman*, 7 Idaho, 283, 62 Pac. 680. That this purpose has no proper relationship to that of elections is too clearly manifest to require any extended discussion.

Counsel for respondent argues, however, that by reason of the provisions of section 4 of article 7 of the state constitution, the legislature has power to enact legislation for removal of officers guilty of malfeasance or nonfeasance in office in whatever manner it sees fit, and that therefore the sections of the "act relating to elections," herein in question, having been enacted in pursuance of this provision of the constitution, are valid. The constitutional provision referred to is as follows: "Provision shall be made by law for the removal from office of any civil officer, other than those in this article previously specified, for malfeasance or nonfeasance in the performance of his duties." While the framers of the constitution recognized the importance of specifying in the organic law of the state a provision requiring the legislature to enact laws for the removal of all officers guilty of malfeasance or nonfeasance in office, other than those whose removal was specified in the constitution to be accomplished by impeachment, it was never intended that such law or laws could be enacted differently from the method prescribed for the enactment of laws generally. Under the constitutional provision mentioned, the legislature is free to provide whatever proceedings for the removal of guilty public officers it deems most advantageous for the public good, so long as it does not in such enactment violate other constitutional provisions. There is nothing in the constitution itself indicating any other purpose, and reason does not dictate why there

should be any exception in the case of this character of a law.

While the conclusion reached is that the sections of the act ²⁹⁹ under which the proceedings sought to be prohibited were instituted relate to a subject foreign to that expressed in the title of the act in which they are found, and that hence they are void, it is proper to note that the effect of this decision is not to hold invalid all provisions of law enacted for the trial of those charged with, and the punishment of those found guilty of, malfeasance or nonfeasance in office. Some of the acts relating to particular county officers contain provisions for the indictment and removal from office of the official who may be found guilty of a misdemeanor in office: *State v. Borowsky*, 11 Nev. 119. The act relating to officers generally contains many provisions definitive of offenses thereunder and providing punishments therefor. The general criminal practice act of this state provides in its first section that "a crime or public offense is an act or omission forbidden by law, and to which is annexed on conviction: Fourth, removal from office": *Comp. Laws*, 3986. Section 63 of the act last mentioned provides that "an accusation in writing against any district, county, or township officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for which the officer accused is elected or appointed." The sections immediately following (*Comp. Laws*, 4038-4051, inclusive) provide for the hearing of objections to the sufficiency of the indictment, for a trial by jury, for judgment upon conviction of removal from office, and the right of appeal to the supreme court. Should these various provisions of law to which attention has been directed be deemed inadequate by the legislature to provide a sufficient remedy for the public against unworthy or corrupt officials, additional legislation upon the subject will doubtless be enacted.

The writ will issue as prayed for.

The Writ of Prohibition is the subject of a recent monographic note to *State v. Superior Court*, 111 Am. St. Rep. 929-978.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

KNICKERBOCKER TRUST COMPANY v. ISELIN.

[185 N. Y. 54, 77 N. E. 877.]

CORPORATIONS—Nature of Stockholders' Liability—Where Enforceable.—The liability of stockholders to the creditors of the corporation is not a contract, but a statutory liability to be enforced primarily at the home of the insolvent corporation and in the state creating the obligation. (p. 864.)

CORPORATIONS.—Statutes Creating Stockholders' Liability Affect the Remedy Only and apply to actions pending when they were passed. (p. 865.)

FOREIGN CORPORATIONS—Statutory Stockholders' Liability.—An Action at Law by a Single Creditor Against a Single Stockholder of an insolvent Maryland corporation, to enforce the statutory liability of the stockholder on the stock held by him cannot be maintained in New York under the laws of Maryland respecting such stockholders' liability, nor can it be maintained under the stock corporation law of New York. (p. 866.)

FOREIGN CORPORATIONS—Pleading Stockholders' Liability—Effect of General Demurrer.—Where the complaint in a suit to enforce the statutory liability of the stockholders of a corporation of another state alleges that "by virtue . . . of the aforesaid laws of Maryland as defined, construed, administered and enforced by the courts of that state, defendant is personally and individually indebted to the plaintiff to an amount equal to double the amount of stock at par," a demurrer to the complaint, on the ground that it does not state a cause of action, does not admit the foreign law as stated in the complaint, since a demurrer does not admit any facts not well pleaded. (p. 866.)

FOREIGN LAWS.—When a Pleading Contains Allegations of Foreign Law, they are not admitted by a demurrer. (p. 866.)

EVIDENCE—Proof of Law of Sister State or Foreign Law—Evidence not Conclusive.—Though the law of a sister state, sometimes called a foreign law, is ordinarily proved as a fact, still it is not in its essential nature a fact any more than domestic law is a fact. Evidence of foreign law by experts, though ever so clear and though uncontradicted, is not conclusive, since the court must examine and determine the law for itself. (pp. 866, 867.)

Edwin T. Rice, for the appellant.

Julien T. Davies, Jr., for the respondent.

55 O'BRIEN, J. The questions in this case arise upon a demurrer to the complaint on the ground that it does not state a cause of action. The purpose of the action was to enforce the statutory liability of the defendant as a stockholder in a Maryland corporation for a debt due to the plaintiff.

The action was commenced on the 19th of November, 1904, and the complaint alleges in substance the following facts: That the plaintiff is a domestic corporation; that the City **56** Trust and Banking Company was a Maryland corporation; that each stockholder therein is liable under the laws of that state to creditors of the corporation for double the amount of stock at the par value held by him in said corporation; that the plaintiff loaned to said Maryland corporation on April 20, 1903, the sum of one hundred thousand dollars due on that date; that the defendant was then a stockholder in said corporation and owned one hundred shares of its stock at the par value of ten dollars per share; that the corporation was then insolvent, and on the 6th of June, 1903, was placed in the hands of a receiver; that there was still due to the plaintiff on said loan the sum of forty-nine thousand dollars, and judgment was demanded against the defendant for two thousand dollars and interest.

The question is whether, upon these facts, the action can be maintained in the courts of this state, it being an action at law by a single creditor against a single stockholder. The case of *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419, 34 L. R. A. 757, is to the effect that such an action cannot be maintained, and that case seems to me to be well supported by the more recent decisions of the supreme court of the United States. If I understand these decisions, they hold that the liability of stockholders in such cases is not a contract but a statutory liability to be enforced primarily at the home of the insolvent corporation and in the state creating the obligation: *McClaine v. Rankin*, 197 U. S. 154, 25 Sup. Ct. Rep. 410, 49 L. ed. 702; *Middletown Nat. Bank v. Toledo etc. R. Co.*, 197 U. S. 394, 25 Sup. Ct. Rep. 462, 49 L. ed. 803; *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. Rep. 244, 47 L. ed. 380. If, however, there ever was any

doubt as to the true scope and meaning of what was decided in the Marshall case (148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419, 34 L. R. A. 757), it has been removed by the legislation that has been enacted both in this state and Maryland since the decision, and which was in force when this action was commenced.

By chapter 337 of the laws of Maryland, enacted in 1904, it was provided as follows: "The exclusive remedy for the enforcement against stockholders of all rights existing under the Code of Public General Laws . . . shall be, as against stockholders residing in the state of Maryland, by bill in equity in the nature of a creditor's bill filed against such ⁵⁷ stockholders by one or more creditors on behalf of themselves and all other creditors of the corporation who may come in and make themselves parties thereto," and by chapter 101 of the laws of that state passed in the same year, it was further enacted: "The stockholders of every such corporation shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such stock. . . . And the liability of such stockholders shall be an asset of the corporation for the benefit of all depositaries and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction."

It was held that these statutes affected the remedy only and applied to actions pending when the same were passed: *Miners' Bank v. Snyder*, 100 Md. 57, 108 Am. St. Rep. 390, 59 Atl. 707, 68 L. R. A. 312; *Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704. So that when this action was commenced it would not lie at the home of the insolvent corporation in its present form.

The law of New York on this subject is now to be found in section 54 of the stock corporation law (Laws 1890, c. 564, sec. 57, as amended, Laws 1892, c. 688, and Laws 1901, c. 354) as follows: "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted

while such stock was held by him. As to existing corporations the liability imposed by this section shall be in lieu of the liability imposed upon stockholders of any existing corporation, under any general or special law (excepting laws relating to moneyed corporations, and corporations and associations for banking purposes), on account of any indebtedness hereafter contracted or any stock hereafter issued; but nothing in this section contained shall create or increase any liability of stockholders of any existing ⁵⁸ corporation under any general or special law. The stockholders of every stock corporation shall jointly and severally be personally liable for all debts due and owing to any of its laborers."

When the case of *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419, 34 L. R. A. 757, is read in the light of these statutes, it would seem to be clear that this action was not, when commenced, maintainable either under the laws of New York or Maryland. In New York all liability for paid-up stock seems to have been swept away, whatever the form of the action, except as to moneyed corporations, and debts due to laborers, etc. In Maryland the liability is still retained, but must be asserted in a particular form of action.

It is argued, however, that the demurrer admits the foreign law as stated in the complaint, though clearly stated erroneously. The statement in the complaint is in this respect quite ambiguous. It is stated that "by virtue . . . of the aforesaid laws of Maryland as defined, construed, administered and enforced by the courts of that state, defendant is personally and individually indebted to the plaintiff to an amount equal to double the amount of stock at par," etc. It may be, and probably is, true that he is personally and individually liable, but it is not true that he is liable in the present form of action, and the complaint does not specifically or plainly allege that he is, and the demurrer does not admit any facts not well pleaded. But I think there is a more conclusive answer to this point. When a pleading contains allegations of foreign law, they are not admitted by a demurrer: *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. Rep. 558, 47 L. ed. 839. This is but a corollary of another proposition which is equally well settled. Proof of foreign law by experts, though ever so clear and though uncontradicted, is not conclusive, since the court must ex-

amine and determine the law for itself, and a demurrer has no greater effect than uncontradicted proof: *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. Rep. 366, 40 L. ed. 525. It is true that foreign law is ordinarily proved as a fact, still it is not in its essential nature a fact any more than domestic law is a fact.

59 What has been said is a sufficient answer to the plaintiff's contention that the case of *Howarth v. Angle*, 162 N. Y. 179, 57 N. E. 176, 47 L. R. A. 725, is conclusive in its favor. That case does not depend upon the statute law of the two states as this case does. That action was by the receiver of an insolvent bank of the state of Washington, to recover the equal and ratable proportion of a deficiency claimed to be due from the defendant on account of his ownership of a certain number of shares of the capital stock of said bank. According to the decisions of the Washington courts the receiver had the title to the right of action, and the amount of the deficiency had been definitely ascertained both by the courts of that state and of this. We simply enforced a promise valid at common law, because, as we declared, "the defendant took stock in the Tacoma Bank subject to the burden of the law, which he impliedly agreed to bear, as he could not otherwise become a stockholder: *Lowry v. Inman*, 46 N. Y. 119. That burden is an asset vested in the receiver, and can be enforced in this state the same as a promissory note, not because the laws of Washington are in force here, but because the defendant voluntarily assented to the conditions upon which the bank was organized. . . . While the liability is, for convenience, frequently called statutory, because the statute, which is the constitution of the bank, affixed the obligation to the ownership of stock, it is in fact contractual and springs from an implied promise. There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it (*Stoddard v. Lum*, 159 N. Y. 265, 70 Am. St. Rep. 541, 53 N. E. 1108, 45 L. R. A. 551), and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned: *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30 L. ed. 864. The express promise runs to the corporation and may be enforced by it, while the implied

promise runs to the creditors, and may, according to the common law of the state where it was made, be enforced for the benefit of creditors ⁶⁰ by a receiver of the corporation appointed to wind up its affairs."

The order appealed from should be reversed, with costs in all courts, and the demurrer sustained, with leave to the plaintiff to plead over on payment of costs.

Question certified answered in the negative.

Vann, Werner, Willard Bartlett and Hiscock, JJ., concur.

Cullen, C. J., and Haight, J., concur in result.

Ordered accordingly.

PROOF AND EVIDENCE OF FOREIGN LAWS AND THEIR EFFECT.

- I. What are Foreign Laws, 869.
- II. Foreign Laws as Provable Facts, 869.
- III. Necessity for Party Claiming Benefit Under Foreign Laws to Place Them in Evidence, 870.
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 - a. Presumptions as to the Existence of the Common Law.
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e. Who Determines the Competency of the Evidence Offered, 884.

VIII. How the Meaning of the Law of Another State is Ascertained by the Court of the Forum, 884.

I. What are Foreign Laws.

The laws of a sister state are regarded as of the same status as are the laws of foreign countries: *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709; *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209. But where one government succeeds another over the same territory, the laws of the preceding government are not regarded as the laws of a foreign country, but as part of the domestic laws of the succeeding government: *Wells v. Stout*, 9 Cal. 479; *Davis v. Curry*, 2 Bibb (Ky.), 238; *Peequet v. Peequet's Exr.*, 17 La. Ann. 204; *Ott v. Soulard*, 9 Mo. 581; *Chouteau v. Pierre*, 9 Mo. 3; *State v. Sais*, 47 Tex. 307; *Bouldin v. Phelps*, 30 Fed. 547; *United States v. Perot*, 98 U. S. 428, 25 L. ed. 251; *United States v. Turner*, 11 How. 663, 13 L. ed. 587; *Crespin v. United States*, 168 U. S. 208, 18 Sup. Ct. Rep. 53, 42 L. ed. 438.

II. Foreign Laws as Provable Facts.

The courts do not take judicial notice of foreign laws, no matter whether they be written or unwritten laws. They must be proved like any other fact: *Malpica v. McKown*, 1 La. 248, 20 Am. Dec. 279; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *De Sobry v. De Laistre*, 2 Har. & J. 191, 3 Am. Dec. 535; *Nelson v. Bridgport*, 8 Beav. 527; *Sussex Peerage Case*, 11 Clarke & F. 35; *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788; *Coghlan v. South Carolina etc. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150, 35 L. ed. 951. Consequently the maritime law of a foreign country must be proved like any other fact: *The Matterhorn*, 128 Fed. 863.

Indeed, the general rule, announced by all the courts, is that the laws of a sister state must be proved as a fact in the same manner that any other fact must be proved: *Mims v. Central Bank*, 2 Ala. 294; *Achison etc. Co. v. Betts*, 10 Colo. 431, 15 Pac. 821; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815; *Sammis v. Wightman*, 31 Fla. 10, 12 South. 526; *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682; *Baltimore etc. R. Co. v. Ryan*, 31 Ind. App. 597, 68 N. E. 923; *Bean v. Briggs*, 4 Iowa, 464; *St. Louis etc. Ry. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Louisville etc. R. Co. v. Sullivan* (Ky.), 76 S. W. 525; *Roehl v. Porteous*, 47 La. Ann. 1582, 18 South. 645; *McKenzie v. Wardwell*, 61 Me. 136; *Chipman v. Peabody*, 159 Mass. 420, 38 Am. St. Rep. 437, 34 N. E. 563; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *Washburn-Crosby Co. v. Boston etc. R. Co.*, 180 Mass. 252, 62 N. E. 590; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363;

Myers v. Chicago etc. R. Co., 69 Minn. 476, 65 Am. St. Rep. 159, 72 N. W. 694; Crandall v. Great Northern R. Co., 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; Bundy v. Hart, 46 Mo. 460, 2 Am. Rep. 525; Lee v. Missouri Pac. Ry., 195 Mo. 400, 92 S. W. 614; Seroggin v. McClelland, 37 Neb. 644, 40 Am. St. Rep. 520, 56 N. W. 208, 22 L. R. A. 110; Jenne v. Harrisville, 63 N. H. 405; Leake v. Bergen, 27 N. J. Eq. 360; Holmes v. Boughton, 10 Wend. 75, 25 Am. Dec. 536; Electric Fireproofing Co. v. Smith, 99 N. Y. Supp. 37; Moore v. Gwynn, 27 N. C. 187; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Keagy v. Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811; Cressey v. Tatom, 9 Or. 541; Musser v. Stauffer, 178 Pa. 99, 35 Atl. 709; Sibley v. Young, 26 S. C. 415, 2 S. E. 314; Morris v. Hubbard, 10 S. Dak. 259, 72 N. W. 894; Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441; Rosenthal Millinery Co. v. Lennox (Tex. Civ. App.), 50 S. W. 401; Murtey v. Allen, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 26 S. E. 421, 36 L. R. A. 271; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Osborn v. Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 47 N. W. 175, 10 L. R. A. 367.

III. Necessity for Party Claiming Benefit Under Foreign Laws to Place Them in Evidence.

The party who desires to avail himself of the benefit of a foreign law must not only plead the foreign law but produce evidence proving the law: Bean v. Briggs, 4 Iowa, 464; Hoyt v. McNeil, 13 Minn. 390; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. Supp. 417; Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664. In the absence of such proof, the law of the forum is applied: Savage v. O'Neil, 44 N. Y. 298; Bollinger v. Gallagher, 144 Pa. 205, 22 Atl. 815.

IV. Extent to Which the Court will Judicially Notice the Laws of Sister States or Foreign Countries.

The general rule is that the courts will not take judicial notice of the laws of a sister state or of a foreign country: Mims v. Central Bank, 2 Ala. 294; Atchison etc. R. Co. v. Betts, 10 Colo. 431, 15 Pac. 821; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Dyer v. Smith, 12 Conn. 384; Summer v. Mitchell, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815; Clark v. Assets Realization Co., 115 Ill. App. 150; Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810; Baltimore etc. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923; Bean v. Briggs, 4 Iowa, 464; St. Louis etc. Co. v. Weaver, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; Louisville etc. R. Co. v. Sullivan (Ky.), 76 S. W. 525; Roehl v. Porteous, 47 La. Ann. 1582, 18 South. 645; Cumberland etc. Tel. Co. v. St. Louis etc. Ry. Co., 117 La. 199, 41 South. 492; McKenzie v. Wardwell, 61 Me. 136; Washburn-Crosby Co. v. Boston etc. R. Co., 180 Mass. 252, 62 N. E. 590; Chapman v. Colby, 47 Mich. 46, 10 N. W. 74; Schultz v. Howard, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363; Myers v. Chicago etc. R. Co., 69 Minn.

476, 65 Am. St. Rep. 759, 72 N. W. 694; Crandell v. Great Northern R. Co., 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983; Smith v. Aultman (Mo. App.), 96 S. W. 1034; McKnight v. Oregon etc. R. Co., 33 Mont. 40, 82 Pac. 661; Seroggin v. McClelland, 37 Neb. 644, 40 Am. St. Rep. 520, 56 N. W. 208, 22 L. R. A. 110; Jenne v. Harrisville, 63 N. H. 405; Leake v. Bergen, 27 N. J. Eq. 360; Hosford v. Nichols, 1 Paige, 220; Holmes v. Broughton, 10 Wend. 75, 25 Am. Dec. 536; Moore v. Gwynn, 27 N. C. 187; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Keagy v. Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811; Cressy v. Tatom, 9 Or. 541; Musser v. Stauffer, 178 Pa. 99, 35 Atl. 709; Sibley v. Young, 26 S. C. 415, 2 S. E. 314; Morris v. Hubbard, 10 S. Dak. 259, 72 N. W. 894; Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441; White v. Richeson (Tex. Civ. App.), 94 S. W. 202; Murtey v. Allen, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 26 S. E. 421, 36 L. R. A. 271; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Osborn v. Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 47 N. W. 175, 10 L. R. A. 367; Armstrong v. Lear, 8 Pet. 52, 8 L. ed. 863; Liverpool etc. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788.

In a few of the states there are statutes authorizing the courts to take judicial notice of the laws of other states. Among other states having such laws is the state of West Virginia: Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035.

"Although courts do not, without proof, take notice of foreign laws, yet they will assume that certain general principles, consonant to reason and natural justice and of universal applicability, are recognized by all civilized nations, as, for instance, the right of self-preservation, the privileges and exemptions of necessity, the common duties of humanity, of more or less perfect obligation, and those obligations, for the most part conventional, upon which is based the modern system of international law. Thus, the right to immunity from personal restraint and personal violence is such a natural right and so generally recognized that he who sues for false imprisonment or assault and battery in another country need not, in the first instance, prove that the act complained of was unlawful where committed; it will be presumed to have been unlawful there, and to have imposed liability for damages; or, to speak more exactly, in the absence of such proof, the court will proceed according to the law of the forum: Lloyd v. Guibert, L. R. 1 Q. B. 115; Carpenter v. Grand Trunk Ry. Co., 72 Me. 388, 39 Am. Rep. 340. Wharton says that with regard to what may be called processual presumption, of which the presumption that a foreign law is the same as the domestic is one, no doubt the *lex fori* decides: Wharton on Conflict of Laws, sec. 782. But whether you say that, in the absence of proof, the court will presume the foreign law to be like the domestic law, or say that the court will proceed according to the domestic law, makes no difference with the rule, for it is the same in effect either way. In Langdon v. Young,

33 Vt. 136, Redfield, C. J., says it is proper to assume that flagrant violations of the fundamental principles of moral obligations, such as theft and murder, are regarded as crimes by all Christian nations, and that unjustly to accuse abroad one of such deeds as there committed is actionable. In *Woodson v. O'Connor*, 28 Vt. 776, this court assumed, in the absence of proof, that there was no difference between our law and the law of Canada in respect of the validity of arbitration notes. So in the case at bar the court might assume, as it did, that there was no difference between our law and the law of Canada in respect of larceny in the circumstances disclosed, and proceed according to our law": *State v. Morrill*, 68 Vt. 68, 54 Am. St. Rep. 870, 33 Atl. 1070.

After the court has once found a certain statute to be in force in another state, it will thereafter take judicial notice of it until it is proved that the law has been changed: *Graham v. Williams*, 21 La. Ann. 594.

An apparent exception to the general rule that courts will not take judicial notice of foreign laws is made with respect to the maritime ordinances and regulations of foreign countries. Thus in *The New York*, 175 U. S. 187, 20 Sup. Ct. Rep. 67, 44 L. ed. 126, the court, in speaking of this subject, said: "The same question as applied to the original rules and regulations was presented to us in the case of *The Scotia*, 14 Wall. 170, 20 L. ed. 822, sub. nom. *Sears v. The Scotia*, 14 Wall. 170, 20 L. ed. 822, in which we held that, in view of the fact that these rules and regulations were originally adopted by the British orders in council of January 9, 1863, and by Congress in 1864, and had been accepted as obligatory by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we would take judicial notice of them and treat them as laws of the sea and of general obligation. The duty to take judicial notice of these rules was also recognized by this court in *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. Rep. 860, 29 L. ed. 152, sub. nom. *The Belgenland v. Jensen*, 108 U. S. 153, 2 Sup. Ct. Rep. 864, 27 L. ed. 825; in *Richelieu etc. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. Rep. 934, 34 L. ed. 398, and in numerous cases in the lower courts. There is nothing in the case of *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469, 32 L. ed. 788, in conflict with this. That did not involve a question of general maritime law, but of a statutory exemption from the consequences of negligence in navigation given by a British act of parliament. We know of no reason why the rule adopted in *The Scotia*, 14 Wall. 170, 20 L. ed. 822, should not be applied to the Revised International Rules and Regulations. They have also been adopted by most, if not all, the nations which gave their assent to the original rules and regulations of 1863, and the reasons which induced this court to take judicial notice of these rules are equally persuasive here."

The federal courts, when exercising original jurisdiction, take notice, without proof, of the laws of the several states of the United States. But when the federal supreme court exercises appellate jurisdiction, whatever was a matter of fact in the court whose judgment or decree is under review still remains a question of fact in the appellate court: *Chicago etc. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 Sup. Ct. Rep. 398, 30 L. ed. 519. In speaking on this subject, the United States supreme court, in *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29 L. ed. 535, said: "Upon principle, therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin [citing *Scott v. Coleman*, 5 Litt. 349; *Thomas v. Robinson*, 3 Wend. 267; *Sheldon v. Hopkins*, 7 Wend. 435; *Van Buskirk v. Mulock*, 18 N. J. L. 184; *Elliott v. Ray*, 2 Blackf. 31; *Cone v. Cotton*, 2 Blackf. 82; *Snyder v. Snyder*, 25 Ind. 399; *Pelton v. Platver*, 13 Ohio, 209, 42 Am. Dec. 187; *Horton v. Critchfield*, 18 Ill. 133, 65 Am. Dec. 701; *Rape v. Heaton*, 9 Wis. 323, 76 Am. Dec. 269; *Crafts v. Clark*, 31 Iowa, 77; *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281, 35 N. H. 484; *Knapp v. Abell*, 10 Allen, 485; *Mowry v. Chase*, 100 Mass. 79; *Wright v. Andrews*, 130 Mass. 149; *Bank of United States v. Merchants' Bank*, 7 Gill, 415; *Coates v. Mackey*, 56 Md. 416]), whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions in *Ohio v. Hinchman*, 27 Pa. 479, and *Paine v. Schenectady Ins. Co.*, 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state, and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof: *Course v. Stead*, 4 Dall. 22, 1 L. ed. 724; *Hinde v. Vattier*, 5 Pet. 398, 8 L. ed. 168; *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246; *United States v. Turner*, 11 How. 663, 13 L. ed. 857; *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. ed. 896; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Junction R.*

Co. v. Bank of Ashland, 12 Wall. 226, 20 L. ed. 385; Lamar v. Micon, 114 U. S. 218, 5 Sup. Ct. Rep. 857, 29 L. ed. 94. But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error; yet, as in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: 'That the laws of a foreign nation designed only for the direction of its own affairs are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned': Talbot v. Seeman, 1 Cranch, 1, 2 L. ed. 15. Where by the local law of a state, as in Tennessee (Hobbs v. Memphis etc. R. Co., 9 Heisk. 873), its highest court takes judicial notice of the laws of other states, this court, also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the court of appeals has not only affirmed the general rule that foreign laws are facts which, like other facts, must be proved before they can be received in evidence in courts of justice, but has held that the effect which a judgment rendered in another state has by the law of that state is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that state is admitted by demurrer: Baptiste v. De Volunbrun, 5 Har. & J. 86; Wernwag v. Pawling, 5 Gill & J. 500, 25 Am. Dec. 317; Bank of United States v. Merchants' Bank, 7 Gill, 415; Coates v. Markey, 56 Md. 416.'

V. Distinction Between Judicial Notice of System of Jurisprudence of Another Country and of What Its Law is on a Particular Subject.

There is a distinction between taking judicial notice of a system of jurisprudence which obtains in another country or state and taking judicial notice of the rule of law which obtains with respect to any particular subject. Thus in Banco De Souvra v. Bankers' Mut. Casualty Co. (Iowa), 95 N. W. 232, the court said: "As to whether the civil law is the foundation of Mexican jurisprudence, the histories are quite as accessible to the court as to the witness. Probably judicial notice should be taken of the fact as a matter of history. But this extends no further than the general system of civil jurisprudence prevails, without taking notice of details. The extent of its adoption we are not bound to know, for, in its adjustment to the situation and conditions of a people on this continent, doubtless many

changes were made. Was the entire body of the Justinian Code adopted? Or this with modifications essential to meet the necessities and demands of modern civilization? This was a matter for specific proof with respect to the particular issue. We know that Mexico was a Spanish province for about three hundred years, and then became, and still is, a republic. At no period of its history has it been under British sovereignty. Its institutions are Latin and not Anglo-Saxon, and the common law is not presumed to be in force in any state or country where English institutions have not been established: *Savage v. O'Neil*, 44 N. Y. 298; *Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543; *Norris v. Harris*, 15 Cal. 226; *Flato v. Mulhall*, 72 Mo. 522; *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467; 13 Am. & Eng. Ency. of Law, 1065."

The state courts do not take judicial notice of the common law as applied in various states: *Crandall v. Great Northern Ry. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10. Nor do the courts take judicial notice of the statutory modifications of the common law in other states: *Rush v. Landers*, 107 La. 549, 32 South. 95, 57 L. R. A. 353.

VI. Extent to Which the Court will Indulge in Presumptions Respecting the Law of Sister States or Foreign Countries.

a. Presumptions as to the Existence of the Common Law.

1. **The General Rule.**—The general rule is that, in the absence of proof to the contrary, it will be presumed that the common law obtains in a sister state: *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43, 25 South. 806; *Alabama etc. R. Co. v. Carroll*, 97 Ala. 126, 38 Am. St. Rep. 163, 11 South. 803, 18 L. R. A. 433; *Eureka Springs Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690; *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Norris v. Harris*, 15 Cal. 226; *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979; *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153, 51 S. E. 603; *Miller v. MacVeagh*, 40 Ill. App. 532; *Scholten v. Barber*, 217 Ill. 148, 75 N. E. 460; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; *Jackson v. Pittsburg etc. Co.*, 140 Ind. 241, 49 Am. St. Rep. 192, 39 N. E. 663; *Penn. Mut. Life Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132; *Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290; *St. Louis etc. R. Co. v. Johnson (Kan.)*, 86 Pac. 156; *Chesapeake etc. R. Co. v. Haumer*, 23 Ky. Law Rep. 1846, 66 S. W. 375; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Tllexan v. Wilson*, 43 Me. 186; *National Bank v. Baltimore etc. R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134; *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159, 22 N. E. 49, 5 L. R. A. 200; *Ellis v. Maxon*, 19 Mich. 186, 2 Am. Rep. 81; *Schroeder v. Boyce*, 127 Mich. 33, 86 N. W. 387; *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; *Hubbard v. Mobile etc. Ry. Co.*, 112 Mo. App. 459,

87 S. W. 52; *Ela v. Ela*, 70 N. H. 163, 47 Atl. 414; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Terry v. Robbins*, 128 N. C. 140, 83 Am. St. Rep. 663, 38 S. E. 470; *Cressy v. Tatom*, 9 Or. 541; *Rosemand v. Southern R. Co.*, 66 S. C. 91, 44 S. E. 574; *Tempel v. Dodge*, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222; *Frank v. Gump*, 104 Va. 306, 51 S. E. 358.

But any modifications of the common law must be proved: *Newton v. Cocke*, 10 Ark. 169; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 348; *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *White v. Knapp*, 47 Barb. 549; *Vanderpoel v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601, 35 N. E. 932, 24 L. R. A. 548.

"There is no doubt," says Justice Field in *Norris v. Harris*, 15 Cal. 226, "that the common law is the basis of the laws of those states which were originally colonies of England, or carved out of such colonies. It was imported by the colonists and established so far as it was applicable to their institutions and circumstances, and was claimed by the Congress of the United Colonies in 1774, as a branch of those 'indubitable rights and liberties to which the respective colonies' were entitled: 1 Kent's Commentaries, 343. In all the states thus having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists—it has been held in repeated instances—and it rests upon parties who assert a different rule to show that matter by proof: See *Inge v. Murphy*, 10 Ala. 885.

"A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where, in fact, the population of the new state upon the establishment of government was formed by emigration from the original states. As in British Colonies, established in uncultivated regions, by emigration from the parent country, the subjects are considered as carrying with them the common law, so far as it is applicable to their new situation, so when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants.

"But no such presumption can apply to states in which a government already existed at the time of their accession to the country, as Florida, Louisiana and Texas. They had already laws of their own, which remained in force until by the proper authority they were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law. They were independent of the English law in their

origin, and hence no presumption of the existence of the common law of England can be indulged. In countries conquered and ceded to England, the common law has no authority without positive enactment, and for the same reason, that they were not part of the mother country, but distinct dominions: 1 Blackstone's Commentaries, 107; 1 Story on the Constitution, 150. As Texas was an independent state at the time of its accession to the United States—having laws of its own, not being carved out of the ancient colonial provinces of England, like the original thirteen states, or formed by emigration into an uncultivated country from those states, but from a Mexican province by a successful revolution against the Republic of Mexico—no presumption can arise of the existence therein of the common law, which is the basis of the jurisprudence of the other states.

“The question then recurs as to what is to be presumed as to the law of Texas, in the absence of any proof on the subject. We can perceive only one way in which the question can be answered, and that is to presume the law of that state to be in accordance with our own. We are called upon to determine the matter in controversy, and are not at liberty to follow our own arbitrary notions of justice. We cannot take judicial notice of the laws of Texas, and we must, therefore, as a matter of necessity, look to our own laws as furnishing the only rule of decision upon which we can act; and to meet the requirement that the case is to be disposed of according to the laws of Texas, the presumption is indulged that the laws of the two states are in accordance with each other.”

There is, however, another presumption which is very often applied in cases where the controversy could have been decided by the law of another state, and that is this, namely, that in the absence of proof to the contrary, the court will presume that the law of the sister state is the same as that of the forum: *Hall v. Pillow*, 31 Ark. 32; *Bovard v. Dickenson*, 131 Cal. 162, 63 Pac. 162; *Estate of Richards*, 133 Cal. 524, 65 Pac. 1034; *Martin v. Haggard Powder Co.*, 2 Colo. 596; *Hill v. Wilker*, 41 Ga. 449, 5 Am. Rep. 540; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581; *Wilhite v. Skelton*, 5 Ind. Ter. 621, 82 S. W. 932; *Goodwin v. Provident Sav. etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157, 32 L. R. A. 473; *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317; *Shattuck v. Chandler*, 40 Kan. 516, 10 Am. St. Rep. 227, 20 Pac. 225; *First Nat. Bank v. Nordstrom*, 70 Kan. 485, 78 Pac. 804; *Succession of Randall*, 26 La. Ann. 163; *McKenzie v. Wardwell*, 61 Me. 136; *Foulke v. Fleming*, 13 Md. 392; *Callender v. Flint*, 187 Mass. 104, 72 N. E. 345; *Cherry v. Sprague*, 187 Mass. 113, 103 Am. St. Rep. 381, 72 N. E. 456, 67 L. R. A. 33; *Crane v. Hardy*, 1 Mich. 56; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363; *Haworth v. Kansas City etc. Co.*, 94 Mo. App. 215, 68 S. W. 111; *Seroggin v. McClelland*, 37 Neb. 644, 40 Am. St. Rep. 520, 56 N. W. 208, 22 L. R. A. 110; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; *Hynes v. McDermott*, 82 N. Y. 41,

37 Am. Rep. 538; *Keagy v. Wellington Nat. Bank*, 12 Okla. 33, 69 Pac. 811; *Linton v. Moorhead*, 209 Pa. 646, 59 Atl. 264; *Morris v. Hubbard*, 10 S. Dak. 259, 72 N. W. 894; *Loud v. Hamilton* (Tenn. Ch. App.), 51 S. W. 140; *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 71 Am. St. Rep. 833, 46 S. W. 194; *Dignan v. Nelson*, 26 Utah, 215, 72 Pac. 936; *Woodrow v. O'Connor*, 28 Vt. 776; *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Osborn v. Blackburn*, 78 Wis. 209, 23 Am. St. Rep. 400, 47 N. W. 175, 10 L. R. A. 367.

Consequently, where the common law obtains on the subject of the controversy in the court of the forum, we may safely presume that it also obtains in the sister state: *Engstrand v. Kleffman*, 86 Minn. 403, 91 Am. St. Rep. 359, 90 N. W. 1054. The presumption in favor of the common law has been indulged in Minnesota even when the law of Minnesota was statutory: *Reiff v. Bakken*, 36 Minn. 333, 31 N. W. 348; *Pardoe v. Merritt*, 75 Minn. 12, 77 N. W. 552. But in New York the law of the foreign state was presumed to be the same as the common law of New York, and not the same as the common law of England: *Spencer v. Busch*, 98 N. Y. Supp. 690. And the general law-merchant being part of the common law is presumed to obtain in a sister state: *Donegan v. Ward*, 49 Ala. 242, 20 Am. Rep. 275; *Reed v. Wilson*, 41 N. J. L. 29.

2. Rule Where the Sister State or Country was Populated or Derived from a Mother Country in Which the Common Law did not Obtain.—As was shown in the quotation from the case of *Norris v. Harris*, 15 Cal. 226, cited in the preceding subdivision, some of the courts refuse to indulge in the presumption that the common law prevails in a sister state where the jurisprudence of that particular state was not derived from the common law, but from that of the civil law, as was the jurisprudence of Texas. Hence the court of Arkansas refused to indulge the presumption that the common law obtained in Texas, and consequently applied the law of the forum: *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022, 21 L. R. A. 467. And that court made a like ruling with respect to the Indian territory; the court, with respect to the presumption of the existence of the common law, saying: "But this presumption is indulged as to those states only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the state of Louisiana or Texas, because we know that their jurisprudence is founded upon a different system. The same reason forbids such a presumption as to the laws of the Indian territory, for we know that no system of laws have been adopted there and their existence universally recognized. They do not depend upon the uncertain tenure of possession, but rest upon a more substantial basis. As such rights are respected there, they should be enforced when they become involved in the courts of this state. There is no federal law on the subject. We have no proof of, and can indulge no presumption as to, the local laws in force there. As the parties have invoked the aid of our courts, we must therefore apply our own law, and administer

justice according to its principles": *Gatner v. Wright*, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715. A like conclusion was reached with respect to the Creek Nation of Indians: *Du Val v. Marshall*, 30 Ark. 230; *Davison v. Gibson*, 56 Fed. 443, 5 C. C. A. 543. The courts of Missouri have applied this rule with great strictness. They hold that the presumption that the common law obtains in a sister state will not be indulged with respect to states which were not English colonies. They have applied this rule to Arkansas (*Clark v. Barnes*, 58 Mo. App. 667), Iowa (*Barhydt v. Alexander*, 59 Mo. App. 188), Idaho (*McManus v. Oregon etc. R. Co.*, 118 Mo. App. 152, 94 S. W. 743), Kansas (*Silver v. Kansas City etc. R. Co.*, 21 Mo. App. 5; *Witascheek v. Glass*, 46 Mo. App. 209), Louisiana (*Sloan v. Torry*, 78 Mo. 623), Mississippi (*Searles v. Lum*, 81 Mo. App. 607), and Texas (*Flato v. Mulhall*, 72 Mo. 522).

And in this connection it is also held that where community property located in Oklahoma is in controversy in Texas, the law with respect to community property will be presumed to be the same in the absence of evidence to the contrary: *Ex parte Latham* (Tex. Cr.), 82 S. W. 1046.

But courts will not presume that the common law of England is also the common law of all her colonies, and hence no presumption will be indulged that the common law obtains in New Brunswick: *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

The laws which were common to the mother country, and which obtained in the state while a dependency of the mother country, are not regarded as foreign laws, such as the laws of Spain and France, which obtained in Louisiana, and the court will take judicial notice of such laws, though not of laws of such foreign countries passed subsequently to the political separation from the mother country: *Peequet v. Peequet's Exr.*, 17 La. Ann. 204; *Malpica v. McKown*, 1 La. 248, 20 Am. Dec. 279.

3. Rule with Respect to Foreign Country Whose System of Jurisprudence is not Based on the Common Law.—The courts will presume that the common law does not prevail in those foreign countries whose jurisprudence is based on the civil law or some system of jurisprudence other than that of the common law. Hence the common law will not be presumed to prevail in Asiatic Turkey: *Aslanian v. Dostumian*, 174 Mass. 328, 75 Am. St. Rep. 348, 54 N. E. 845, 47 L. R. A. 495; nor in Russia: *Savage v. O'Neill*, 44 N. Y. 298; nor in France: *In re Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406; nor in Mexico: *Banco de Sonora v. Bankers' Mut. etc. Co.*, 124 Iowa, 576, 104 Am. St. Rep. 367, 100 N. W. 532; though it was held in Texas that the court would consider that the common law prevailed in Mexico to the extent that compensation could be recovered for a tort committed there: *Mexican Central R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282. The general rule is that in order to obtain the benefit of the law of a foreign country, it must be pleaded and proved. And in the absence of proof to the contrary, the rights of the parties will be

adjudicated by the law of the forum: *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376; *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. Rep. 340; *Chase v. Alliance Ins. Co.*, 9 Allen, 311; *Thompson v. Ketcham*, 8 Johns. 189, 5 Am. Dec. 332; *Savage v. O'Neil*, 44 N. Y. 298; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Mexican Cent. R. Co. v. Olmstead* (Tex. Civ. App.), 60 S. W. 267; *Daniel v. Golden Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884; *Robinson v. Detroit etc. Nav. Co.*, 73 Fed. 883, 20 C. C. A. 86; *Mexican Cent. R. Co. v. Glover*, 107 Fed. 356, 46 C. C. A. 334.

b. How the Court Determines What is the Common Law of a Sister State.—The common law as declared by the court of the forum is generally presumed to prevail in the sister states: *Scolling v. Knollin*, 94 Ill. App. 443; *St. Louis etc. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389, 36 N. E. 837, 25 L. R. A. 806; *Callender etc. Co. v. Flint*, 187 Mass. 104, 72 N. E. 345; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331.

c. Presumptions as to the Statutory Law of Sister States or Foreign Countries.

1. In General.—There is a direct conflict of authority as to whether the statutes of a sister state or foreign country will be presumed to be similar to those of the forum. Among those courts holding that such statutes are similar to that of the forum are the following: *Campbell v. Campbell*, 129 Iowa, 317, 105 N. W. 583; *Roe v. Roe*, 52 Kan. 724, 39 Am. St. Rep. 367, 35 Pac. 888; *Sandidge v. Hunt*, 40 La. Ann. 766, 5 South. 55; *Fisher v. Donovan*, 57 Neb. 361, 77 N. W. 778, 44 L. R. A. 383; *Rogers v. Hatch*, 8 Nev. 35; *Iowa Loan etc. Co. v. Schnose* (S. Dak.), 103 N. W. 22; *Southern etc. Ry. Co. v. J. W. Burgess Co.* (Tex. Civ. App.), 90 S. W. 189; *White v. Richeson* (Tex. Civ. App.), 94 S. W. 202; *Clark v. Eltinge*, 38 Wash. 376, 107 Am. St. Rep. 857, 80 Pac. 556; *Edelman v. Edelman*, 125 Wis. 270, 104 N. W. 56. And among those holding that the courts will not presume any similarity of statutory laws are the following: *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Wood v. Supreme Ruling etc.*, 212 Ill. 532, 72 N. E. 783; *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389, 36 N. E. 837, 25 L. R. A. 806; *Cherry v. Sprogue*, 187 Mass. 113, 103 Am. St. Rep. 381, 72 N. E. 456, 67 L. R. A. 33; *Wilcox v. Bergman*, 96 Minn. 219, 104 N. W. 955; *Eekles v. Missouri Pac. Ry.*, 112 Mo. App. 240, 87 S. W. 99; *Robb v. Washington etc. College*, 185 N. Y. 485, 78 N. E. 359; *Rudy v. Rio Grande R. Co.*, 8 Utah, 165, 30 Pac. 366.

Where the foreign law seeks to enforce a penalty or work a forfeiture, no presumption will be indulged that it is similar to the law of the forum: *Grider v. Driver*, 46 Ark. 50; *Fred Miller B. Co. v. De France*, 90 Iowa, 395, 57 N. W. 759; *Samuel Westheimer & Sons v. Habinck* (Iowa), 109 N. W. 189; *People's etc. Assn. v. Backus*

(Neb.), 89 N. W. 315; *Harris v. White*, 81 N. Y. 532; *Leake v. Bergen*, 27 N. J. Eq. 360; *Allen West etc. Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314; *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055.

2. Presumption of Continued Existence of a Law After Its Existence is Once Proved.—Where the law of a foreign state is once proved to have been in existence, its continued existence will be presumed, in the absence of proof showing its repeal or modification: *Bush v. Gariner*, 73 Ala. 162; *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622; *St. Louis etc. Ry. Co. v. Eggmann*, 161 Ill. 155, 43 N. E. 620; *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; *In re Huss*, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620; *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699. Nor will the repeal of a statute of another state which is similar to the one previously in force in the state of the forum be presumed because of the repeal of the statute of the forum: *Ex parte Lafonta*, 2 Rob. (La.) 495.

3. How Presumption of Similarity of Foreign Law With that of the Forum may be Rebutted.—Of course, the presumption of similarity of a foreign law with that of the forum may be rebutted by evidence showing a dissimilar law. But this presumption of similarity may also be rebutted by evidence, such as decisions of the foreign state, tending to show a dissimilar law, even though the evidence be deemed insufficient or inconclusive upon the subject. It must, however, be of sufficient probative force as not to amount to a "total lack of evidence": *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360.

VII. Kind of Evidence by Which the Laws of Sister States or of Foreign Countries may be Proved.

a. In General.—The proof of the law of a sister state or foreign country being the proof of a matter of fact, it naturally follows that the best evidence obtainable must be adduced: *Isabella v. Pecot*, 2 La. Ann. 387; *Charlotte v. Chouteau*, 25 Mo. 465; *Hall v. Castello*, 48 N. H. 176, 2 Am. Rep. 207; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158; *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249; *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. ed. 472. This question is often regulated by the statutes of the various states.

With respect to whether foreign laws may be proved by parol evidence, the authorities are in apparent conflict. As far as the proof of unwritten laws is concerned, there is not much diversity of opinion, but with respect to written laws, the objection is urged that the written law itself is the best evidence. This objection, however, is answered by the statement that the issue is as to the state of the law at some particular time, and that the state of a written law may be affected not only by the decisions of the courts with respect to its meaning, but also by many other considerations in which the words of a statute are but an element: *Baron de Bode's Case*, 8 Q. B. 208; *Sussex Peerage Case*, 11 Clarke & F. 35. The American Am. St. Rep., Vol. 113—56

rule, as based on the weight of authority, is that whenever a statute is involved, a copy of the statute is deemed the best evidence: *Innerarity v. Mims' Heirs*, 1 Ala. 660; *Bowles v. Eddy*, 33 Ark. 645; *Hoes v. Van Alstyne*, 20 Ill. 201; *Comparet v. Jernegan*, 5 Blackf. 375; *State v. Cross*, 68 Iowa, 180, 26 N. W. 62; *Talbot v. Peoples*, 6 J. J. Marsh. 200; *Isabella v. Pecot*, 2 La. Ann. 387; *Owen v. Boyle*, 15 Me. 149, 32 Am. Dec. 143; *Baltimore etc. R. Co. v. Glenn*, 28 Md. 287, 92 Am. Dec. 688; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Stewart v. Swauzy*, 23 Miss. 502; *Charlotte v. Chouteau*, 25 Mo. 465; *Watson v. Walker*, 23 N. H. 471; *Kenny v. Clarkson*, 1 Johns. 394, 3 Am. Dec. 336; *Chanoine v. Fowler*, 3 Wend. 173; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520; *Bryant v. Kelton*, 1 Tex. 434; *Smith v. Potter*, 27 Vt. 304, 65 Am. Dec. 198; *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249. There are, however, a few decisions sustaining the contrary rule, but they generally refer to the statutes of foreign countries: *Raynham v. Canton*, 3 Pick. 293; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158; *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283; *Wilcocks v. Phillips*, 1 Wall. Jr. 49, Fed. Cas. No. 17639; *Herbst v. Asiatic Prince*, 108 Fed. 287; *Mexican etc. R. Co. v. Slater*, 115 Fed. 593, 53 C. C. A. 239; *Badische etc. Co. v. Klipstein*, 125 Fed. 543. The oral evidence in the cases just cited was allowed in a few of the cases because of the difficulty of obtaining information as to the laws of foreign countries.

But oral testimony going merely to the construction of the words of the foreign statute is not regarded as incompetent or inadmissible: *Walker v. Forbes*, 31 Ala. 9; *Dyer v. Smith*, 12 Conn. 384; *Canole v. People*, 177 Ill. 219, 52 N. E. 310; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 581, 34 N. E. 581; *Greasons v. Davis*, 9 Iowa, 219. Sometimes it is stated with respect to the proof of the written laws of foreign countries, that the court has a discretion in allowing the admission of parol evidence: *Line v. Mack*, 14 Ind. 330.

b. By Expert Witnesses.

1. **In General.**—It is generally conceded that the unwritten laws of a sister state or foreign country may be proved by expert witnesses: *McNeill v. Arnold*, 17 Ark. 154; *Dyer v. Smith*, 12 Conn. 384; *McDeed v. McDeed*, 67 Ill. 545; *Comparet v. Jernegan*, 5 Blackf. 375; *Greasons v. Davis*, 9 Iowa, 219; *Taylor v. Sweet*, 3 La. 33, 22 Am. Dec. 156; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *De Sobry v. De Laistre*, 2 Har. & J. 191, 3 Am. Dec. 555; *Mowry v. Chase*, 100 Mass. 79; *Hemphill v. Bank of Alabama*, 6 Smedes & M. 44; *Charlotte v. Chouteau*, 25 Mo. 465; *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. 594; *Kenny v. Clarkson*, 1 Johns. 385, 3 Am. Dec. 336; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622; *Temple v. Board of Commrs.*, 111 N. C. 36, 15 S. E. 886; *State v. Moy Looke*, 7 Or. 54; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520; *City*

Sav. Bank v. Kensington Land Co. (Tenn. Ch. App.), 37 S. W. 1037; State v. De Leon, 64 Tex. 553; Woodbridge v. Austin, 2 Tyl. 364, 4 Am. Dec. 740. For the admissibility of expert evidence with respect to written laws, see the previous subdivision.

2. Who May be Deemed Experts.—Expert witnesses need not be members of the legal profession, though they must be persons acquainted with the law: Pickard v. Bailey, 26 N. H. 152; Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207; State v. Behrman, 114 N. C. 797, 19 S. E. 220; American Life Ins. Co. v. Rosenagle, 77 Pa. 507. Thus a Roman Catholic clergyman may testify as an expert as to the matrimonial laws of Rome: Massucco v. Tomassi, 78 Vt. 188, 62 Atl. 57; Sussex Peerage Case, 11 Clarke & F. 35. But it has been held that an American lawyer not acquainted with the laws of Mexico is not entitled to testify as an expert as to the unwritten laws of Mexico: Banco de Sonora v. Bankers' Mut. etc. Co. (Iowa), 95 N. W. 232.

3. Right of Experts to Refresh Their Memory by Reference to Books of Authority.—Experts in giving evidence as to a foreign law may refresh their memory or confirm their opinion on the subject by referring to law books: Sussex Peerage Case, 11 Clarke & F. 35; Nelson v. Bridgport, 8 Beav. 527.

c. Effect of Decisions of the Courts or of Law Treatises by Writers of Recognized Authority as Evidence.—The decisions of the courts of the foreign state are evidence of the unwritten laws of such state: McDeed v. McDeed, 67 Ill. 545; Hendry v. Evans, 120 Iowa, 310, 94 N. W. 853; Ferd Heim Brwg. Co. v. Gunter, 67 Kan. 834, 72 Pac. 859; McRae v. Mattoon, 13 Pick. 53; White v. Knapp, 47 Barb. 549; Dougherty v. Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520. Likewise the works of law-writers of recognized authority are also admissible: Banco de Sonora v. Bankers' Mut. etc. Co. (Iowa), 95 N. W. 232; Chase v. Alliance Ins. Co., 9 Allen, 311; Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728; The Maggie Hammond, 9 Wall. 435, 19 L. ed. 772.

d. How the Statutes of Sister States or Foreign Countries are Generally Proved.—The statutes in the various states, as a general rule, provide the manner in which the written laws of sister states or foreign countries may be proved: McCrancy v. Glos, 222 Ill. 628, 78 N. E. 921. Exemplified or authenticated copies of foreign statutory laws are frequently used in proving their existence: McNeill v. Arnold, 17 Ark. 154; Comparet v. Jernegan, 5 Blackf. 375; Charlotte v. Chouteau, 25 Mo. 465; Lincoln v. Battelle, 6 Wend. 475; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Dec. 538; Territt v. Woodruff, 19 Vt. 182; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. Rep. 418, 27 L. ed. 254.

Compilations of statutes purporting to have been published under official authority are generally admissible to prove the statutory law of a foreign state or country: Paine v. Lake Erie etc. R. Co., 31 Ind. 283; Goodwin v. Providence etc. Assur. Assn., 97 Iowa, 226, 59 Am.

St. Rep. 411, 66 S. W. 157, 32 L. R. A. 473; *Biesenthall v. Williams*, 1 Duvall, 329, 85 Am. Dec. 629; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Raynham v. Canton*, 3 Pick. 293; *Wilt v. Cutler*, 38 Mich. 189; *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622; *Toulandon v. Lachemeyer*, 6 Abb. Pr., N. S., 215; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Jones v. Maffet*, 5 Serg. & R. 532; *How v. Ballard*, 113 Wis. 375, 89 S. W. 136; *Clagett v. Duluth Tp.*, 143 Fed. 824. But where the verity of any part of a compilation of the laws, printed by public authority but private enterprise, is questioned, the court will look to the original enactments: *Clagett v. Duluth Tp.*, 143 Fed. 824.

The promulgation in the United States of the law of France by the joint act of the departments of war and state is deemed a sufficient authentication of such law: *Talbot v. Seeman*, 1 Cranch, 1, 2 L. ed. 15.

An authentication of the copy of a statute by the great seal of the state is sufficient to render the copy admissible: *Griswold v. Pitcairn*, 2 Conn. 85; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Line v. Mack*, 14 Ind. 330; *State v. Carr*, 5 N. H. 367; *Topliff v. Richardson* (Neb.), 107 N. W. 114; *Lincoln v. Battelle*, 6 Wend. 475; *State v. Twitty*, 9 N. C. 441, 11 Am. Dec. 779.

e. Who Determines the Competency of the Evidence Offered.—The competency of the evidence offered to prove foreign laws is naturally a question for the court: *Kline v. Baker*, 99 Mass. 253; *Thrasher v. Everhart*, 3 Gill & J. 234; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

VIII. How the Meaning of the Law of Another State is Ascertained by the Court of the Forum.

The construction of a foreign written law may be ascertained from the decisions of that state upon the subject: *Roberts v. Knights*, 7 Allen, 449; *Wilson v. Smith*, 5 Yerg. 379; *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728. "Where the law in question is a statute of a sister state, and the text of that statute is before the court, as it was in this case, the question of the construction to be given to the language thereof should be determined by ascertaining, if possible, the construction given said statute by the highest court of that state. If this cannot be ascertained, it would be doubtless competent to show what the holdings of courts of general jurisdiction in that state were as to this law. If no proof as to the holding of any court of that state is produced, then it is the duty of the court where the trial is being had to interpret and construe the statute of said sister state according to the same rules that are applicable in the construction of a domestic statute": *Clarke v. Eltinge*, 38 Wash. 376, 107 Am. St. Rep. 857, 80 Pac. 556. In other words, the courts will, on proof of what construction is given to a statute of another state, in that state, adopt the same construction: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349.

SKILTON *v.* CODINGTON.

[185 N. Y. 80, 77 N. E. 790.]

BANKRUPTCY—Jurisdiction of Claim to, or Lien on, Property of Bankrupt.—A court of bankruptcy has no jurisdiction, except by the consent of the parties, to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate or to have been transferred by him in fraud of the act. Such suits must be prosecuted either in the state courts, or in the circuit courts of the United States, if the citizenship of the parties authorizes the action to be maintained in the latter tribunal. (p. 887.)

BANKRUPTCY—Jurisdiction of State Courts Over Lien Suits. Under the bankrupt act parties claiming the property or liens thereon may establish their rights by suits in courts of plenary jurisdiction. It was not the intention of the act to subject such claims to summary disposition in the bankruptcy court unless the claims are frivolous or made in bad faith. Hence, where a trustee in bankruptcy under order of the bankruptcy court recovered from out of the proceeds of sale of property, covered by a chattel mortgage, a sum to pay liens or claims that might be established against the property, the state court has jurisdiction of a suit against the trustee to enforce the mortgage lien. (p. 887.)

BANKRUPTCY.—A Judgment of a State Court in Relation to a Fund or Property in the possession of a bankruptcy court does not authorize such fund or property to be taken from the possession of the bankruptcy court. (p. 888.)

BANKRUPTCY.—A Bankruptcy Court May Enjoin the Prosecution of a Suit in the State Court to determine and establish a lien on the fund or property of the bankrupt in possession of the bankruptcy court. (p. 888.)

CHATTEL MORTGAGES.—Under the Lien Law, a Failure to File a Chattel Mortgage for five years renders it void as against creditors of the mortgagor whose claims accrued prior to such filing. (p. 888.)

CHATTEL MORTGAGES—Unfiled—Right of Bankruptcy Trustee to Attack.—Under the bankrupt act, the trustee in bankruptcy may attack a chattel mortgage for default in filing, though he could not have done so under the bankruptcy act of 1868. (p. 890.)

CHATTEL MORTGAGES—Subsequently Acquired Property.—A chattel mortgage, otherwise valid, is not rendered void because it professes to include property that may be subsequently acquired. (p. 892.)

CHATTEL MORTGAGES—Effect of Permission to Sell.—The fact that a chattel mortgage permits the mortgagor to sell the mortgaged chattels and apply the proceeds in payment of the mortgage does not render the mortgage void, since in such case the proceeds of the sales must be treated as reducing the amount due on the mortgage, even though the mortgagor should misapply them or refuse to pay them to the mortgagee. (p. 892.)

CHATTEL MORTGAGES—Effect of Applying Proceeds of Retail Sales to Expenses of Business.—A chattel mortgage on a stock of merchandise which provides that the mortgagor may sell and dispose of the property and apply the proceeds to the payment of the debt "excepting such portion thereof as is necessary for the

expenses of the business or as he or they may need to replenish or increase the said stock of goods," is fraudulent and void as against the mortgagor's creditors, as a matter of law. (pp. 892, 893.)

Myron D. Short, for the appellant.

George L. Bachman, for the respondent.

⁸³ CULLEN, C. J. This action was brought to enforce a chattel mortgage executed on October 4, 1897, by William J. Barron to the plaintiff and his deceased partner. On that day the plaintiff's firm sold to Barron all the stock and fixtures of a plumbing and roofing establishment, in the city of Geneva, for the sum of six thousand dollars. Part of the purchase money was represented by a note executed by the vendee to the vendors for the sum of two thousand five hundred dollars, to be paid five years from date, with interest payable semi-annually. To secure that note it was provided that the vendors should have a lien upon all the goods, wares, merchandise and chattels so sold and upon all other personal property, goods and merchandise which might be used or put on the premises by the vendee, such lien, in case of default in payment, to be enforced in the same manner as in the case of a chattel mortgage. It was agreed that the vendee, his executors or assigns, "may sell and dispose of said property and apply the proceeds of such sale to the payment of the debt hereby secured," and the vendee covenanted for himself and his assigns "that as said stock is sold and disposed of by him or them, he or they ⁸⁴ will apply the proceeds to the payment of such debt, excepting such portion thereof as is necessary for the expenses of the business or as he or they may need to replenish or increase the said stock of goods, wares and merchandise, it being understood and agreed that in such case the substituted stock shall take the place and be instead of the stock so sold, and it being also understood and agreed that no part of said stock or of the proceeds of such sales shall be used or disposed of by" the vendee or his assigns, "except as hereinbefore set forth." The vendee further covenanted that he would keep the said stock "replenished, renewed and of a value at least equal to its then value." This agreement was first filed on October 2, 1902, in the office of the clerk of the city of Geneva. On November 7th the plaintiff demanded the possession of the goods and chattels mentioned in said agreement or chattel mortgage, which was refused. On November 25, 1902, Bar-

ron, the vendee, was adjudicated a bankrupt. The defendant, as trustee in bankruptcy, under an order of the bankrupt court which directed that out of the proceeds of the sale the sum of two thousand six hundred dollars be reserved by the trustee for the benefit of any liens or claims that might be established on the property, sold the stock and fixtures of the bankrupt and out of the proceeds held on deposit the amount prescribed by the order. Thereupon the plaintiff brought this action in the supreme court to recover the amount due him on the note and mortgage. The foregoing facts appear in the findings of the learned trial court, which awarded judgment for the plaintiff. That judgment was affirmed by the appellate division, and from that affirmation an appeal is now taken to this court.

The first contention of the appellant is that the state court had no jurisdiction of the cause of action, because the fund was in the possession of the bankrupt court. We think it had jurisdiction of an action to determine and establish the plaintiff's lien. It is settled by the decision of the supreme court of the United States in *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 L. ed. 1000, 44 L. ed. 1175, that the bankrupt court, except by the consent of the parties, has not jurisdiction to try and determine a suit brought ⁸⁵ by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the state courts or in the circuit court of the United States, if the citizenship of the parties authorizes the action to be maintained in the latter tribunal: See, also, *First Nat. Bank of Chicago v. Chicago Title etc. Co.*, 198 U. S. 280, 25 Sup. Ct. Rep. 693, 49 L. ed. 1051. While it is not so certain that that rule obtains in its full integrity as to a suit brought against trustees in bankruptcy, we think it was the intention of the bankrupt act to allow adverse claimants to property or parties claiming liens to establish their rights by suits in courts of plenary jurisdiction, and not to subject such claims to summary disposition in the bankrupt court, unless it may be when the claims are frivolous or made in bad faith. In *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403, it was said: "The opinion seems to have been quite prevalent in many quarters at one time that, the moment a man is declared a bankrupt, the district court which has so adjudged draws to itself by that act not only all control of

the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions." This statement is quoted with approval by Judge Gray in *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 L. ed. 1000, 44 L. ed. 1175. Of course, we do not mean to assert that under the judgment of the state court ⁸⁶ the fund or property could be taken from the possession of the bankruptcy court; the contrary is the law. It may also be that the bankrupt court could have enjoined the prosecution of this action, but it has not done so. Apparently, it has invited the plaintiff to assert his claim by a plenary suit in a court of general jurisdiction, and we may assume that the bankrupt court will give effect to any judgment recovered therein.

On the merits of the controversy, however, we are of opinion that the judgments below were erroneous. By reason of the failure to file the chattel mortgage for five years, that mortgage was void as against creditors whose claims accrued prior to such filing: *Lien Law*, c. 418, sec. 90, *Laws 1897*; *Thompson v. Van Vechten*, 27 N. Y. 568. "A creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien, or a right to a lien upon the specific property, he is not in a condition to assert his rights by action as a creditor": *Southard v. Benner*, 72 N. Y. 424; *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073. In *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11, the mortgagee had obtained possession of the mortgaged property and sold the same prior to the recovery of a judgment by the creditor. Nevertheless, the mortgagee was held liable to account to the creditor for the

amount realized from the sale of the property. It was there said by Judge Peckham: "The mortgage, as to the creditors of the mortgagor, was always void. . . . The action is against the mortgagee, and I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it, and which asserts the validity of such instrument, provided they are taken before the creditors are armed with a judgment and execution so as to enforce their rights which rest upon the invalidity of the mortgage." This decision seems to me controlling on the point we are now considering. It is true there is to be found in some cases a statement that the mortgage is void only as to judgment creditors. This statement, if construed ⁸⁷ in the light of the circumstances of the case before the court and with reference to the context of the opinion, is substantially correct, though not strictly accurate as a general proposition. The question is quite similar to that of the right of an attaching creditor to seize goods fraudulently transferred by his debtor. That he has such right is settled by authority: *Rinehey v. Stryker*, 28 N. Y. 45, 84 Am. Dec. 324; *Frost v. Mott*, 34 N. Y. 253; *Hess v. Hess*, 117 N. Y. 306, 22 N. E. 956. In the first of these cases the same argument was made as is now presented, that the transfer was void only as to judgment creditors, and numerous dicta of eminent judges were quoted in support of that position. This court held that all that was meant by the expression was that a creditor could not attack the fraudulent transfer until he had obtained some process which authorized the seizure of the debtor's property. That is the true interpretation of the dicta relating to unfilled chattel mortgages. The rule that a creditor must first recover a judgment is simply one of procedure, and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor. So it was held that an assignee in bankruptcy could, for the benefit of creditors, attack a fraudulent mortgage, though if a creditor had sought that relief in his own name it would be necessary that his claim be first put in judgment: *Southard v. Benner*, 72 N. Y. 424. Even where a statute, which secures to creditors liability of stockholders, provides in express terms for the recovery of a judgment

and return of execution against the corporation, judgment and execution are unnecessary where they have become impracticable on account of the dissolution of the corporation or of an injunction restraining the prosecution of suits against it: *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354; *Hunting v. Blun*, 143 N. Y. 511, 38 N. E. 716; *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24. It is urged by the respondent that the unfiled mortgage was valid as between the parties, and that the trustee in bankruptcy succeeds only to the rights of the bankrupt, and hence cannot attack the mortgage for default in filing. This was the law under the ⁸⁸ bankrupt act of 1868: *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816. But by section 67 of the present bankrupt act it is expressly provided that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," a provision which was not found in the earlier statute. This seems to cover the case. The respondent, however, relies on two cases in the federal courts as authority to the contrary (*Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. Rep. 690, 48 L. ed. 986, and *In re New York Economical Printing Co.*, 49 C. C. A. 133, 110 Fed. 514). The case in the supreme court is not in point. That arose under section 112 of the lien law, which provides that reservations of title in contracts for the conditional sale of goods and chattels unless filed as directed by the statute shall be void as against subsequent purchasers, pledgees or mortgagees in good faith. But there is no provision that it shall be void as against creditors. This is the vital distinction between the law applicable to such contracts and that prescribed as to chattel mortgages. The court held that the trustee in bankruptcy was not a purchaser in good faith from the mortgagor, and hence could not attack the contract, but observed in conclusion: "We concur in this view which is sustained by decisions under previous bankruptcy laws, and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors." The case in the circuit court of appeals is in point, and it was there held that a trustee in bankruptcy could not attack a chattel mortgage for default in filing. As appears by the opinion, the result was reached on the assumption that by the law of the state of New York a nonfiled chattel mortgage was void only as to judgment creditors ob-

taining a lien, not as to general creditors. We think the very eminent judge who wrote in the case misconceived the law of the state in this respect. If it were a federal question we would follow the decision regardless of our own opinion, but as the question is as to the law of this state, we must adhere to the prior decisions of this court. It is to be further observed that in a ⁸⁹ subsequent case in the circuit court (*In re Kellogg*, 118 Fed. 1017, 56 C. C. A. 383), which arose under the conditional sale statute, the decision was placed on the ground that the statute did not render such contracts void as against creditors, and it was pointed out that decisions in states where such sales are void as against creditors were not in conflict with the decision. In the case before us it appears that almost all the debts of the bankrupt were incurred prior to the filing of the mortgage.

Since the foregoing was written the supreme court of the United States has decided the case of *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. Rep. 481, 50 L. ed. 782, in which it was held, reversing the decision of the United States circuit court of appeals of the sixth circuit, that under the laws of the state of Ohio an assignee in bankruptcy takes the property of the bankrupt subject to the lien of an unfiled contract of conditional sale, which in that state is void as against creditors as well as against subsequent purchasers. I understand by the opinion there delivered by Mr. Justice Peckham that the decision proceeds on the ground that under the state law as construed by the courts of the state in reference to chattel mortgages (*Wilson v. Leslie*, 20 Ohio, 161) a conditional contract is void only as against those creditors who, before the contract or mortgage is filed or before the vendor or mortgagee obtains possession, seize the property on execution or attachment. This, as shown in the opinion delivered by Judge Peckham in the case of *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11, already cited, is not the law of this state. With us the mortgage is void as to simple contract creditors, but such creditors cannot attack it until the recovery of a judgment and issue of execution. Then they can seize the mortgaged property whether the mortgagee has filed his mortgage or taken possession; though otherwise if the mortgagor has by subsequent action made a valid alienation. This principle has recently been reasserted by the court in *Russell v. St. Mart*, 180 N. Y. 355, 73 N. E. 31.

Though the trial court found that the mortgage was made in good faith, we are of opinion that by reason of its provisions it was fraudulent as a matter of law and void as ⁹⁰ against creditors. A chattel mortgage otherwise valid is not rendered void because it professes to include property that may be subsequently acquired: *Gardner v. McEwen*, 19 N. Y. 123. Nor does permission given the mortgagor to sell the mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage, render the mortgage void, because in such case the proceeds of the sales must be treated as reducing the amount due on the mortgage, even though the mortgagor should misapply them or refuse to pay them to the mortgagee: *Conkling v. Shelley*, 28 N. Y. 360, 84 Am. Dec. 348. But an agreement between the parties by which the mortgagor was to carry on a retail store, making purchases from time to time and selling off in the ordinary manner, the mortgagee all the time retaining a lien on the whole stock by way of mortgage under which he could, upon default, take possession of the remaining goods and sell them for the payment of his debt, was held void as against creditors: *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 532. This last case may be somewhat limited by the subsequent decision in *Brackett v. Harvey*, 91 N. Y. 214, but nevertheless it is unquestionably the law that where there is an agreement that the mortgagor may sell for his own benefit, the mortgage is fraudulent as a matter of law: *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605; *Hangen v. Hachemeister*, 114 N. Y. 566, 11 Am. St. Rep. 691, 21 N. E. 1046, 5 L. R. A. 137; *Mandeville v. Avery*, 124 N. Y. 376, 21 Am. St. Rep. 678, 26 N. E. 951. The instrument under which the plaintiff claims his lien expressly provided that the mortgagor might sell and dispose of the property and apply the proceeds to the payment of the debt, "excepting such portion thereof as is necessary for the expenses of the business, or as he or they may need to replenish or increase the said stock of goods." The plaintiff contends that under the authority of the *Brackett* case (91 N. Y. 214) the agreement that the plaintiff should apply the proceeds of the sales of the mortgaged chattels to the purchase of other goods did not render the mortgage void. I do not think the decision goes to that extent. The agreement in that case was a peculiar one. While it did provide for the application of the proceeds of ⁹¹ sales to new purchases, it also provided

that new mortgages should be given from time to time on the chattels subsequently purchased. Such new mortgages were in fact given, and it was the validity of these later mortgages that was impeached in the suit then before the court. As was pointed out in the opinion, when these mortgages were given the mortgagee was a creditor of the mortgagor, whatever may have been the misapplication of the proceeds of sales under the earlier mortgages, and the parties had the right to contract on the then existing status, because there was no creditor in a position to question the validity of the contract. In the course of the discussion it was said that it was perhaps a just inference from the contract between the parties that the mortgagor might sell and apply the proceeds toward new purchases on condition that the substituted property should be brought in and subjected to the mortgage; that this did not injuriously affect the rights of creditors, as the substituted property would represent the property sold, and that, therefore, it was not necessary to hold the agreement fraudulent. This statement was not necessary to the disposition of the cause, and I am frank to say that I should be loath to accede to it in its entirety. The substituted property might or might not equal in value the property realized from the lien of the mortgage by sale. Even in the most favorable view, it would give the mortgagor unlimited power of speculation in the disposition of the mortgaged property. The property might be wasted by ill-judged speculation, even though the mortgagor acted in good faith. However this may be, the agreement now before us goes a step further than that in the Brackett case (91 N. Y. 214): It does not require all the proceeds of the mortgaged chattels to be applied either on the mortgage debt or to the acquisition of new property, but only the surplus after deducting the expenses of carrying on the business. We need not consider whether the expenses of the business which the mortgagor was authorized to deduct from the sales would include compensation for his own services or not. Plainly, they would comprehend rent, clerk hire and similar items. Of such a provision contained in the agreement it is idle to argue that if the mortgagor acted honestly and lived up to his agreement, the property newly acquired would be the equivalent of that disposed of by sale. On the contrary, it is not only possible, but, if the business proved unsuccessful, probable, that a large part of the mortgaged property

would be sold without the proceeds being applied either to the reduction of the debt or to new property substituted for that disposed of. The purpose and intent of the agreement between the parties is plain on its face. The mortgagor was to conduct the business for the term of five years in the same manner as if he was the absolute owner of the stock in trade, selling and buying stock at his pleasure and discretion and paying the expenses of the business out of the sales, while if at any time he should be unsuccessful and be pressed by his creditors, the whole stock was to be subject to the lien of the mortgage as against the creditors from whom the very goods might have been purchased. No case in this state has gone to the extent of upholding such an agreement, and, in our opinion, it is fraudulent and void as a matter of law.

The judgment should be reversed and complaint dismissed, with costs in all courts.

Gray, Edward T. Bartlett, Werner and Chase, JJ., concur.

O'Brien, J., absent.

Hiscock, J., not sitting.

Judgment reversed, etc.

The Term "Creditors" in a Statute Making an Unrecorded chattel mortgage void as to creditors, where the mortgagor retains possession of the property, applies only to such creditors as by legal process have fastened a lien or charge upon the property for the satisfaction of their debts: Folsom v. Peru Plow etc. Co., 69 Neb. 316, 111 Am. St. Rep. 537; Union Nat. Bank v. Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533.

The Validity of Chattel Mortgages allowing the mortgagor to remain in possession and sell the goods is discussed in the monographic note to Peabody v. Langdon, 15 Am. St. Rep. 912-917. A chattel mortgage on a stock of merchandise, permitting the mortgagor to remain in possession and sell the goods, is void as to his creditors, if its effect is to hinder and delay them, and to protect the mortgagor in the further prosecution of his business, rather than secure the mortgage debt: Bergman v. Jones, 10 N. Dak. 520, 88 Am. St. Rep. 739, and see the cases cited in the cross-reference note thereto.

HALE v. WORSTELL.

[185 N. Y. 247; 77 N. E. 1177.]

CIVIL SERVICE LAW—Effect of Rules Made Thereunder.--

The rules prescribed by the state and municipal commissions pursuant to the provisions of the civil service law have the force and effect of law. (p. 898.)

CIVIL SERVICE LAW—Method of Making Promotions.—

The constitutional provisions requiring examinations for appointments and promotions in the civil service contemplate that all appointments and promotions shall be made according to merit and fitness, to be ascertained by competitive examination, unless it is in good faith found that it is impracticable so to determine the relative merit and fitness of persons for a particular position or employment. Special circumstances and acts of personal bravery and heroism may be sufficient in some cases without other test of merit and fitness. (p. 898.)

CIVIL SERVICE LAW—Constitutionality of Statutes or Rules

Thereon.—Any statute or rule contrary to the express language or true spirit, and intent of the constitutional provisions requiring civil service examinations cannot be enforced, and in every case it is for the courts to determine whether a statute or rule is a valid exercise of the power to determine what employes or class of employes it is not practical to select from lists prepared after an examination or a competitive examination. (p. 899.)

CIVIL SERVICE LAW—Promotions and Transfers.—

Since a promotion is an advancement to a higher position, an elevation, a preferment, if the practical working of the civil service requires a transfer of one engaged therein, such transfer can only be made when it does not in fact constitute a promotion. Promotions under the name of transfers are evasions, and illegal and contrary to the express terms of the constitution. (p. 899.)

CIVIL SERVICE LAW.—The Transfer of a Bath Attendant

whose salary was nine hundred dollars per year and whose duties were to take charge and care of a particular bathhouse under the direction and supervision of a superintendent of public baths, who in turn was subject to the control of the borough president, to the position of assistant superintendent of public baths, is in fact a promotion both in grade of work to be done and in compensation to be received therefor, and hence the transfer of such an attendant to the position of assistant superintendent at an annual salary of fifteen hundred dollars, where he was seventh on the eligible civil service list for the position, and the transfer was made without regard to those prior to him on the list, is illegal. (pp. 899, 900.)

CIVIL SERVICE LAW.—The Transfer of a Third Grade Clerk

assigned to the bureau of buildings in the borough of Brooklyn, and whose duties were of a clerical nature and incident to the issuing of slip permits for the alteration of buildings and such other clerical work as was directed by superior order, and whose annual salary was one thousand and fifty dollars, to the position of assistant superintendent of baths at an annual salary of fifteen hundred dollars, is an illegal promotion where he stood seventeenth on the eligible civil service list for the position, and was appointed without regard to those prior to him on the list. (pp. 899, 900.)

In May, 1899, John P. Worstell was appointed a bath attendant in the borough of Manhattan, New York, at an an-

nual salary of nine hundred dollars, upon the certification of his name to the appointing officer as at the head of the eligible list of bath attendants. In July, 1900, he was transferred as a bath attendant from the borough of Manhattan to the borough of Brooklyn. On or about July 6, 1903, he was at the request of the appointing officer transferred to the position of assistant superintendent of public baths and comfort stations in the borough of Brooklyn at an annual salary of fifteen hundred dollars. A certificate was issued by the municipal civil service commission that such transfer was made agreeable to the provisions of rule 40 of said commission, and such transfer was noted upon the records of said municipal civil service commission, and he assumed and performed the duties of the position until December 2, 1903, when he was, at the request of the appointing officer, transferred to the position of superintendent of public baths and comfort stations at an annual salary of two thousand five hundred dollars. A certificate was again issued by the municipal civil service commission that such transfer was made agreeable to the provisions of said rule 40, and a record of such transfer was noted upon the records of such civil service commission. At the time of each of said transfers said civil service commission had a list of persons eligible to be ²⁴⁹ appointed or promoted to the positions of superintendent of public baths and comfort stations and assistant superintendent of public baths and comfort stations of the borough of Brooklyn, prepared by them after competitive examination, on which list said Worstell was No. 7. The statement of facts and findings of the court that Worstell was the seventh on the list of persons eligible for promotion is unqualified. There is nothing to show that the six persons ahead of Worstell on the eligible list were not all, at the time of Worstell's transfer, employés of the municipality and "persons holding positions in a lower grade in the department, office or institution in which the vacancy exists," and no claim to the contrary was made by the appellants in this court.

On or about April 15, 1903, Joseph P. McNamara was appointed a third grade clerk in the bureau of buildings, borough of Brooklyn, New York, at an annual salary of one thousand and fifty dollars, and his appointment was recorded upon the records of the municipal civil service commission. On December 29, 1903; McNamara, at the request of the ap-

pointing officer, was transferred to the position of assistant superintendent of public baths and comfort stations at an annual salary of fifteen hundred dollars. A certificate was issued by the municipal civil service commission that said transfer was made agreeable to rule 14 of said commission, and such transfer was noted upon the records of said commission. Said McNamara was No. 17 on said eligible list. Subsequently to July 6, 1903, no request was ever made to the municipal civil service commission for the certification of the names of those eligible to be appointed or promoted either to the said position of superintendent of public baths and comfort stations or to the said position of assistant superintendent of public baths and comfort stations, and subsequent to said date no certification was ever made by said commission of the names of those eligible to be appointed or promoted to said positions, nor were the names of the three highest upon any eligible list submitted to said appointing officer.

The plaintiff in this action was No. 3 in said eligible list, and brought this action as a taxpayer to have the said appointments declared null and void and the positions adjudged vacant and the comptroller of the city of New York restrained from paying the salaries to said appointees. Neither the said plaintiff nor the said Worstell nor McNamara are veterans.

John J. Delaney, corporation counsel (James D. Bell, of counsel), and Charles H. Kelby, for the appellants.

Walter S. Brewster and James McKeen, for the respondent.

251 CHASE, J. In obedience to a very general sentiment that appointments and promotions in the civil service should be removed as far as possible from personal and political influences, New York was the first of the states to provide by constitution that appointments and promotions in the civil service of the state and of the civil divisions thereof should be made according to merit and fitness, and so far as practicable after competitive examination.

Section 9 of article 5 of the constitution adopted in 1894, and which went into effect January 1, 1895, is as follows: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities

and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examination, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section." Laws have been made to provide for the enforcement of this section (The Civil Service Law, chapter 370, Laws of 1899, and the amendments and additions thereto), and rules have been adopted by the state civil service commission and by many municipal civil service commissions throughout the state. The rules prescribed by the state and municipal commissions pursuant to the provisions of said act have the force and effect of law: The Civil Service Law, sec. 6.

In the construction of such statutes and rules, and in the consideration of appointments made pursuant thereof, said section of the constitution and the purpose of its enactment must be constantly borne in mind.

252 The constitution clearly contemplates that all appointments and all promotions shall be made according to merit and fitness, to be ascertained by competitive examination, unless it is in good faith found that it is impracticable so to determine the relative merit and fitness of persons for a particular position or employment. Special circumstances and acts of personal bravery and heroism have been held sufficient to justify the promotion of a patrolman without other test of merit and fitness: *People v. Knox*, 62 N. Y. Supp. 940, 48 App. Div. 477; *People v. Knox*, 166 N. Y. 444, 60 N. E. 17, 54 L. R. A. 589.

In the *Schelpp* case (62 N. Y. Supp. 940, 48 App. Div. 477) the court say: "No examination can be devised which will present the conditions to furnish a test of the comparative gallantry or heroism of policemen or firemen engaged in the attempt to rescue persons from a burning building. It would be most unfortunate for the public service, however, if the constitution and laws of the state forbade the recognition of exceptionally brave conduct under such circumstances by awarding deserved promotion to those by whom such conduct had been displayed." The legislature, by the civil service law,

has provided generally for an exempt class, and also for filling certain positions after a noncompetitive examination. Any exception, however, to the constitutional direction that appointments and promotions must be made according to merit and fitness, to be ascertained by competitive examination, must be based upon the impracticability of the selection being based upon the result of such competitive examination. Apart from the fact that statutes may be made and rules may be adopted to make a practicable and workable system of appointments and promotions, the plain, general direction of the constitution requiring that such appointments and promotions be made after a competitive examination must be obeyed. The constitutional provision must be given a fair and liberal construction and the power reserved to the legislature and to civil service commissions to make laws and rules must be exercised with a view of carrying out the purpose and intent of the constitution. Any statute or ²⁵³ rule contrary to the express language of the constitution or to its true spirit and intent is void and cannot be enforced, and in every case it is for the courts to determine whether a statute or rule is a valid exercise of the power to determine what employes or class of employes it is not practical to select from lists prepared after an examination or a competitive examination.

The constitution is not only the supreme law, but the guide in the determination of every question arising in connection with the civil service appointments.

The word "transfer" is not used in the constitution. A promotion is an advancement to a higher position, an elevation, a preferment. If the practical working of the civil service requires a transfer of one engaged therein, such transfer can only be made when it does not in fact constitute a promotion. Promotions under the name of transfers are evasions and illegal and contrary to the express terms of the constitution.

The duties of Worstell when engaged as a bath attendant were to take care and charge of a particular bathhouse under the supervision and direction of a superintendent of public baths. The duties of a superintendent of public baths and comfort stations are to supervise and direct the work of the various bath attendants detailed to the bathhouses and comfort stations in a borough of the city of New York, and to exercise control of that work subject to the approval of the

borough president. The duties of the assistant superintendent of public baths and comfort stations are substantially identical with those of the superintendent of baths and comfort stations, but subordinate to and under the immediate direction of the superintendent. The duties of the defendant McNamara before his transfer on December 29, 1903, were that of a third grade clerk assigned to the bureau of buildings in the borough of Brooklyn, and his duties were of a clerical nature and incident to the issuing of slip permits for the alteration of buildings, and such other clerical work as was directed by superior order.

²⁵⁴ It does not require argument or authority to substantiate or justify the statement that each of the transfers mentioned were in fact promotions both in the grade of work to be done and in the compensation to be received therefor. If appointing officers are allowed to make transfers among those in the competitive class without regard to grade, class of work or compensation, providing only that the person so transferred is upon the eligible list for the position to which he is transferred, the beneficial effects obtained by the constitutional provision will be substantially overcome. Such a transfer would enable a person hopelessly low on an eligible list for an important place in the classified service to obtain an appointment through personal or political influence or favoritism if he could once obtain an appointment to any inferior place in the service. Such transfers would demoralize the service.

The rules of the municipal civil service commission referring to promotions provide: "Except as this rule otherwise provides, the conduct of an examination for promotion and the making of selections therefor from any eligible list formed as the result of such examination shall be governed by the rules relating to original appointment."

It is not claimed that the defendants Worstell and McNamara were appointed pursuant to the rules of the commission relating either to original appointments or promotions. It is unnecessary to discuss at length the provisions of the civil service law or the rules of the municipal civil service commission except to say that so far as they can be given a construction that will permit of a promotion under the guise of a transfer, they are to that extent unconstitutional and void.

The judgment should be affirmed, with costs.

CULLEN, C. J. I concur in the opinion of Judge Chase and vote for the affirmance of the judgment appealed from. As to the questions discussed in the dissenting opinion of my brother Haight, I am of the opinion that under both the constitutional provision and the statute, vacancies in the civil service can be filled by promotion from those occupying a lower ²⁵⁵ grade in the department, and that it is not necessary that the position should always be thrown open to persons not in the service. The rules of the civil service commission in force at the time provided a scheme for promotion as distinguished from original appointment and for competition for such promotion. Had the defendant Worstell been promoted in accordance with the provisions of the rule, I think the promotion would have been valid, notwithstanding outside competitors might have stood higher on the eligible list. The difficulty is that Worstell, so far as appears by this record, was not promoted in accordance with the civil service rules, nor was he certified for promotion, but was promoted arbitrarily without competition.

Gray and Edward T. Bartlett, JJ., concurred with Chase, J. Willard Bartlett, J., did not sit. Haight, J., with whom Vann, J., concurred, dissented. After reciting the facts in regard to the promotion of the defendant Worstell from bath attendant to assistant superintendent and subsequently to superintendent of baths, he remarked upon the fact that the defendant had served as such bath attendant in a faithful and satisfactory manner for upward of four years. He then observed that the defendant stood seventh on the eligible civil service list, and that the first four on the list had been disposed of by appointments to other positions. He then said: "It thus appears that the three persons standing at the head of the list after Weeks had received appointments, and that James W. Moran, Franklin M. Horton and John P. Worstell, the defendant in this action, were the next three remaining on the list undisposed of. Under the rule then in force the appointing officer had the right, with the consent of the municipal civil service commission, to recognize the merit, fitness, fidelity and ability from the faithful and satisfactory services of a person who had been in service for at least three years prior thereto, in making a promotion to a position for which he had passed a competitive examination. The eligible list was made up both for original appointments and promotions, but under the findings upon which this judgment is based, the defendant Worstell is the only person who appears upon the list as holding a position in that department who was a candidate for promotion. Under section 15 of the civil service law it is provided that 'Vacancies in positions in the competitive class shall be filled, so far as practicable,

by promotion from among persons holding positions in a lower grade in the department, office or institution in which the vacancy exists.' Here we have an express statutory provision requiring vacancies in a department, office or institution to be filled, so far as practicable, by promotion from persons holding positions in a lower grade in that department, office or institution. This permits competition among the persons holding positions in a department, etc., for promotion to a higher position in such department when a vacancy occurs, and prevents such vacancies from being filled by outside persons who have never held positions under the civil service or who may be connected with some other department or office, unless there exists some special reason with reference to the position to be filled that renders it impracticable to be filled by promotions from those holding lower positions in the same department, such as a doctor or surgeon, or a person possessed of technical knowledge or skill. It consequently follows that the defendant Worstell, being the only person upon the eligible list who, under the findings, held a position in the department of public baths at the time the vacancies referred to in the findings occurred, his promotion was legal. The judgment as to him should, therefore, be reversed."

The Constitutionality of Civil Service Laws is considered in the monographic note to *People v. Mosher*, 79 Am. St. Rep. 560-564.

PEOPLE v. MARCUS.

[185 N. Y. 257, 77 N. E. 1073.]

CONSTITUTIONAL LAW.—The Free and Untrammelled Right to Contract is a part of the liberty guaranteed to every citizen by the federal and state constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health, or moral and general welfare of the public, but subject to such restraint an employer and employé may make and enforce such contracts relating to labor as they may agree upon. (p. 903.)

CONSTITUTIONAL LAW.—Contracts for Labor may be freely made with individuals or a combination of individuals as long as such contracts do not interfere with public safety, health or morals. (p. 906.)

CONSTITUTIONAL LAW.—Right to Contract Respecting the Joining of Labor Organizations.—An employer of labor may refuse to employ a person who is a member of any labor organization, or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. (p. 906.)

MASTER AND SERVANT.—Construction of Contract.—The Words "Coerce or Compel," used in Penal Code, section 171a, which made it a misdemeanor for one "who shall hereafter coerce or com-

pel any person or persons, employé or employés, laborer or mechanic, to enter into an agreement, either written or verbal, from such person, persons, employé, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations," do not refer to physical violence or interference with the person of the employé. (p. 907.)

CONSTITUTIONAL LAW—Freedom of Contract—Prohibiting the Joining of Labor Unions.—Penal Code, section 171a, which makes it a misdemeanor for a person to make the employment or the continuance of an employment of a person conditional upon the employé not joining or becoming a member of a labor organization is unconstitutional, in that it impairs the right to contract. (p. 908.)

William Travers Jerome, district attorney (Robert S. Johnstone, of counsel), for the appellant.

Elias B. Goodman, Ernest F. Eidlitz and Frederick Hulse, for the respondent.

259 CHASE, J. It is provided by section 1 of the fourteenth amendment of the constitution of the United States that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is provided by section 1 of article 1 of the constitution of the state of New York that "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." And by section 6 of said article that no person shall "be deprived of life, liberty or property without due process of law."

The free and untrammelled right to contract is a part of the liberty guaranteed to every citizen by the federal and state constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health or moral and general welfare of the public, but subject to such restraint an employer and employé may make and enforce such contract relating to labor as they may agree upon.

In 1887 the legislature added to the Penal Code section 171a, as follows: "Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations in behalf of such corporation or corpo-

rations, who shall hereafter coerce or compel any person or persons, employé or employés, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employé, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or ²⁶⁰ employers, corporation or corporations, shall be deemed guilty of a misdemeanor."

The constitutional right of the legislature to enact that section of the Penal Code is challenged by the defendant, and the question is now presented for consideration because of the arrest and conviction of the defendant for a violation thereof.

On December 1, 1904, the H. Marcus Skirt Company, a corporation, as the party of the first part, and H. Scheinbaum, as the party of the second part, entered into an agreement, the material parts of which are as follows:

"Party of the first part agrees to employ party of the second part as a piece worker, and party of the first part agrees to pay for all finished work only on each and every Tuesday. Party of the second part hereby agrees not to belong to any labor union or to take part in any strike against party of the first part, and to work as an individual in the open shop of party of the first part.

"Party of the second part further agrees that in the event of not complying with all the articles herein mentioned to forfeit to the party of the first part his money due for all work unpaid.

"Party of the second part also agrees to deposit \$1.00 each week, which will be deducted from his salary until the amount reaches ten dollars; same to be held as a forfeit in the event of his not complying with all the above stipulations.

"H. Marcus Skirt Company agrees to keep party of the second part employed as long as he proves satisfactory."

Thereafter an information was filed in a court of special sessions in which it alleged that the defendant is a person of said corporation and an employer of labor, and that he "did on behalf of such corporation, and as such employer of labor, coerce and compel one Hyman Scheinbaum to enter into a written agreement on the part of and from him the said Hyman Scheinbaum not to join or become a member of

any labor organization as a condition of the said Hyman Scheinbaum securing employment from and continuing in the employment of the said H. Marcus Skirt Co."

²⁶¹ On such information a warrant was issued and the defendant was arraigned and plead guilty. He thereupon made a motion in arrest of judgment upon the ground "that it appears upon the face of the information that the facts therein stated do not constitute a crime; . . . that the statute upon which said information is based contravenes the fourteenth amendment of the constitution of the United States, and is, therefore, null and void, and that said statute contravenes the constitution of the state of New York in that it restrains the right to free contract for a purpose not calculated, intended, convenient or appropriate to protect the public health or to serve the public comfort or safety."

The motion in arrest of judgment was denied and the defendant was fined five dollars, which he paid under protest, and an appeal was taken to the appellate division, which reversed the judgment of conviction: *People v. Marcus*, 97 N. Y. Supp. 322, 110 App. Div. 255. From the order of reversal this appeal is taken.

The legislative intent in the use of the words "coerce or compel" in said section of the Penal Code is apparent on reading the section. They were not intended to refer to physical violence or interference with the person of the employé. In *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937, the court in construing the words of section 110 of the labor law (Laws of New York of 1897, chapter 415), as follows: "No employé shall be required or permitted to work in a biscuit, bread or cake bakery . . . more than sixty hours in any one week or more than ten hours in any one day," say: "The mandate of the statute . . . is the substantial equivalent of an enactment that no employé shall contract or agree to work more than ten hours per day." In the case now before us the mandate of the statute is the substantial equivalent of an enactment that a person shall not make the employment or the continuance of an employment of a person conditional upon the employé not joining or becoming a member of a labor organization. There is nothing in the information upon which the warrant against the defendant was issued to show ²⁶² that there was any interference with the freedom of Scheinbaum in decid-

ing whether he would enter into the contract with the corporation.

The courts of this state recognize the right of employés and employers to organize and co-operate for any lawful purpose. Contracts for labor may be freely made with individuals or a combination of individuals, and so long as they do not interfere with public safety, health or morals, they are not illegal. The views of this court as to what constitutes freedom to contract in relation to the purchase and sale of labor and as to what contracts relating thereto are lawful and enforceable, were stated with much detail and ability by the members of the court when the cases of *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135, and *Jacobs v. Cohen*, 183 N. Y. 207, 111 Am. St. Rep. 730, 76 N. E. 5, 2 L. R. A., N. S., 292, were decided, and the decisions in those cases are substantially controlling in the determination of this appeal.

In *National Protective Assn. v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 63 N. E. 369, 58 L. R. A. 135, it was said that a person may refuse to work for another on any ground that he may regard as sufficient and the employer has no right to demand a reason for it, but even if the reason is that the employé refuses to work with another who is not a member of his organization, it does not affect his right to stop work or to refuse to enter upon an employment. The converse of this statement must be true, and an employer of labor may refuse to employ a person who is a member of any labor organization, or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. It is a well-known fact that combinations of employés and also of employers require their members to do or refrain from doing many things which they deem to their individual and combined advantage, while a person not a member of such an organization can act in accordance with the terms of such agreement as he may choose to make. A person employing labor may decide that it is to his advantage to employ only union labor, and be willing to enter into an agreement necessary to procure such labor, or he may decide that it is to his advantage ²⁶³ to employ nonunion labor, in which case he may also decide that it is to his advantage to make the employment

conditional upon an agreement that such employé will not join or become a member of a labor organization.

In *Jacobs v. Cohen*, 183 N. Y. 207, 111 Am. St. Rep. 730, 76 N. E. 5, 2 L. R. A., N. S., 292, an employés' union sued certain manufacturing employers on a promissory note given by them as collateral security to be applied as liquidated damages for the violation of a certain agreement by which the manufacturing employers agreed not to employ any help whatsoever, other than members of said labor union who should procure a pass-card showing that they were in good standing in said union, and by which they further agreed to conform to the rules and regulations of said union and cease to employ anyone not in good standing in said union, and by which they further agreed to many restrictive and other provisions relating to the conduct of their business, which are stated more fully in the prevailing and dissenting opinions in this court. The answer in the second separate defense alleged in substance that the contract was in restraint of trade, and that its purpose is to combine employers and employés whereby the freedom of the citizen in pursuing his lawful trade and calling is, through said contract, combination and arrangement, hampered and restricted, and that it is also for the purpose of coercing workmen to become members of a particular employés' organization under penalty of loss of position and deprivation of employment, and that it is against public policy and unlawful. Two questions were submitted to this court, viz.: "1. Is a contract made by an employer of labor, by which he binds himself to employ and to retain in his employ only members in good standing of a single labor union, consonant with public policy and enforceable in the courts of justice in this state? 2. Is the 'second' separate defense, contained in the answer herein of the defendants Morris Cohen and Louis Cohen, insufficient upon the face thereof to constitute a defense?" Both of these questions were answered in the affirmative, and the court say: "Whatever else may be said ²⁶⁴ of it, this is the case of an agreement voluntarily made by an employer with his workmen, which bound the latter to give their skilled services for a certain period of time, upon certain conditions, regulating the performance of the work to be done and restricting the class of workmen who should be engaged upon it to such persons as were in affiliation with

an association organized by the employer's workmen with reference to the carrying on of the very work. It would seem as though an employer should be unquestionably free to enter into such a contract with his workmen for the conduct of the business without its being deemed obnoxious upon any ground of public policy. If it might operate to prevent some persons from being employed by the firm, or, possibly, from remaining in the firm's employment, that is but an incidental feature. Its restrictions were not of an oppressive nature, operating generally in the community to prevent such craftsmen from obtaining employment and from earning their livelihood. It was but a private agreement between an employer and his employ  s concerning the conduct of the business for a year, and securing to the latter an absolute right to limit the class of their fellow-workmen to those persons who should be in affiliation with an organization entered into with design of protecting their interests in carrying on the work."

That freedom to contract which entitles an employer to make by agreement his place of business wholly within the control of a labor union entitles him, if he so desires, to require of his employ  s that they be wholly independent of any labor union.

The order of the appellate division should be affirmed.

Cullen, C. J., Gray, Haight, Vann and Willard Bartlett, JJ., concurred with Chase, J. Edward T. Bartlett, J., filed a dissenting memorandum, in which he expressed the idea that a person desiring employment ought not to be required to abstain from joining any labor organization, nor should he be compelled to join such an organization.

A Statute Which Attempts to make it a crime for an employer to insist, and to impose as a condition of employment, or continued employment, that his employ   shall withdraw from or refrain from joining any trade or labor union, is held unconstitutional in State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443. See, in this connection, Toney v. State, 141 Ala. 120, 109 Am. St. Rep. 23. It has recently been affirmed that a contract made by an employer of labor by which he binds himself to employ and retain only members in good standing in a single labor union is consonant with public policy and enforceable in the courts: Jacobs v. Cohen, 183 N. Y. 207, 111 Am. St. Rep. 730.

HATHAWAY v. COUNTY OF DELAWARE.

[185 N. Y. 368, 78 N. E. 153.]

APPEAL AND ERROR.—On an Appeal from the Judgment, the appellate division cannot disturb a finding of fact made by the trial court. (p. 910.)

PAYMENT.—Money Paid Under a Mistake of Fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, but if the circumstances exist which make such recovery inequitable, the burden of proving them rests upon the party resisting the payment. (p. 910.)

PAYMENT.—Mistake of Fact Need not be Mutual.—Although in actions to recover money paid under a mistake of fact, the mistake under which the money is paid is generally a mutual one as to the existence or nonexistence of a fact which justifies or requires the payment, still it is not essential that the mistake should be of that character. (p. 911.)

PAYMENT.—Recovery of Money Paid to County on Its Forged Note.—Where an ex-county treasurer, who was a defaulter, and who had during his term of office borrowed money on behalf of the county on obligations purporting to have been given by the county, presented a forged note of the county to plaintiff, on the representation that he was obtaining a loan for the county, and thereupon received plaintiff's check payable to the order of the county treasurer, but turned over the check to the county treasurer in payment of his personal defalcation, the plaintiff on discovering the forgery may recover the sum so paid under mistake of fact, where it does not appear that the county's claim against the defaulter or his sureties has been in any manner jeopardized or impaired. (pp. 912, 913.)

BANKS AND BANKING.—Ordinary Checks as Cash.—Although cashier's checks, from their peculiar character and general use in the commercial world, are regarded substantially as the money which they represent, this rule is not extended to the case of ordinary checks of the depositor drawn on his bank. (p. 914.)

Alfred B. Cruikshank, for the appellants.

Edwin D. Wagner, Charles L. Andrus and George A. Fisher, for the respondent.

369 CULLEN, C. J. As to the first cause of action we content ourselves with stating our concurrence in the view of the appellate division and of the trial term, that the plaintiffs failed to establish that the money which they sought to recover was appropriated to the discharge of valid obligations of the defendant, and that, therefore, as to this cause of action the judgment below should be affirmed. For the facts relating to this claim, see report of the case in 103 App. Div. 179.

As to the second cause of action we think that the decision

of the trial term was correct and the action of the appellate division in reversing the judgment awarded by the trial term was erroneous. The facts on which this claim was founded are as follows: Prior to January 1, 1900, one Woodruff was the county treasurer of Delaware county—the respondent in this action—and was a defaulter in his trust. On that day he was succeeded as county treasurer by Hugh Adair. About May 1, 1900, Adair discovered that Woodruff was indebted to the county and demanded payment of the debt. Thereupon Woodruff presented to the plaintiffs what purported to be a note of the county of Delaware and to be executed by Hugh Adair, its treasurer, under authority of the board of supervisors, for the sum of five thousand dollars and interest, payable February 1, 1901. The signature of Adair ³⁷⁰ to this note was forged by Woodruff. Woodruff had dealt with the plaintiffs during his incumbency of the office of county treasurer and had borrowed for the county, on what either were or were assumed to be its obligations, several sums of money. On the presentation of the forged note referred to Woodruff represented that he was obtaining the loan for the county. The plaintiffs thereupon drew their check to the “order of Hugh Adair, county treasurer of Delaware County,” and delivered it to Woodruff for transmission to the county treasurer. Woodruff turned the check over to Adair on account of his personal indebtedness and it was received by Adair as a payment on that account, he being ignorant of the means by which Woodruff had obtained it. The money was collected and went into the treasury of Delaware county. The plaintiffs, on discovering the forgery, demanded the return of the money, which being refused they instituted this action.

On the trial neither party asked for the submission of any question to the jury, and if the evidence presented any question of fact that question must be considered as decided by the court in favor of the plaintiffs; a finding which it was not within the power of the appellate division to disturb, for the appeal to that court was solely from the judgment: *Alden v. Knights of Maccabees*, 178 N. Y. 535, 71 N. E. 104.

Plaintiffs sought to recover this money as paid under a mistake of fact. The rule as to such payments is thoroughly settled in this state. “Money paid under a mistake of fact may be recovered back, however negligent the party paying

may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund": *National Bank of Commerce v. National Mechanics' Banking Assn.*, 55 N. Y. 211, 14 Am. Rep. 232; and if circumstances exist which make such recovery inequitable, the burden of proving that fact rests upon the party resisting the payment: *Mayer v. Mayor etc. of New York*, 63 N. Y. 455; *Phetteplace v. Bucklin*, 18 R. I. 297, 27 Atl. 211. That the plaintiffs paid their money under a mistake of fact, to wit, ³⁷¹ that they had received a genuine obligation of the defendant, is unquestioned. It does not appear that the defendant's claim against Woodruff or his sureties has been in any manner jeopardized or impaired. On final analysis the transaction is simply this: The plaintiffs paid money to the defendant as a loan. The defendant received it as a payment on the debt of Woodruff. Though the fault or misfortune which led to this mistake was the plaintiffs' in failing to discover the forgery, that no more than negligence can bar their right to recover, unless by that payment the situation of the defendant has been altered to its detriment. Generally, in actions of this kind the mistake under which money is paid is a mutual one as to the existence or nonexistence of a fact which justifies or requires the payment. It is not essential, however, that the mistake should be of that character. The case at bar is on all-fours with that of *Mayer v. Mayor etc. of New York*, 63 N. Y. 455. In that case the plaintiff paid the city of New York an assessment for a local improvement upon an adjoining lot instead of the assessment on his own. The fault or negligence by which the payment was made on the wrong lot was the plaintiff's, yet it was held that he was entitled to recover back the money so paid, it not appearing that by the payment the city had lost its lien upon the lot, the assessment of which had been paid. Judge Andrews said: "The city received the money upon a lawful demand, but from a person who was not legally liable to pay it, and we do not find that the circumstance that money paid by mistake is received upon a valid claim in favor of the recipient against a third person prevents a recovery back, provided the claim against the party who ought to pay it is not thereby extinguished or its collection prevented." The case is decisive of the one before us, unless under the facts some

other rule conflicting with or modifying the general rule is applicable to this case.

The learned judge who wrote for the appellate division recognized the principle that money paid under a mistake of fact may be recovered back, and would have upheld the judgment for the plaintiffs had he not deemed the case controlled ³⁷² by the decision of this court in *Goshen Nat. Bank v. New York*, 141 N. Y. 379, 36 N. E. 316. That case and the earlier decisions on which it is founded (*Justh v. National Bank of Commonwealth*, 56 N. Y. 478; *Stephens v. Board of Education of Brooklyn*, 79 N. Y. 183, 35 Am. Rep. 511; *Southwick v. First Nat. Bank*, 84 N. Y. 420) proceed on the primary proposition that "money has no earmarks," and that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in good faith in the due course of business, and upon the secondary principle that where money is transferred by checks the same rule obtains as where payment is made in coin or bills. In the *Justh* case (56 N. Y. 478), a person had obtained a loan from the plaintiff on altered and forged bonds. The money was advanced by a check to the order of the borrower, who deposited it in the defendant bank. Thereafter by a check on his deposit the forger paid the defendant a loan which he had obtained from it. In the *Stephens* case (79 N. Y. 183, 35 Am. Rep. 511), one Gill obtained from the plaintiff money on a forged mortgage and the check was deposited in Gill's bank and collected. Thereafter Gill paid the defendant a debt he owed it by a check on his own bank. It was held that the plaintiffs could not recover, but it is to be observed that in each case the plaintiff intended to give the money to the borrower, that the check was given for the purpose of paying the borrower, and when deposited and collected it was the same as if payment had been made in the first instance in money. The same is true of the checks given by the borrowers to their creditors. When the money was collected thereon it was the same as if the original payments had been made in money. There was not in any respect a diversion of the checks. Each served the exact purpose for which it was drawn. The latest case in this court is *Nassau Bank v. National Bank of Newburgh*, 159 N. Y. 456, 54 N. E. 66, and is of a similar character. The crucial distinction between those cases and the present one lies here. There was an

earmark on the money which the defendant received and the plaintiff's check was diverted, in that, while it was given as a loan to defendant, it was used to pay Woodruff's debt. ³⁷³ Had the plaintiffs given Woodruff money and the defendant received it in good faith without knowledge how it was obtained, doubtless the plaintiffs could not recover. I assume that if they had given a check to Woodruff's order the money could not be reclaimed after payment even if plaintiffs could have successfully resisted an action brought on the check: *Southwick v. First Nat. Bank*, 84 N. Y. 420. But that is not the present case. The check was drawn by the plaintiffs to the order of the defendant. It imported on its face that the money represented by it was the property of the plaintiffs, and that they, not Woodruff, were paying it to the defendant: *Sims v. United States Trust Co.*, 103 N. Y. 472, 9 N. E. 605; *Bristol Knife Co. v. National Bank of Hartford*, 41 Conn. 421, 19 Am. Rep. 517. Woodruff had no apparent title to the check. He was merely the agent of the plaintiffs for the purpose of delivering it to the defendant. It is not necessary to consider the ostensible or apparent authority of Woodruff as to the directions he might give the defendant for the disposition of the proceeds. That question was a vital one in the *Sims* (103 N. Y. 472, 9 N. E. 605), and the *Knife Co.* cases (41 Conn. 421, 19 Am. Rep. 517), because in each case the defendant had not only collected the checks, but on the faith of the instructions received from the agent, disposed of the proceeds. In those cases the defendants were held liable notwithstanding the payment of the money in good faith. The decisions proceeded on the circumstances of the case and the character of the business.

Nor is it necessary to consider whether the rule that one who holds money or property as agent, trustee, executor, administrator, guardian or partner has no apparent authority to dispose of it in payment of his own debt (*Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; *Rochester etc. R. Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790), applies to one intrusted with a check for delivery to another. These questions would be important had the defendant parted with anything on the faith of the check. The *Sims* case (103 N. Y. 472, 9 N. E. 605), and the *Knife Co.* case (41 Conn. 421, 19 Am. Rep. 517), are cited as au-

thority (if authority be necessary) for the single proposition that the defendant was chargeable with knowledge that the ³⁷⁴ moneys to be transferred by the check were the moneys of the plaintiffs. Therefore, we have in this case a payment not made by Woodruff, but made by the plaintiffs, and as to which the ordinary rule that money paid by mistake may be recovered applies.

To return to the case of the Goshen Nat. Bank (141 N. Y. 379, 36 N. E. 316). There the cashier of the plaintiff was also the county treasurer of Orange county. He paid the comptroller the state taxes by a check drawn by him as cashier of the plaintiff upon the Importers and Traders' Bank of New York city. It was within the power and a part of the duty of the cashier to issue such checks to customers who might pay the bank therefor. But in the instance of the payment to the comptroller the issue of the check was simply an embezzlement of the funds of the bank. The bank sought to reclaim these funds, and in answer to that claim this court held, first, that there was no diversion of the check, because it was issued for the very purpose of paying the comptroller the state taxes, and second, that by reason of the peculiar character of cashier's checks and their general use in the commercial world they were to be regarded substantially as the money which they represented. It was there said by Judge Peckham: "When the comptroller received this draft he had the right, in the absence of any other notice than its form, to regard it as the property of the cashier, regularly in his possession and proper to be used in payment of the taxes due at that time." This presumption cannot be extended to the case of ordinary checks of the depositor drawn on his bank. On the contrary, if in this case the money belonged to Woodruff and not to the plaintiffs, the presumption is that the check would have been drawn to Woodruff's order and not to that of the defendant. Possession of a bill or note unindorsed by the payee is not of itself evidence of title. It may have been acquired by fraud or theft: Daniel on Negotiable Instruments, sec. 574.

The judgment appealed from, so far as it affirmed the judgment of the trial court dismissing the first cause of action, should be affirmed, but so far as it reversed the judgment for ³⁷⁵ the plaintiffs on the second cause of action should be reversed and such part of the judgment of the trial court

reinstated; neither party to recover costs in the appellate division or in this court.

O'Brien, Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ., concur.

Judgment accordingly.

A Payment Made Under a Mistaken apprehension of the true state of facts involved, though made voluntarily, may be recovered back, if not justly or legally exactable: See the monographic note to New Orleans etc. Co. v. Louisiana etc. Co., 94 Am. St. Rep. 415, on the recovery of voluntary payments.

BROWN v. DOHERTY.

[185 N. Y. 383, 78 N. E. 147.]

WILLS—Trusts—Power of Disposition, When Imperative.—

A clause of a will bequeathing the residuary estate to executors in trust and authorizing them "to rent, sell, or dispose of the rest, residue and remainder of my said real estate, either at public or private sale, as they may deem most advantageous to my estate," and authorizing the placing of the money, after the payment of the debts, at interest, for the benefit of testator's widow and minor children, creates an imperative power to dispose of the residuary estate. (p. 919.)

EXECUTORS AND ADMINISTRATORS—Joint Executors' Sale With Only One Joining in Conveyance.—Where two executors, acting under an imperative power in a will, sell certain real estate at public auction, through an auctioneer, upon a published notice, over their names, of the time and place of sale but only one of such executors signs the deed, the other executor failing to sign it for no assigned reason, and the executor who did not join in the deed never at any time objected or in any manner contested the purchaser's title, and no proceedings were taken by the heirs, who were infants at the time of the sale and became of age ten or eleven years thereafter, to rescind it or contest the title, the purchaser becomes the owner of the whole equitable title with the right of possession, the heirs being at the most the holders of the legal title in trust for the purchaser at such executor's sale. (pp. 919, 920.)

EXECUTORS AND ADMINISTRATORS—Quieting Title—Failure of Coexecutor to Join in Conveyance.—Where two executors, acting under an imperative power in a will, sell real estate belonging to the estate at auction, under a published notice over their joint names, but one of the executors, for no assigned reason, fails to join his coexecutor in the conveyance, and afterward dies, the purchaser at the sale may, under the provisions of the Code of Civil Procedure, allowing one in possession of real property and claiming title to maintain an action to determine any adverse claim to the fee, obtain a judgment barring any claim by the heirs and establishing the purchaser's title, since equity will regard as done what should have been done. (p. 920.)

George W. Carr, for the appellants.

A. C. Hottenroth and F. W. Hottenroth, for the respondent.

384 GRAY, J. The plaintiff, claiming to be the owner in fee, and to have been in the possession for over twenty-three years, of certain real estate, brought this action against the defendants to determine the title and to bar them from all claim thereto. The defendants denied the plaintiff's title and set up their title to the estate as devisees under their father's will. The premises originally belonged to Thomas Doherty, or Dougherty, who died seised thereof in 1874. He left a will, by which he made a disposition of all of his property. After directing the payment of his debts, etc., and making a gift of his household effects to his wife, by the third clause, he gave to his wife, during the time she should remain his widow, the use and benefit of certain parcels of land. The fourth clause disposed of the property so given to his wife, upon her ceasing to be his widow, by dividing the same equally among his children. The fifth clause reads as follows: "I give and bequeath unto my executors, to be hereinafter appointed, the rest, residue and remainder of my personal and real estate. In trust, nevertheless, and I do hereby by this my last will and testament authorize my executors hereinafter appointed to rent, sell, or dispose of the rest, residue and remainder of my said real estate, either at public or private sale as they may deem most advantageous to my estate, and to execute good and **385** sufficient deed or deeds for the same and to place the residue of the money, after paying my just debts as hereinbefore directed, arising from such sale or sales, at interest and to pay to my said wife, so long as she shall remain my widow, such income arising therefrom for the support and maintenance of my said infant children, during their minorship or infancy. And after the said Margaret Dougherty shall cease to be my widow, I give and bequeath to my said children Patrick Dougherty, John Dougherty and James Dougherty, equal, share and share alike, all the estate, both real and personal, that may remain in the hands of the said executors at the time the said Margaret Dougherty shall cease to be my widow. And I do also authorize and direct my said executors, in case of the sale of my real estate, as already provided for, to sign, seal, execute and deliver good and sufficient deed or deeds of con-

veyance in the law for conveying the said real estate to the purchaser or purchasers thereof." He appointed his brother Patrick and Hugh Lunny to be his executors and both qualified. In 1878 the premises in question were sold and the finding of fact is that the executors sold the same at public auction, after advertising the sale in the usual way in a newspaper published in the county in which the property was located. The notice was entitled "Executors' sale of valuable property"; stated that "the executors will sell the real estate of Thomas Doherty, deceased, on August 1, 1878, at 2 P. M., on the premises"; described their advantageous situation; declared that they "will be sold to the highest bidder, without reserve, for cash," and bore the names of both executors. It is further found that "both of the executors were present at the sale, and sold the said premises, which were struck down by the said Hart (the auctioneer) to one Patrick Kedney, the purchaser at said sale, for the sum of four hundred dollars, said amount being the highest bid"; that Kedney assigned his bid to James F. Brown; "that said Lunny, being present and participating in said sale, made no objection thereto, and that he lived for over twelve years thereafter, and during that time in no way ³⁸⁶ contested the claim of title of the plaintiff, or her grantors, to said premises; that said Patrick Doherty, one of the said executors, made, executed and delivered to said James F. Brown, on August 5, 1878, a deed of said premises, in the usual form of executor's deed, for the consideration of four hundred dollars; that the said James F. Brown paid the sum of four hundred dollars, to said Doherty and thereupon entered into possession of said premises," and the deed was duly recorded. Brown, in the same year, conveyed the premises to one Bauer, who immediately reconveyed to Brown's wife, this plaintiff. It was found that she immediately entered into possession of the premises under her deed; that she has been in continuous possession thereof ever since, and that she has paid the taxes since assuming such possession. Upon these facts the legal conclusions were reached that the title to the premises, upon the death of Thomas Doherty, was vested in his surviving children, subject to be divested by the exercise of the power of sale vested by his will in the executors thereof; that that power had been duly exercised by the executors and the defendants were divested of their title to the premises and that the same had become vested in the plain-

tiff; that Lunny, as one of the executors, participated in and approved and ratified the sale and the consummation thereof by the delivery of the deed of his coexecutor to Brown; "that the plaintiff having been in possession of the premises for more than twenty years and more than ten years after the defendants had attained their majority, the defendants are precluded from setting up their claim by reason of the statute of limitations." Judgment was entered in favor of the plaintiff, barring the defendants from any claim of title to, or estate in, the premises described, and adjudging that plaintiff is the owner in fee simple absolute thereof. The judgment was affirmed by the appellate division, in the first department, and the defendants have appealed to this court.

³⁸⁷ This action, which is brought under the provisions of article 5 of title 1 of chapter 14 of the Code of Civil Procedure, is peculiar in its features and is not, perhaps, free from difficulty, with respect to the determination of the conflicting claims to the title to the premises described in ³⁸⁸ the complaint. I have reached the conclusion that the judgment was correct in adjudging the title to the plaintiff, upon the ground that there was a sale by the executors, in execution of the power of sale, and, under the facts of the case, that the ownership, and the right to the possession, of the property sold have become vested in her.

The fifth clause of the testator's will contained an imperative power to dispose of his residuary estate. It was not dependent upon the will of the executors and the testator's purpose was to create from a residue, which should remain after the payment of his debts, an interest-bearing fund for the benefit of his children, while minors. The power was given to the executors, *qua* executors, and they accordingly proceeded to execute it as such. The finding of fact is that they did sell the real estate at public auction, through an auctioneer, upon a published notice, over their names, of the time and place, and that the premises in question were struck down by the auctioneer to Kedney, as the highest bidder. Kedney assigned his bid to Brown, who paid to Doherty, one of the executors, the sum at which the premises had been struck down at the sale, and received a deed thereof from Doherty, as executor. For no assigned reason, the other executor did not join in the conveyance, and died some years later and twelve years before the plaintiff commenced her action without contesting plaintiff's title. These defendants,

who were infants when the testator died, are his sole surviving children and heirs at law, and they became of age some ten and eleven years, respectively, after the sale and the plaintiff's entry into possession. During the twelve or thirteen years intervening before this action was commenced, no proceeding was taken by them with reference to the sale or to the plaintiff's possession. We have, therefore, in the facts established by the findings upon evidence, and by the affirmance of the judgment by the appellate division, an execution of the power of sale by the executors through a public sale to the highest bidder. The auctioneer was the agent of the executors, for making the sale, as he was for the vendee, for ³⁸⁹ the purpose of the memorandum of sale: See *M'Comb v. Wright*, 4 Johns. Ch. 659; also, 3 Am. & Eng. Ency. of Law, 509. The assignee of the purchaser at the sale paid the whole of the consideration money to one of the executors, and all that was needed to perfect the transaction of sale was that Lunny should unite with his coexecutor in the deed, or himself execute a deed. This was not a case of the non-execution of the power of sale, but of a defective execution; because the intention to execute the power was effectuated by the actual sale. The deed was but an incident and the final consummation of a sale under which the plaintiff, or her predecessor in the title, was let into possession. The case is one where equity should grant relief, which may be administered through these provisions of the code: *Brown v. Crabb*, 156 N. Y. 447, 51 N. E. 306. The general rule, undoubtedly, is that trustees must unite in a disposal of the trust estate and a deed of land from less than all the living trustees is invalid: *Brennen v. Willson*, 71 N. Y. 502. But this case is not, by reason of the circumstances, bound by the rigid requirements of that general rule. The requirement of our statutes that, where a power is vested in several persons, all must unite in its execution, was complied with, in effect, by the actual sale made by the executors. It would be a most harsh and inequitable application of the statute if, after executing the power by this sale, the subsequent death of one of the executors who had united in the selling, but who had not joined in a conveyance, should, from the impossibility of procuring or compelling his deed, result in avoiding the plaintiff's title. The estate of the testator received the consideration moneys, and neither executor nor devisee at any time attempted to rescind the sale or to contest the title. If Lunny

unreasonably or without any reason neglected or refused to execute a deed in consummation of the sale, he must be regarded as refusing to perform his duty under the will. If his death prevented any legal steps from being taken against him, equally can it be said that it terminated what opposition he could have made ³⁹⁰ to the plaintiff's ownership. The surviving executor had given a deed, and there is nothing that can now be done further to complete the plaintiff's title.

The plaintiff was the owner of the whole equitable title, having the possession and the right to the possession. The sale and the agreement of purchase having been performed by the payment of the price and the taking of possession, equity will now regard as done what should have been done. The most that can be said of the defendants' position is that if, by the failure of the purchaser to receive an adequate conveyance, upon the execution of the power of sale by the executors, the legal title has not passed, then they, as heirs, are trustees of the legal title for the plaintiff's benefit: See *Brown v. Crabb*, 156 N. Y. 447, 51 N. E. 306. While an action for specific performance may not be maintainable by the plaintiff in this action, the provisions of the code, previously referred to, sufficiently warranted the court in rendering the judgment below, which barred the defendants' claim of title and which established the ownership of the plaintiff. I think that the code provisions fulfill the equitable rule by permitting the court to establish by a judgment, in such an action, that which ought to have been done.

In the view I have taken, it becomes unnecessary to discuss the question of whether title has been gained by the plaintiff through an adverse possession during the twenty-three years of her occupation. Upon the authority of *Howell v. Leavitt*, 95 N. Y. 617, it would hardly appear that the facts of this case bring the defendants, who were infants at the time of the sale, within the provisions of section 375 of the Code of Civil Procedure.

For the reasons given, I advise the affirmance of the judgment below, with costs.

Cullen, C. J., Edward T. Bartlett, Haight, Werner and Hiscock, JJ., concur.

O'Brien, J., absent.

Judgment affirmed.

Where a Trust Estate is vested in two or more trustees, a conveyance by one of them without the concurrence of the others is generally invalid: See the note to *Tyler v. Herring*, 19 Am. St. Rep. 268.

If the Agreement for a Sale of land by two executors is signed by only one of them, the other may so assent to the sale by his conduct as to make it his own in fact: *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519.

VOHMANN v. MICHEL.

[185 N. Y. 420, 78 N. E. 156.]

MORTGAGES—Forged Satisfaction—Estoppel of Testamentary Trustees.—Where one of three testamentary trustees, holding a mortgage for the benefit of their trust, executed a satisfaction of the mortgage, purporting to be signed by himself and his cotrustees, but the signature of one of whom was forged and the other obtained by fraud, the fact that his cotrustees had surrendered to him full control of the trust estate and had failed, upon discovery of his dishonesty, to compel him to make restitution, and had failed to notify the mortgagor, and had obtained releases from their adult cestuis que trustent, does not estop them from enforcing, as trustees, the demands of the estate which they represent, even though it might be sufficient as an estoppel against them individually. (p. 924.)

TRUSTS.—Where the Cestui Que Trust has Assented to or concurred in the breach of trust or has subsequently acquiesced in it, he cannot afterward proceed against those who would otherwise be liable therefor. (p. 925.)

TRUSTS—Effect of Release of Trustee's Defalcation by Beneficiary.—Where cestuis que trustent were, at the time of giving to the trustees holding a mortgage for their benefit releases of liability for the defalcation of one of such trustees, who had forged a satisfaction of the mortgage, entitled to the remainder of their shares of the trust fund, the trustees cannot enforce the mortgage as far as their interests are concerned, since their interests were at the time of their ratification subject to alienation and disposition, and the trustees who represent their interests can have no greater interests than they have. (p. 925.)

J. Culbert Palmer, for the appellants.

Frederic W. Hinrichs, for the respondents.

421 WERNER, J. This action was brought to compel the reinstatement as valid liens of two mortgages executed by the defendant Michel, which were procured to be satisfied of record by means of forged and fraudulent satisfaction pieces, executed by and at the instance of the defendant Carl Coenen, and to foreclose such mortgages. The defendant Coenen and the plaintiffs Meeke and Vohmann were the executors and trustees named in the will of Louise Pommer, deceased, who died on Staten Island on March 12, 1897. By her will she

devised her residuary estate to her executors and trustees in trust, to keep the same invested and pay the income to her four children until they should respectively become twenty-five years of age, when each was to receive an equal share of such residuary estate. The executors and trustees duly qualified and entered upon their duties.

On or about February 15, 1899, the executors and trustees, acting through one Cossmann, a real estate agent, loaned ⁴²² to the defendant Michel the sum of six thousand five hundred dollars of the funds of the estate, and as security therefor took back a mortgage made to such trustees individually, due February 15, 1902. Before this mortgage became due, and in November, 1900, Coenen prepared a satisfaction piece of this mortgage, signed his name to it, forged the signature of Vohmann thereto, and procured the signature of Mecke by false and fraudulent statements. Then Cossmann, who was a notary public, and who appears to have abetted Coenen in his dishonesty, executed an acknowledgment of the signatures of Mecke and Vohmann to the false satisfaction piece. At Coenen's request Cossmann procured the defendant Michel to pay the six thousand five hundred dollars loaned to him on the mortgage, although it was not then due. The money thus paid was turned over to Coenen, who used it for his own purposes. The defendant Michel paid this money in good faith to Cossmann, with whom he had dealt in the transaction and was guilty of no negligence in the matter.

The defendant Horrmann loaned to Michel the money to pay off this mortgage, believing that the satisfaction piece had been legally executed in good faith, and took from Michel a mortgage on the same property to secure his loan. The full amount of Horrmann's loan to Michel was eight thousand dollars.

Shortly after the execution of this first mortgage to the trustees by Michel, a second loan of five hundred dollars was made by the trustees to him, and he gave a second mortgage, which was paid off and discharged at the same time and in the same way as the first mortgage, the only difference being that the second mortgage was due at the time it was paid by Michel. The courts below have held that this payment of the second mortgage is good as against the estate, and there is no question as to its validity upon this appeal.

Coenen's two cotrustees, Vohmann and Mecke, spent most of their time out of this state, and only visited Staten Island

at infrequent intervals. They intrusted to Coenen the possession of all the securities of their trust and practically the entire management of the trust estate. They did not discover Coenen's dishonesty or his fraudulent discharge of the mortgage ⁴²³ referred to until about September 20, 1901, about a year after the money had been stolen. When the discovery was made they informed Frank and Hermann Pommer, two of the children of Louise Pommer, deceased, and beneficiaries of the trust, of Coenen's dishonesty. At this time Hermann was about twenty-three years of age and Frank about twenty-five. The other two children were infants. It appears that Coenen had married an adopted daughter of Louise Pommer and the children referred to him as "uncle." The defendant Michel, however, was not informed of the true state of affairs. In order to shield Coenen from prosecution, Frank and Hermann Pommer executed releases to Vohmann and Mecke, from any liability to them for losses occasioned by Coenen's dishonesty, and on October 3, 1901, they gave Coenen a receipt for their distributive shares of the trust estate. They permitted him to resign his trust on October 4, 1901, and consented to his leaving the country. Frank Pommer was appointed executor and trustee in his place, and is one of the plaintiffs in this action, together with Vohmann and Mecke, the other two executors and trustees.

This action was commenced in February, 1903, over two years after the execution of the fraudulent satisfaction pieces, and more than one year after the discovery of the dishonesty of Coenen. The first cause of action relates to the first mortgage for six thousand five hundred dollars, and the second to the five hundred dollars. The special term dismissed the complaint on the ground that the plaintiffs were estopped from claiming that the mortgages were not properly satisfied of record. Upon appeal to the appellate division the dismissal of the first cause of action was reversed and a new trial granted as to that, but the judgment as to the second cause of action was affirmed and is not now questioned.

⁴²⁴ The appellants in this court concede that the calling in of the mortgage before it was due involved the exercise of a joint discretion by the trustees, in which the participation of them all was essential to protect any person dealing with them. The learned counsel for the appellants insists, however, that although the mortgage was called in before it was due, the trustees are estopped from challenging the validity

of the transaction because of their surrender to Coenen of the full control of the trust estate, and their failure, upon the discovery of his dishonesty, to compel him to make restitution, as well as their omission to promptly notify the defendant Michel. We think this contention cannot be admitted. While the conduct of the appellants in these respects and in taking releases from their adult cestuis que trustent may be ⁴²⁵ quite sufficient to create an estoppel against them individually, we do not think their acts constitute such an estoppel as to prevent them from enforcing, as trustees, the demands of the estate which they represent: *Ludington v. Mercantile Nat. Bank*, 102 App. Div. 251, 92 N. Y. Supp. 454; affirmed on opinion below, 182 N. Y. 522, 74 N. E. 1119.

If this were all that is shown by the record before us we should be compelled, notwithstanding the obvious hardships of the case, to concur in the conclusion reached by the learned appellate division. It appears, however, that at the time of the discovery of Coenen's dishonesty two of the beneficiaries of the trust estate were adults. Hermann Pommer was then about twenty-three years of age, and Frank C. Pommer was about twenty-five. They were at that time fully informed of Coenen's misdeeds, and that his fraud and defalcation had entailed upon the estate a loss of about twenty-one thousand dollars: With full knowledge of these facts they released the two trustees, Vohmann and Mecke, from all liability on account of Coenen's default and gave to Coenen himself receipts for their distributive shares in the estate. They concurred with the two trustees in permitting Coenen to resign his trust without calling him to account, and consented to his leaving the country without making any attempt to compel restitution. They voluntarily released Vohmann and Mecke from all liability, although it was through their neglect of the duties of their trust that Coenen was afforded, to some extent at least, the opportunity to perpetrate his frauds, and in effect connived at Coenen's unmolested escape from prosecution. After having released all the guilty parties and acquiesced in all that had been done from the discovery of the irregularities in September, 1901, until the bringing of this action in February, 1903, they now seek to compel Michel, the innocent mortgagor, to bear the full burden of Coenen's wrongdoing in respect of this mortgage, although the mortgagor was not notified or given any opportunity to protect himself. We think it would be highly inequitable to permit

the plaintiffs at this late day to disregard and disaffirm all that has been done by the two adult cestuis que trust, and to ⁴²⁶ proceed against these defendants in the same manner as they could have done if they had not formally acquiesced in Coenen's default. "Where the cestui que trust has assented to or concurred in the breach of trust, or has subsequently acquiesced in it, he cannot afterward proceed against those who would otherwise be liable therefor"; Beach on Modern Equity Jurisprudence, sec. 244; Perry on Trust, sec. 850; Thompson v. Harrison, 2 Bro. Ch. 164; Kirby v. Taylor, 6 Johns. Ch. 242. In this connection it should be borne in mind that at the time these adult beneficiaries ratified the defaulting trustee's act they were entitled to the remainder of their shares of the trust fund, subject only to the contingency that they should arrive at the age of twenty-five years, a contingency which had occurred at the time of the trial. These remainders, therefore, were at the time of ratification subject to alienation and disposition by these two beneficiaries. We are, therefore, led to the conclusion that the adult beneficiaries, Hermann and Frank C. Pommer, have bargained away their right to now insist on a reinstatement of the lien of the mortgage so far as their interests are concerned, and that the plaintiffs, who represent their interests, can have no greater rights than they have.

The judgment of the appellate division should be reversed, and the judgment of the trial court modified by directing that the six thousand five hundred dollar mortgage be re-established as a lien and foreclosed for only one-half of that amount, with interest, in favor of the two infant beneficiaries. As so modified, the judgment of the trial court is affirmed, and the record is remitted to the special term, with directions to render judgment in accordance with the views herein expressed, without costs of this appeal to either party as against the other.

Cullen, C. J., O'Brien, Haight, Vann and Hiscock, JJ., concur.

Willard Bartlett, J., not sitting.

Judgment accordingly.

While a Cestui Que Trust may bind himself by acquiescence in a breach of trust by the trustee, it must appear that he knew all the facts, was apprised of his legal rights, and was under no disability to assert them: White v. Sherman, 168 Ill. 589, 61 Am. St. Rep. 132.

DOWNEY v. SEIB.

[185 N. Y. 427, 78 N. E. 66.]

JUDGMENT—Reformation of Deed—Effect on Subsequent Issue—Marketable Title.—Where a father, through the mistake of the scrivener, conveyed land to his daughter for life, with remainder over to her children living at time of her death, and to her brothers upon her death without issue, or to the issue of such children or brothers of the grantee, instead of an absolute conveyance to the daughter, but the father died before correcting the mistake by another conveyance, though the brothers united in a warranty deed to her, a judgment, in an action by the daughter against her father's executor, her mother and her brothers, none of whom had been married, reforming the father's deed to conform to the intention of the parties, does not bar the title of persons born after the judgment was rendered, where they were not represented by any party to the action, and hence the daughter did not by such judgment obtain a marketable title to the fee. (pp. 929, 931.)

PARTIES.—In Every Case There Must be Such Parties before the court as to insure a fair trial of the issue, in behalf of all. (p. 930.)

PARTIES—Privity of Interest—Representation of Unborn Remaindermen.—Where, in a suit by the grantee of a deed to reform it to conform to the intention of the parties, the deed granted a life estate to the grantee with remainder to her children, and on a failure of such issue to her brothers and their issue, but the brothers conveyed by warranty deed to the grantee prior to the commencement of the suit, the unborn issue of the brothers are not represented by the brothers being made parties defendant, since the interest of the brothers was to protect their warranty of title, and the interest of the plaintiff was to destroy the conveyance creating the title in remainder. (p. 931.)

Isidor Wels, for the appellant.

Isaac Ringel, for the respondent.

428 VANN, J. The controversy arose over the title to land on Jefferson avenue, in the borough of Brooklyn, through the claim of the defendant that he was not obliged to perform his contract of purchase because the title was not marketable. The history of the title as set forth by the parties in their agreed statement of facts is substantially as follows: On the 13th of November, 1889, one John Scott, Sr., who then owned the premises in question, and his wife Ann, conveyed the same to their daughter Margaret, who is the plaintiff in this action, for life, with remainder over to her children living at the time of her death, and the issue of any deceased child, and upon her death without lawful descendants to her brothers, John, James and William Scott, who were parties of the third part, "or to the survivors or survivor of them living

at the time of the death of the said Margaret and the lawful children and issue, if any, of such of said three sons as may then be dead."

At the time he executed said conveyance Mr. Scott was worth about one hundred thousand dollars. He had four children, the plaintiff and the three sons already named, who were then his only descendants. Shortly before he gave the deed, being well ⁴²⁰ advanced in years, he told his children at a family consultation that he was about to make a will and that he intended to give Margaret the house in question, which he had bought for her and in which she then resided. All of the children approved of this plan, whereupon he told the plaintiff that he would convey to her accordingly, and shortly thereafter he informed her that he had done so and had filed the deed for record. Acting on the belief that this was true, she expended a large sum of money in repairing and improving the house and premises.

About the 20th of October, 1892, the plaintiff first learned that the deed did not convey the premises to her absolutely and in fee simple, but only for life with remainder over, as already stated. She at once informed her father of the fact and he said that he intended to make her an absolute conveyance, but the lawyer who drew the deed had made a mistake, which he would have corrected at once by a new deed. John, James and William Scott, on learning of the mistake, promptly united in a conveyance of the premises to the plaintiff with full warranty. John Scott, Sr., was ill when the mistake was discovered, and, rapidly growing worse, died on the 5th of November, 1892, before he could execute the new deed, as he had promised. The plaintiff was then about thirty years old, and although she had been married for more than seven years, she had never had any children and for physical reasons expected none. This fact was known to her father, who in his will, executed after the deed, left her no part of his estate, because he believed that he had already made suitable provision for her by the absolute conveyance of said premises.

Early in 1893 the plaintiff herein, alleging the foregoing facts among others in her complaint, commenced an action against her mother, her three brothers, none of whom had then been married, and the executor of her father's will, for a reformation of said deed so as to make it conform to the intention of the parties when it was executed. That action,

which was not defended, resulted in a judgment, entered on ⁴³⁰ the 2d of November, 1893, reforming the conveyance from John Scott, Sr., to his daughter, by making it absolute in form and directing that the register of Kings county should, by apt and proper words, insert in the margin of the liber where said deed was recorded a reference to such judgment.

Said William Scott died before this controversy arose, having never been married. Some years after the rendition of said judgment, John Scott, Jr., and James Scott, sons of John Scott, Sr., married, and their respective wives are living. John has two children and James one. The plaintiff has no issue, and her husband is still living. She is now forty-one years of age, has been married nineteen years, and is not likely to become a mother owing to a structural defect in the organs of generation.

Upon submitting the controversy the plaintiff demanded judgment that the defendant perform his agreement to purchase said premises and pay her the balance of the purchase money. The defendant demanded judgment that the plaintiff could not convey the premises, as she had agreed, by a good and sufficient deed in fee simple, for a return of the sum of two hundred dollars paid on account of the contract of purchase and the sum of seventy-five dollars for the reasonable expense of searching the title. The appellate division rendered judgment relieving the defendant from his contract and awarding judgment against the plaintiff for the sum of two hundred and seventy-five dollars besides costs. From that judgment the plaintiff appealed to this court.

⁴³¹ John Scott, Sr., probably could not write, for he signed the conveyance in question as a marksman, and perhaps he could not read. At all events, he did not understand that cumberson and complicated instrument, which, with its parties of the first, second and third parts, its reversions, remainders and wealth of technical words, doubtless reflected the learning of the scrivener better than the instructions of the grantor. The unfortunate result is a title in the air, and unmarketable, perhaps, for a generation.

There would be little difficulty were it not for the action, unselfish and well intended but not well advised, of the remaindermen in conveying to the life tenant before the judgment of reformation was rendered. While they wished

simply to correct the mistake of their father so far as they⁴³² could and to give their sister a good title, they created such a situation as to leave no one to be made a party to the action to reform the deed who represented unborn children and who through his own interest would be presumed to see that there was a fair trial and a just disposition of the case.

It is well settled, as stated by Judge Earl in a recent case, that "where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost of necessity": *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693, 32 N. E. 704, 18 L. R. A. 331. After distinguishing *Monarque v. Monarque*, 80 N. Y. 320, upon the ground that the court took jurisdiction of that action only by consent, and that, therefore, its adjudication bound only those who consented and could not bind persons not in being, the learned judge continued: "That case did not determine that in a proper action for the construction of a will persons not in esse could in no case be concluded by the judgment rendered therein. That they could be concluded I have no doubt, if the parties to the action properly brought were vested with the whole title, subject merely to the contingency that it might open and let in persons thereafter to be born."

So Mr. Freeman, in his valuable work on Judgments, said in section 172: "If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him; and a verdict and judgment for or against the former may be given in evidence for or against any of the latter": See, also, *Black on Judgments*, sec. 554; 24 Am. & Eng. Ency. of Law, 2d ed., 759.

The principle upon which the rule above stated rests is that the tenant of the first estate virtually represents the subsequent estates, because he has a common interest with the other parties in defending. Mere privity in blood does not authorize⁴³³ one party to defend the interest of another. Thus, again referring to Mr. Freeman, we find that: "Kinship, whether by affinity or consanguinity, does not create privity,

except where it results in the descent of an estate from one to another. Therefore, there is no privity between husband and wife, or parent and child, or other relatives, when neither of them has succeeded to an estate or interest in property formerly held by the other." "It is essential to privity, as the term is here used, that one person should have succeeded to an estate or interest formerly held by another. He who has so succeeded is in privity with him from whom he succeeded, and all the estate or interest which he has acquired is bound by the judgment recovered against his predecessor while he held such interest or interests": Freeman on Judgments, sec. 162.

"If a person is bound by a judgment, as a privity to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject matter of the litigation, and not because there is privity of blood, law or representation between them, although privity of the latter sort may also exist": Black on Judgments, sec. 549.

While the learned authors, who are well supported by authority, may refer particularly to cases where the successor has taken the very title of the party against whom the judgment is recovered, we cannot see why the principle is not equally applicable to the case of the holder of one estate and the tenant of the subsequent estate.

The case of *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28 L. ed. 1015, is instructive, if not controlling on the subject. There after-born remaindermen were allowed to enforce a trust in lands devised by their grandfather under a will, which was adjudged void in an action brought and decided before their birth. Mr. Justice Gray, speaking for the court, recognized the general rule as to parties not in being, but he said: "In every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all." The parents of the plaintiffs in that action were parties, but, as stated by the court, ⁴³⁴ had no interest to support the will, though they had an interest to destroy it. There were charges in the complaint that the suit was fraudulent, but these were denied by the answer, and the court held that they should be considered as disproved. The decision rested on the ground that there was no real representation in the action of the subsequently accruing interests. This is made plain in a later case where Mr.

Justice Bradley, in commenting upon *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28 L. ed. 1015, said: "There was no party in the case to represent the will or the interests created by it, or the legal estate which supported those interests. This was the special ground on which the decision in *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. Rep. 652, 28 L. ed. 1015, was placed, as is fully expressed in the opinion": *Miller v. Texas etc. Ry. Co.*, 132 U. S. 662, 10 Sup. Ct. Rep. 206, 33 L. ed. 487.

In the present case, by the conveyance from her brothers the plaintiff had acquired the first freehold estate, namely, the remainder in fee after her own life estate, subject to be divested by her leaving issue before her death. Therefore, she held the estate which in the ordinary course of things would make it to her interest to uphold the deed, but she was the very party who was trying to destroy it. She could not be plaintiff and defendant in the same suit. She, in fact, represented herself only and could not represent her after-born children or those of her brothers. The interest of her brothers was the same as her own, because they had their warranty of title to protect. We are inclined to the opinion, therefore, that the judgment recovered by her did not bar the title of persons born after the judgment was rendered who were not represented by any party to the action.

At least, the question is too doubtful to warrant the courts in compelling the purchaser to take title under such circumstances, for the persons entitled to raise the question are not parties to this controversy. As, since the date of the judgment of reformation, children have been born, it may be that the plaintiff can bring a new action, and by making them parties clear the title. In such an action those children would represent all who might be born thereafter, for they would
435 have a common interest. That remedy, however, can have no effect on this action, and our present duty is to affirm the judgment appealed from.

While in this case, as we feel well assured, there was neither furtive motive nor evil result in the judgment of reformation, still, if we sustain the position of the plaintiff, our adjudication will declare the law to govern all cases of like character arising hereafter, and the next to come before us may involve the robbery of children by a judgment rendered before they were born, with no one to represent or

defend them. A general rule, established by the decision of a question of law, is much more important than the effect in a particular case.

The judgment should be affirmed, with disbursements, but, under the circumstances, without costs.

Cullen, C. J., O'Brien, Haight, Werner and Hiscock, JJ., concur.

Willard Bartlett, J., not sitting.

Judgment affirmed.

By Privity is Meant Mutual or successive relationship to the rights of property, and is classified into privity in estate, privity in blood, and privity in law, in all of which there must be privity of interest: Ahlers v. Thomas, 24 Nev. 407, 77 Am. St. Rep. 820.

The Effect of Judgments against persons not in being is discussed in the monographic note to Rutledge v. Fishburne, 97 Am. St. Rep. 762-768.

VILLAGE OF CARTHAGE v. CENTRAL NEW YORK TELEPHONE AND TELEGRAPH COMPANY.

[185 N. Y. 448, 78 N. E. 165.]

TELEGRAPHS AND TELEPHONES—Source of Power to Erect Poles.—In New York the telegraph and telephone companies derive the right to erect their poles and string their wires directly from the state. (p. 934.)

MUNICIPAL CORPORATIONS—Delegation of Power by State. While it is competent for the state to delegate its sovereign power to cities and villages in regard to the construction, management and control of these companies, such surrender of sovereignty cannot be implied, but must rest on express legislation containing a clear and unqualified grant of power. (p. 935.)

MUNICIPAL CORPORATIONS—Compelling the Placing of Telephone Wires Underground.—Under the transportation corporation law granting such corporations the right to construct and maintain telephone lines upon, over, or under any public roads, streets and highways, and the village law conferring upon the boards of trustees of villages the power to regulate the erection of telegraph, telephone or electric light poles, and the stringing of wires on those poles, the right of a telephone company to erect poles and string wires is derived from the state, but the village authorities may regulate their erection; that is to say, the location of the poles and the streets to be occupied. Hence a village has no power to compel a telephone company to place the extension of its existing lines in underground conduits. (p. 935.)

Frederick G. Fineke and W. B. Van Allen, for the appellant.

A. E. Kilby, for the respondent.

450 EDWARD T. BARTLETT, J. This appeal is taken by permission of the appellate division and the following question certified: "Has the plaintiff, the village of Carthage, the right and power to require and compel the defendant, the Central New York Telephone and Telegraph Company, to place the extension of its existing lines in the streets of said village in underground conduits?"

A few only of the facts appearing by the affidavits in this case are material to a solution of the single question submitted for answer. It appears that the defendant company had for some years prior to the first day of January, 1905, operated a telephone system in the village of Carthage. On or about that date the defendant company made application to the board of trustees of the plaintiff for permission to extend its telephone lines in said village. After due consideration the board passed the following resolution: "Resolved, that the said telephone company be allowed to maintain an exchange in said village by means of conduits under the streets only, the location of which is to be under the direction of this board. And it is further resolved, that no more poles be erected by said company in said streets and that such company be required to remove all its poles erected since January 1, 1905." The defendant was served with notice of this resolution, but continued to erect poles and string wires notwithstanding.

Thereupon the village commenced this action in equity, praying for a permanent injunction enjoining the defendant from erecting any more poles in the streets and compelling the removal of those it had erected since January 1, 1905, after knowledge of the foregoing resolution of the board of trustees. A temporary injunction was granted by the county **451** judge of Jefferson county, enjoining the defendant as prayed. The defendant moved to vacate the temporary injunction, which motion was granted.

The learned judge at special term rested his decision, according to his opinion, on the lack of power in the village to compel the defendant to place the wires of its proposed extended line underground; also that "when the village of Carthage assumes to require one telephone company to place its wires underground in the same streets in which another is permitted to use poles and open air construction, it does an act which cannot be justified, even assuming the matter is

within its jurisdiction." On appeal by the village to the appellate division the order vacating the temporary injunction was reversed, with a divided court, Mr. Justice Nash writing the dissenting opinion, McLennan, P. J., concurring.

We agree with the conclusion of the dissenting opinion that it is preferable to dispose of the matter upon the question of right rather than that of an illegal discrimination between the two competing companies operating existing plants in the same streets of the plaintiff village.

The question of law certified to this court as to whether the village has the power to compel the defendant to place the extension of its existing lines in the streets in underground conduits is to be determined by the present state of legislation bearing upon the subject. It has long been the settled law of this state that telegraph and telephone companies derive the right to erect their poles and string their wires directly from the state. The Transportation Corporations Law, article 8, headed "Telegraph and Telephone Corporations," section 102, reads in part as follows: "Construction of lines. Such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways," etc.

Our attention is called to certain general provisions of the charter of the village of Carthage, which do not in terms refer to the subject under consideration, from which it is argued that it can be implied that the legislature has delegated ⁴⁵² to the village the power to compel telegraph and telephone companies to place their wires underground. We are of opinion that, while it is competent for the state to delegate its sovereign power to cities and villages in regard to the construction, management and control of these companies, such surrender of sovereignty cannot be implied, but must rest on express legislation containing a clear and unqualified grant of power.

It is further argued on behalf of the plaintiff village that the village law (section 89, subdivision 9) is to be construed as conferring the power in question. It reads as follows: "Poles and wires. To regulate the erection of telegraph, telephone or electric light poles, or the stringing of wires, in, over or upon the streets or public grounds, or upon, over or in front of any building or buildings." It is to be observed that the legislature, when conferring upon these companies

in the transportation corporations law the authority to construct and maintain the necessary fixtures for their lines, used the words "upon, over or under" any of the public roads, etc., while in the village law the language is "in, over or upon" the streets, etc. This discrimination in the use of language is consistent with the language of the section relied upon from the transportation corporations law (section 102). The legislature having granted these corporations the right to construct and maintain their lines upon, over or under any public roads, streets and highways, it sought to confer upon the boards of trustees of villages the power to regulate the erection of telegraph, telephone or electric light poles, or the stringing of wires, in, over or upon the streets, etc. It is clear that the intention of the legislature was to permit villages to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles. The right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate.

453 It is apparent that if the state should see fit to surrender its sovereignty in the premises and permit each municipality through which a telegraph or telephone line passes to determine whether wires should be strung upon poles or placed in conduits according to the varying judgments of the different local boards, it would work a great and radical change in the right of companies to construct and maintain their plants.

As the law now stands, the company is at liberty to decide whether it will go on, over or under a street, subject to the right of the state to revoke its license. Opinions may differ as to which policy should prevail in view of the rapid increase of telephone companies and the disfigurement of streets by the erection of a large number of poles, each company placing its own; be this as it may, it is clear that no such power as is claimed by the respondent is at present vested in the villages of the state.

The order appealed from should be reversed, with costs in this court, and the order of the special term vacating the temporary injunction affirmed.

Question certified answered in the negative.

Cullen, C. J., Gray, O'Brien, Hiscock and Chase, JJ.,
concur.

Werner, J., not voting.

Ordered accordingly.

A City Vested with Power to Regulate the use of its streets has power to authorize, and, if public safety and the general welfare demand it, to require, all electric wires used for the benefit of the public to be laid underground: *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515.

HOUSE v. CARR.

[185 N. Y. 453, 78 N. E. 171.]

LIENS.—*Equity Will not Set Aside, as a Cloud Upon Title,* a lien outlawed by the statute of limitations. (p. 937.)

MORTGAGES—Defenses.—*By a Foreclosure by Advertisement,* the owner of the equity of redemption may be deprived of a defense which he could successfully interpose had an action been brought to foreclose the mortgage. (pp. 938, 939.)

LIMITATIONS—Barring of Different Remedies.—Though the statute of limitations may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation applies, a creditor may enforce his claim through that remedy. (p. 939.)

MORTGAGES—Enjoining Sale Under Power After Bar of Limitations.—A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain a sale under the power of sale contained in the mortgage, where it is not shown that the bond and mortgage have been in fact paid. (pp. 939, 940.)

S. C. Huntington, for the appellant.

O. M. Reilly, for the respondents.

454 CULLEN, C. J. This action was commenced on the 23d of June, 1903, to restrain the foreclosure of a mortgage by advertisement under the statute. The mortgage, collateral to a bond of even date, was given by Alonzo House to Cynthia Gilbert on the 13th of October, 1870, to secure the payment of a debt which he owed her, then amounting to the sum of four hundred dollars, within four years from date. The mortgagor owned the land covered by the mortgage at the date thereof, and at this time, as well as thenceforward until he died, on the 11th of May, 1895, he resided thereon with his family. By this will he devised said land to his son,

Cline E. House, one of the plaintiffs, who still owns the same subject to the dower right of his mother, the other plaintiff. The mortgagee died intestate on the 2d of April, 1902, and the defendant is his legal representative. On the 2d of April, 1903, the defendant commenced a statutory foreclosure of said mortgage, which had come into his possession as part of the assets of the estate so represented by him. The last installment of the bond and mortgage became due on the 13th of October, 1874, and no payment was proved to have ever been made thereon, nor any new promise or acknowledgment with reference thereto. Payment of the mortgage was not alleged in the complaint.

After finding the foregoing facts among others, the referee before whom the action was tried found, as conclusions of law, that all causes of action on said bond and mortgage were barred by the statute of limitations before the commencement of this action; that the sale of the premises in such proceeding to foreclose would place a cloud on the title of the plaintiffs, and that they were entitled to a judgment perpetually restraining the defendant from foreclosing the mortgage. The judgment entered accordingly was unanimously affirmed by the appellate division, and the defendant appealed to this court.

⁴⁵⁵ This appeal presents the single question whether a court of equity will, on the ground that the statute of limitations has run against a mortgage, restrain a sale under the power of sale contained in the mortgage. There is neither allegation in the complaint nor finding by the court that the bond and mortgage have been paid. The complaint charged and the trial court found merely that no payments had been made within twenty years upon the bond ⁴⁵⁶ and mortgage and that, therefore, they were, under the statute, barred by lapse of time. I can find no case in the books, and none has been cited to us, in which such an action has been maintained. On the contrary, in the only cases in which the precise question has been presented it has been held that the action would not lie: *Goldfrank v. Young*, 64 Tex. 432; *Hutaff v. Adrian*, 112 N. C. 259.

It is settled law, as appears by the cases cited in my brother Vann's opinion, that equity will not set aside as a cloud upon title a lien outlawed by the statute of limitations. In *Matter of Willett*, 70 N. Y. 490, it was sought to vacate an assess-

ment, the enforcement of which was barred by lapse of twenty years from the time of its imposition. In affirming a denial of the application this court said: "In this proceeding taken by him [the petitioner], seeking affirmative relief, depending upon the fact of payment, he cannot rely upon the presumption, but must show actual payment by competent proof." Hence, I assume it to be conceded that had the defendant not sought to execute under the statute the power of sale, that is to say, to foreclose by advertisement, as it is usually called, the plaintiffs could not have cleared their lands from the apparent lien of the mortgage. The controversy is, therefore, further narrowed to this question: Did the attempt of the defendant to sell and the effect of such a sale, if had, entitle the plaintiffs to relief against the sale which would have been denied against the mortgage itself?

In support of the affirmative of this proposition it is urged that under this statute the effect of a sale is the same as that of a decree of foreclosure in a court of equity, and the question is then asked: "Is it possible that a land owner can be deprived of his land by an attack out of court which has the same effect as an attack in court, with no opportunity to defend himself?" To this (assuming that the sale will cut off every defense, which it will not if notice of the defense is given at the time and place of sale) I answer yes, and assert that the exact question has been determined in this state nearly a century ago. At the time of the decision to which I refer ⁴⁵⁷ the statute law was substantially the same as at present, the Revised Laws of 1813 (chapter 32, section 14, page 375), enacting that the sale should have "the like effect as if any of the said mortgages had been foreclosed in the court of chancery by a decree against all parties in interest." At that time, as at present, the law declared usurious securities void. At the same time the courts had also held that at a sale under a usurious mortgage a purchaser without notice would acquire a good title: *Jackson v. Henry*, 10 Johns. 185, 6 Am. Dec. 328. Such being the state of the law, in *Fanning v. Dunham*, 5 Johns. Ch. 128, a bill was filed to restrain a statutory sale under a usurious mortgage. Chancellor Kent held that the plaintiffs could not get relief except on payment of the amount actually owing on the mortgage. The chancellor recognized perfectly the point that is now made, that by a foreclosure by advertisement the owner of the

equity of redemption might be deprived of a defense which he could successfully interpose had an action been brought to foreclose the mortgage, for he said: "If the defendant was endeavoring to enforce any of his securities in this court, and the present plaintiff had set up and made out the usury by way of defense, the remedy would have been obvious. The securities would have been declared void and ordered to be delivered up and canceled." Nevertheless, he held that as the plaintiff was compelled to resort to a court of equity, he must do equity as a condition of obtaining relief. The authority of *Fanning v. Dunham*, 5 Johns. Ch. 128, has never been questioned. The case is cited with approval in *Williams v. Fitzhugh*, 37 N. Y. 444, the court saying: "He [the defendant] might stand on his legal rights and defend any and every endeavor to compel him to pay, but if he invoked the aid of a court of equity to give him affirmative relief, that court recognized his equitable obligation to refund what he had received." The case is also cited as authority in nearly every state where either our system of statutory foreclosure or the practice of giving trust deeds to secure debts obtains. The *Fanning* case equally disposes of the contention that a suit to enjoin a sale is not an attack, but a defense.

⁴⁵⁸ It must be borne in mind that the statute of limitations in this state never pays or discharges a debt, but only affects the remedy. It would be within the constitutional power of the legislature to repeal the statute of limitations and revive claims, the enforcement of which have been barred by the statute for a generation: *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. Rep. 209, 29 L. ed. 483. Therefore, though the statute may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation applies, a creditor may enforce his claim through that remedy. Thus, *Hulbert v. Clark*, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59, was an action to foreclose a mortgage given to secure payment of a promissory note. The note itself was outlawed, more than six years having elapsed since its maturity, and there was no promise to pay contained in the mortgage. Nevertheless, this court held the action could be maintained, Judge Earl saying: "The statute of limitations does not after the prescribed period destroy, discharge or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the

same remain. These notes were, therefore, not paid, and so the referee found. The condition of the mortgage has, therefore, not been complied with. The notes being valid in their inception, the only answer to the foreclosure of the mortgage is payment. The mortgage was given to secure payment of the notes, and until they are paid the mortgage is a subsisting security and can be foreclosed." There is in the case of a mortgage containing a power of sale a third remedy open to the creditor, a sale under the power. It is unnecessary to determine whether the exercise of that power is barred by the lapse of time or not. If it is not, then the defendant had the undoubted right to pursue it, and was very wise in so doing—just as wise as the plaintiff was in the Hulbert case (128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59) in not suing on the note, where he would have been beaten, but in bringing an action to foreclose the mortgage. But assuming that the statute of limitations bars the right to exercise the power of sale, and further assuming that the plaintiffs could not set up that bar in answer to a title acquired by a sale under the barred power (which I deny), ⁴⁵⁹ and, therefore, is in the unfortunate (?) position of being compelled to seek relief in a court of equity, nevertheless the court will require them, as a condition of relief, to do equity and pay the debt which they do not deny they owe. For, as Judge Earl has said, the statute does not discharge or pay the debt; the debt and obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment.

The case of *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643, has no application to the case at bar. There at the suit of the devisees an executor was restrained from selling their lands for the payment of outlawed debts. The action was not against the creditor, but against one who, as Judge Peckham said, was a trustee for the devisees. The learned judge recognized the general rule that the statute of limitations is not a ground for affirmative relief, but, as he pointed out, the action of the executor was a breach of his trust for the beneficiaries. There the fealty of the defendant was due not to the creditor, but to the land owner. Here the fealty of the defendant was due solely to himself and to the beneficiaries whom he represents. That case was decided on the ground of a breach of trust. There is nothing of the kind here.

Nor is the position in which the plaintiffs are placed anomalous. A pledgee may retain or sell the pledge, though the debt to secure which the pledge was given is outlawed: *Jones v. Merchants' Bank of Albany*, 6 Robt. 162; *Jones on Pledges*, sec. 582. This is not on the theory that by lapse of time title has vested in the pledgee, for the law is otherwise (*Jones on Pledges*, sec. 581), but because the statute bars merely the remedy by action.

Doubtless from lapse of time the court might find that a mortgage had been paid, though there were no direct evidence of payment: *Bean v. Tonnele*, 94 N. Y. 381, 46 Am. Rep. 153; *Matter of Neilley*, 95 N. Y. 382. But to the statement already made that there is no such claim in the pleadings or in the findings, I may add that no such question is presented by the evidence. So far from proving any payment or anything that might ⁴⁶⁰ lead the court to believe that payment had been made, the plaintiffs took pains to show affirmatively that nothing had been paid on the mortgage. They proved by witnesses, relatives of the plaintiffs, that Mrs. Gilbert, the defendant's intestate, had on several occasions shown them the bond and mortgage and stated her belief that they had become outlawed, and that her attorney had advised her to that effect. There is, therefore, no equity in the plaintiff's claim, and we can indulge in no speculation or surmise that were it not for the lapse of time and the death of all the parties actual payment might be proved. If the plaintiffs have any such proof, however, that may be given upon a new trial under an amendment to the complaint.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

Vann, J., Dissenting. It is insisted that the judgment appealed from should not stand because a court of equity will not grant affirmative relief founded only on the statute of limitations, nor restrain the foreclosure of a mortgage for any reason without actual payment or an offer to pay the debt secured thereby.

It is a general principle that the statute of limitations may be used as a shield, but not as a sword. The party attacked may use it to defend himself, but he cannot use it for aggressive action or as the means of getting property from the other party. Courts of equity, under ordinary circumstances, do not open their doors to a plaintiff who can produce no evidence in support of his claim for affirmative relief except the lapse of time and the statute of limitations.

In an early case in this court a vendee in possession of land for twenty years under a contract of sale sued in equity to compel the vendor to convey the legal title to him. While he alleged payment of the purchase money, he proved payment only of the first installment and relied on the presumption raised by the statute to enable him to get the land without payment of the balance. Thus he attempted to get property without paying for it, and his complaint was dismissed for want of equity: *Morey v. Farmers' Loan etc. Co.*, 14 N. Y. 302.

Lawrence v. Ball, reported in the same volume at page 477, was a similar case resulting in the same way.

These cases were followed and made the basis of the judgment rendered in *Johnson v. Albany etc. R. R. Co.*, 54 N. Y. 416, 13 Am. Rep. 607, where one Edgerton, after subscribing for twenty shares of the defendant's stock at the price of two thousand dollars, paid one thousand dollars but did not pay five calls for installments of two hundred dollars each for the balance, and an action was brought against him therefor. He interposed as a defense the statute of limitations, which was held good as to four installments, but judgment was entered against him for the last, which he paid. His assignee then brought an action to compel the defendant to issue its certificate for the twenty shares subscribed for, although eight of them had not in fact been paid for. He relied wholly on the presumption of payment arising from the statute, but was defeated upon the ground that such presumption was designed simply as a defensive weapon, or as a shield against attack and not as a method of acquiring property through affirmative action.

Matter of Willett, 70 N. Y. 490, was similar in principle, and was decided substantially without argument on the authorities already referred to. Other cases might be cited to the same effect, but the foregoing are sufficient to show that while the statute may be used to defend, it cannot be used to attack, or to enable one person to take away the property of another by means thereof.

If the object of this action is to obtain affirmative relief simply, it should fail; but is that its real purpose? What are the facts? A mortgage for four hundred dollars on a farm worth one thousand dollars was allowed to run with no effort to collect it from October 13, 1874, when the last payment fell due, until May 11, 1895, when the mortgagor died, and yet seven years longer until the mortgagee died, and one year longer still, when his administrator began a foreclosure by advertisement, claiming the amount unpaid to be nine hundred and thirty-eight dollars and seventy-five cents, which with the costs would equal the value of the property. Both mortgagor and mortgagee lived in the same county, yet the mortgagee allowed more than twenty years to elapse after the mortgage became due before the mortgagor died, and although he survived him seven years, he never attempted to collect the mortgage in any way. More than twenty-eight years had passed before the proceeding to foreclose was

begun. If the administrator had sued the bond at law, or had commenced to foreclose the mortgage in equity, the statute of limitations could have been pleaded as an absolute defense. Perhaps for this reason he kept out of court altogether, and sought to enforce the mortgage through the power of sale contained therein. What was the heir of the mortgagor to do under these circumstances in order to defend himself? He had not commenced the attack. The administrator was the aggressor, although doubtless from prudential motives he did not go into court. Nearly a generation had gone by since the last payment fell due. All the parties to the original transaction had passed away. The witnesses presumed to know whether the mortgage had been paid or not were dead, or incompetent to testify. There was no way to defend against the statutory foreclosure, directly, yet if the sale took place what would be the result? The statute provides that a sale "to a purchaser in good faith is equivalent to a sale pursuant to judgment in an action to foreclose a mortgage" in every substantial respect: Code Civ. Proc., sec. 2395. The affidavits of sale, when recorded, "are presumptive evidence of the matters of fact therein stated with respect" to the property sold: Code Civ. Proc., sec. 2398. Thus, the proceeding to foreclose by advertisement is a substitute for a foreclosure by action, and has the same effect so far as any question now before us is concerned: *Jackson v. Henry*, 10 Johns. 185, 6 Am. Dec. 328; *Tuthill v. Tracy*, 31 N. Y. 157. It was simply another form of foreclosure, resorted to, apparently, because no direct defense could be made thereto. Is it possible that a land owner can be deprived of his land by an attack out of court, which has the same effect as an attack in court with no opportunity to defend himself? The plaintiffs were made parties to the proceeding under the statute, for notice was served upon them, yet they could not defend in the proceeding itself, as the law does not authorize it. They could only defend themselves by going into court and asserting their defense there. It is true, as urged by the appellant, that they could give notice at the sale that the mortgage was outlawed, but the statute does not authorize it, yet it makes the affidavits presumptive evidence of a title equivalent to one obtained by a sale under foreclosure in equity. If a purchaser, in good faith, brought ejectment, how could the land owners defend against one form of sale any more than the other, when the statute pronounces each equivalent to the other? If they could not, the plaintiffs were without any direct means of defense against the attack made by the defendant.

But, assuming that notice given at the sale would be effective as to the purchaser, it would be no protection under the recording act against a grantee or mortgagee of the purchaser acting in good faith and without notice. There would be no effectual means of giving notice to them, for nothing in the nature of a *lis pendens* could be filed or recorded in the county clerk's office so as to notify all the world. It would be only by accident or through good fortune in learning of a proposed conveyance or mortgage that notice could be given

in time, and if action was thus defeated once, what assurance would there be that it could be defeated twice, or indefinitely while another generation was passing and witnesses to prove the notice were disappearing? Can one with a defense to a mortgage given him by statute be prevented from asserting it in any way, directly or indirectly, at the election of the mortgagee? Can the mortgagee, by selecting one form of foreclosure or one method of attack, prevent an absolute defense given by law? Can one party to a contract control both the action and the defense?

I think that the plaintiffs did not commence this action by way of attack, but simply for self-defense. With no remedy at law, bound and helpless against the attack made upon them by the mere election of the defendant to foreclose by advertisement, their only means of defending themselves was to make their defense in a court of equity. Quite independently of the technical learning relating to a cloud upon title, or to the duty of paying the debt before asking affirmative relief, I think they had a right to thus defend themselves, for otherwise a mortgagee can nullify the statute of limitations and the mortgagor is powerless to prevent it. The plaintiffs did not go into court for affirmative relief in the ordinary meaning of that term. They did not go there to get the property of the defendant, but went solely for the purpose of defending themselves against the attack made by him. Equity looks at substance rather than form, and the substance of the matter is that the defendant was the assailant. As Chancellor Kent said in *Jackson v. Henry*, 10 Johns. 185, 6 Am. Dec. 328: "The notice given by the advertisement is intended for the party as well as the world, and he has an opportunity to apply to chancery if he wishes to arrest the sale," in that case on the ground of usury, but is that a more equitable defense than the statute of limitations, so as to warrant a distinction? *Peters v. Mortimer*, 4 Edw. Ch. 279.

This is purely a defensive action, and unless the courts confess themselves unable to enforce the law, it should be sustained as the only practicable way of asserting a defense which the law gives. *Ubi jus, ibi remedium, et boni judicis ampliare jurisdictionem*. In principle it is like an important case where the defense of the statute was made and a cloud upon title prevented by parties who went into a court of equity as plaintiffs and set up the statute of limitations as a defense to an attempt to sell real estate under a power contained in a will: *Butler v. Johnson*, 41 Hun, 206, 111 N. Y. 204, 18 N. E. 643, cited in *O'Flynn v. Powers*, 136 N. Y. 412, 32 N. E. 1085; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925. In that case the special term had held that the plaintiffs were not entitled to a decree restraining the sale, because the statute was designed as a shield and could not be invoked in aid of affirmative relief. The general term and the court of appeals, however, held otherwise, and it was declared by Judge Follett that the "action is prosecuted strictly in defense of the plaintiffs' title, seeking no affirmative relief as such against the

defendant, except to prevent her from clouding their title. Suppose a statutory foreclosure of a mortgage be commenced, all rights of action being barred by the statute, would the owner of the fee be compelled to lie by and permit his title to be clouded by a sale and defend an action of ejectment brought by the purchaser? We think not. The statute of limitations may be used defensively by a plaintiff when, as in this case, he is without an adequate legal remedy."

When the case reached this court Judge Peckham said: "In taking proceedings under such circumstances to prevent the further action of the defendant, which would otherwise result in placing such a cloud upon the title to their property, we think the plaintiffs do not run counter to any principle or decision holding the general view that the statute of limitations can only be used as a shield and not as a sword. . . . Under such circumstances the bar of the statute is simply a defense to the affirmative and improper proceedings of the defendant, and is not an attack upon any right of a third person." The question was asked in that case whether the plaintiffs had the right to enter a court of equity and ask for an injunction to restrain the sale when the foundation of the right rested upon the proposition that there were no legal claims against the estate, and that, in turn, depended upon the barring of such claims by setting up the statute of limitations against them, and it was held that they could. In other words, a defensive action was sustained, founded solely on the statute of limitations, and that is this case.

I think the judgment should be affirmed, with costs.

Gray, O'Brien and Willard Bartlett, JJ., concur with Cullen, C. J.

Haight and Werner, JJ., concur with Vann, J.

Judgment reversed, etc.

The Power of Sale given in a mortgage may be exercised after the debt secured thereby has been barred by statute of limitations: *Mentzel v. Hinton*, 122 N. C. 660, 95 Am. St. Rep. 647, and note on the effect of the bar of the statute of limitations.

CASES
IN THE
SUPREME COURT
OF
OHIO.

HOILES v. RIDDLE.

[74 Ohio St. 173, 78 N. E. 219.]

LIMITATION OF ACTIONS Against Estates of Decedents.—
The Statute of Limitations does not Begin to Run against the estate of a decedent until an executor or administrator has been appointed, though the creditor might have petitioned for, and procured, such appointment if the next of kin unreasonably neglected to do so. (p. 952.)

Action brought August 29, 1903, to recover a judgment on a claim against the estate of Robert Watson, deceased, who died in April, 1895, and on whose estate no letters of administration were taken out until August 6, 1903. The petition alleged an agreement on the part of the decedent to bequeath to the plaintiff all the personal property which he might own at the time of his death, and he died possessed of personal property, but bequeathed it to his wife. A demurrer was interposed on the ground that more than six years had expired after the accrual of the cause of action, and the plaintiff appealed.

William H. Spence, for the plaintiff in error.

Craine & Snyder and David Fording, for the defendants in error.

176 SPEAR, J. The entire petition is not reproduced in the statement because it was practically conceded at the argument, and such seems to have been the view of the circuit court, that the petition states a cause of action unless the plea of the statute of limitations is fatal to it. But it

is insisted by counsel ¹⁷⁷ that the cause of action, if one existed, accrued not later than the time of the decease of Robert Watson, and more than six years having elapsed before commencement of suit, the claim is outlawed, and such was the opinion of the majority of the learned circuit court, as appears by the report of the case, 26 Ohio C. C. 363, opinion by Cook, J. The opinion pertinently inquires: What is required by a creditor who seeks to enforce a claim under a contract made in this state which accrued at the death of the debtor? Can he remain idle for an indefinite period, although no administration be taken out upon the estate by the next of kin, or is it the duty of the creditor to be diligent in having an administrator appointed in order to save his claim from the bar of the statute? In this case plaintiff in error took no steps whatever to save her claim until April 6, 1903, a period of nearly eighteen years. If the rule is that the statute did not begin to run until an administrator was appointed, then claims of this nature would never become stale, as in suits at law the statute alone controls as to whether a claim is stale or not. A party might wait, as in this case, until all the witnesses to the contract but one, who was interested as a father, were dead, and then have an administrator appointed and commence action. Section 6605 of the Revised Statutes gives authority to the probate court, where the next of kin are incompetent, or unreasonably neglect to take administration, to appoint a creditor, or some person whom the court may think fit. So that it was plaintiff's privilege to cause letters to be issued and then commence her action. This opportunity was neglected until long after the statute had run against her claim, and she ought not now to be heard. Concretely stated, the holding is that in such ¹⁷⁸ case the statute runs from the time the creditor should have had an administrator appointed, and not from the time letters were in fact issued. Divers authorities are cited by the learned judge which are believed to support these views.

One member of the court, Burrows, J., maintained a contrary view. He held in substance that the decision by the majority is not based upon any statute which meets the circumstances of this case, but the broad claim is made that the commencement of the period of limitation is not coexistent with the time when the right to bring an action in fact ex-

ists in favor of the creditor, but when by proper steps he might, by other proceedings, have procured the right to bring his action. In other words, the statute is to be judicially amended so that its bar becomes effective after six years from the time the cause of action might have been made to accrue and not from the time it in fact did accrue. It seems plain that, unless our courts are to be governed by the statutes of other states, we have merely to decide whether the statute of limitations begins to run when the right to sue is perfect, or when such right does not exist, but may be brought into existence by the act of the creditor. The proper answer to this question is that in the absence of a positive provision of the law depriving a creditor of his right to have payment, or exonerating the debtor from the duty of making payment, it is not the duty and not within the power of the courts to add to the statute of limitations by attaching a condition to the right to prosecute an action which is not found in the statute itself; that to do so would be to exercise legislative, rather than judicial power. The general ¹⁷⁹ statutes limiting the time when actions may be commenced do not make provision for the enforcement of claims against the estates of decedents; and proceedings for the latter purpose are governed by the law regulating the settlement of estates. It is not contended that the claim of the plaintiff below is barred by any provision relating to the settlement of estates; nor is it claimed that there is any provision of statute which in terms meets the circumstances of this case, but only that it is barred by section 4981 of the Revised Statutes. To engraft upon the statute the condition contended for would be simply a judicial amendment or supplement to the statute. One feature of the general policy of our statutes is indicated by the terms of section 4989, where it is provided that when a cause of action accrues against a person who is out of the state, or where he leaves after the cause accrues, the time he is absent shall not be counted. In a suit involving absence it should be as reasonable to say, in case it should be made to appear that, although the debtor was himself absent, yet all the time of such absence he had property within the state reachable by attachment, that fact should require the court to hold that the case presented an exception to the application of the general rule, as it is to hold in this case that the failure

by the plaintiff to have an administrator appointed takes the case out of the general rule and defeats the plaintiff's right to a recovery.

We find ourselves in agreement with this view of the dissenting judge. Let us start with a clear understanding of the exact issue. The inquiry is not what rule should apply in a case where the cause of action has already accrued, and the question to ¹⁸⁰ be answered is simply what will suspend the operation of the statute, but what rule is to apply where the right to maintain an action has not yet accrued. In cases involving the first inquiry, interposition is asked of the court to arrest the operation of a statute already in full effect; in the other to breathe life into a statute as yet without vitality. This distinction, in our judgment, eliminates from consideration *Granger's Admr. v. Granger*, 6 Ohio, 35, and a large number of cases from other states cited and relied upon in support of the judgment below, some of which may be particularly referred to farther on. Statutory provisions which are invoked to defeat the plaintiff's claim are: Section 4976 of the Revised Statutes, to the effect that civil actions can only be commenced within the periods prescribed in this chapter after the cause of action accrues, and 4981 which limits the right to commence an action to six years upon a contract not in writing. When, therefore, did the cause of action in this case accrue? When did it arise? When did it first exist? It seems to be conceded on all hands that it did not accrue prior to the death of Robert Watson. We cannot conclude that it accrued at the moment of the decease of Robert Watson, because to do so would be to ignore or overturn a fundamental rule of law, to wit, that in order to give a right of action there must be a party in existence capable of suing and one capable of being sued, and, as an inevitable consequence of this principle if it be applicable, the action cannot accrue and the statute cannot begin to run, until there are in existence a person who may be plaintiff and one who may be made defendant. We understand that this, as a general rule, is conceded, and yet it may not be amiss to call attention ¹⁸¹ to two Ohio cases in which the rule has been distinctly announced: *Taylor v. Thorn*, 29 Ohio St. 569; *Treasurer of Brown County v. Martin*, 50 Ohio St. 197, 33 N. E. 1112.

It is true, as insisted by counsel for defendants in error, that in a number of states the courts have held that where it is within the power of a claimant to have a personal representative appointed, a reasonable time only in which to secure such appointment is allowed, after which the statute will run, but in a large proportion of these cases, if not all of them, the cause of action had accrued before the decease of the debtor, and the statute was, therefore, running at the time of such decease. Those cases present the question of what will suspend the operation of the statute after it has commenced to run and not what will start it to running. *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051, is of this character. Charlott's judgment, which was the basis of his action, had been obtained long before the death of the judgment debtor, and the statute of limitations was then running. The statute of Kansas in force permitted the judgment creditor, in case the widow or next of kin neglected to take out letters for fifty days after the death of the decedent, to obtain such letters for himself, or some other person, and the court held that the statute continued to run notwithstanding the decease of the debtor, and the statutory limit having expired, the debt was barred. We have a different case. Two other decisions of the same court more nearly resemble our case in principle. In *Carney v. Havens*, 23 Kan. 82, opinion by Brewer, J. (now of the United States supreme court), the holding is that "where services are performed under a single and entire contract, in the absence of stipulations to the contrary, payment is ¹⁸² not due until the services are fully performed and the contract completed, and if, pending such a contract, the party employed to render the services, dies, the statute of limitations does not begin to run on the claim for compensation until by the appointment of an administrator or executor, there is someone authorized to collect and receive the compensation." This ruling was followed in *Mills v. Mills*, 43 Kan. 699, 23 Pac. 944, where the holding is that "where a cause of action upon an agreement does not accrue until after the death of one of the parties, the statute of limitations will not begin to run on the claim of the estate of the deceased upon such agreement until an administrator or executor authorized to collect or enforce the payment of the claim has been appointed." These cases are not disapproved in *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051,

but it is distinctly stated in the opinion that "it is not necessary at this time to reconsider any of the former decisions of this court." But more than this. It is, we think, a mistake to assume that the statute of Kansas respecting the appointment of administrators is in all essential respects similar to ours. That statute, as above shown, enjoins upon the widow or next of kin a duty to procure administration within fifty days from the death of the decedent. No such duty is enjoined by our statute. By section 6005, if the widow and next of kin are incompetent or evidently unsuitable, or if they neglect without sufficient cause to take administration, the court may appoint a creditor, or any competent person, but there is no limit defined by statute unless it is found in section 6014, which provides that administration shall not be originally granted as of right after the expiration of twenty years from the death of the ¹⁸³ deceased. It would seem not unreasonable to assume that the language of the Kansas statute implies a different intent from that to be gathered from the sections of our statute bearing on the subject.

But there is still another view of this situation. The holding of the circuit court is really put upon an equitable ground—a ground in the nature of an estoppel. The plaintiff, says the court, has been guilty of laches, in that she failed to avail herself of the means within her power to preserve her claim. May not this criticism apply also to the parties of the other side, Watson the heir, and Freshley the purchaser? Did they not omit to do that which they might easily have done to protect their titles? By the procurement of letters of administration, and due notice, Watson could easily have caused the statute to begin to run against the plaintiff's claim, and Freshley could easily have refused to buy until that had been done, and we think it reasonable to assume that the law in this respect is as likely to have been known by these men as that the law with respect to the appointment of an administrator was known to the plaintiff, a woman. From a business standpoint, it was negligence on the part of these men to take the chances with respect to their titles, and it would seem not unfair in matching up equities to leave them where they have put themselves. Of course, however, it is understood that we are dealing with a suit at law and not with an equitable action, and as the ma-

jority opinion itself says, "in suits at law the statute of limitations alone controls as to whether a claim is stale or not."

There is to be found, here and there, language in decisions and by text authors which would imply ¹⁸⁴ that the judgment of the writers is opposed to the conclusion we have reached and which is hereinbefore announced. But we think such is not the trend of judicial opinion, and we cite in support of this statement additional authorities: Angell on Limitations, c. 7; Wood on Limitations, sec. 6; Murray v. East India Co., 5 Barn. & Adol. 204; Andrews v. Hartford R. R. Co., 34 Conn. 57; Hobart v. Turnpike Co., 15 Conn. 145; Bullard, In re, 116 Cal. 355, 28 Pac. 219; Marsteller v. Marsteller, 93 Pa. 350; Riner v. Riner, 166 Pa. 617, 45 Am. St. Rep. 693, 31 Atl. 347; Parks v. Norris, 101 Mich. 71, 59 N. W. 428; Baird v. Reynolds, 99 N. C. 469, 6 S. E. 377; McCollough v. Speed, 3 McCord, 455; Benjamin v. De Groot, 1 Denio, 151; Sorrels v. Trantham, 48 Ark. 386, 3 S. W. 198, 4 S. W. 281.

Our conclusion is reached only because we are of the opinion that the court is without authority to supplement the statute, and not because we think the statute wise in this respect. Indeed, we are inclined to agree with the declaration of the learned judge of the circuit court in his report of the case, 26 Ohio C. C. 363, and with a like expression of the court in Riner v. Riner, 166 Pa. 617, 45 Am. St. Rep. 693, 31 Atl. 347, that the present condition of the statute leaves a way open by which estates may be imposed upon, and are of opinion that an amendment providing that, in a case like the present, the statute shall commence to run from the death of the decedent, or within a fixed time thereafter, would be in the interest of justice. But this is for the general assembly, and not for the courts.

The judgment will be reversed and the cause remanded, with direction to overrule the demurrer to the petition and for further proceedings according to law.

Price, Crew, Summers and Davis, JJ., concur.

The Death of a Party in whose favor a cause of action exists does not stop the running of the statute of limitations, though no representative of his estate is appointed: Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796; Mereness v. First Nat. Bank, 112 Iowa, 11, 84 Am. St. Rep. 318. But if no cause of action accrues till after the death of the party, the statute does not commence to run until administration is granted: Riner v. Riner, 166 Pa. 617, 45 Am. St. Rep. 693; note to Miller v. Surls, 65 Am. Dec. 595.

GAISER v. HURLEMAN.

[74 Ohio St. 271, 78 N. E. 372.]

MALICIOUS PROSECUTION, When not Terminated.—If, in an action for malicious prosecution, it appears that the defendant had prosecuted the plaintiff before a justice of the peace for extorting money by blackmailing, and the plaintiff was held to answer, but on presentation of the same matter to the grand jury, it found two indictments against the plaintiff on the same evidence and founded on the same transaction, one for blackmailing and the other for assault with an intent to rob, and that the former indictment had been quashed and the second had not been disposed of when the action for malicious prosecution was commenced, it cannot be sustained, because the prosecution out of which it arose had not been finally determined. (p. 959.)

Oscar M. Gottschall, for the plaintiff in error.

W. A. Hallanan, for the defendant in error.

275 PRICE, J. It was incumbent upon the plaintiff on the trial of his action for malicious prosecution to establish by a preponderance of the evidence, among other things, that the prosecution for which he was asking damages had legally terminated prior to the commencement of such action, and if he failed to make out the averment of his petition to that effect, he had no right to recover.

The question was fairly raised at the close of the plaintiff's evidence, by the motion of the defendant, Gaiser, asking the trial court to direct a verdict in his favor on the ground that plaintiff had failed in his evidence to establish that the prosecution complained of had legally ended. The court overruled the motion and defendant excepted.

One of the grounds assigned in the motion for new trial is that the court erred "in overruling the motion of defendant to instruct the jury to return a verdict for the defendant at the close of the plaintiff's testimony." The motion for new trial containing this assignment was overruled. This ruling was complained of by Gaiser, in his petition in error filed in the circuit court. The same question is presented in the petition in error filed in this court, wherein it is alleged that the circuit court erred in affirming the judgment of the court of common pleas, and in not reversing the same.

Therefore, our first duty is to determine the vital question, whether the plaintiff in the trial court established by a preponderance of the evidence the **276** fact that the criminal

prosecution complained of had terminated or ended when he commenced his action for damages on account of the same. To decide this point, we are required to examine some of the facts disclosed by the record. As shown by the petition, the substance of which appears in our statement of this case, the plaintiff in error, Gaiser, on or about the twenty-first day of January, 1901, filed his affidavit against defendant in error, Frank Hurleman, and two others, charging therein that on the second day of January, 1901, in Montgomery county, Ohio, they did unlawfully, knowingly and maliciously and verbally demand of him, said Jacob Gaiser, the sum of four thousand dollars, with menaces to do injury to his person, by assaulting, striking and beating him with a club and rope, etc., with intent thereby then and there, by means of such menaces, to unlawfully, maliciously and feloniously extort from him said sum of money. The affidavit charged the accused persons with a violation of section 6830 of the Revised Statutes—a law penalizing such acts to extort money as blackmailing, and making the same a felony.

On hearing of the case, the examining magistrate held the accused, including Hurleman, to answer to the court of common pleas, and recognizance was asked and given for their appearance before that court.

The petition further alleges that on the thirty-first day of January, 1901, Gaiser appeared before the grand jury, and there willfully, maliciously and without probable cause, testified in said cause and furnished to the grand jury certain false information against the plaintiff, and thereby procured the indictment of the plaintiff on said charge, but that ²⁷⁷ on the second day of March, 1901, said indictment was quashed and dismissed and plaintiff discharged. The foregoing is the prosecution which the petition avers was thus wholly ended and determined. The printed record shows that the petition correctly details the contents of the affidavit upon which plaintiff and the others were arrested and bound over to the court of common pleas, and that the indictment found by the grand jury charged them with the same offense. But the record does not stop here. It appears that the same grand jury at the same time, and we think on the same testimony, found and returned another indictment, styled in the record as an indictment for assault with intent to rob. We do not find a copy of this indictment in the record, but we think it is en-

tirely clear that it was found on the same testimony that supported the indictment for blackmailing which was quashed, and that it covered the precise criminal transaction set out in that indictment. It appears that there was but one encounter between the parties, and that was on the 2d of January, 1901, and that after the grand jury heard Gaiser and the other evidence which he furnished, and perhaps on advice of the prosecuting attorney, the two indictments were found upon the same testimony. It is not claimed that Gaiser was twice heard before the grand jury, or that there were two separate examinations, which resulted in the two indictments. The petition does not allege that plaintiff was arrested on the indictment for assault with intent to rob, and the record shows his bond was fixed at two hundred dollars, and that he remained at large on such bond until the indictment was dismissed on the twenty-fifth day of November, 1902.

278 Such being the facts as we glean them from the record, what is the character of the second indictment as compared with the other?

The crime of committing an assault with intent to rob is defined by section 6821 of the Revised Statutes: "Whoever assaults another with intent to kill or commit robbery . . . shall be imprisoned in the penitentiary not more than fifteen years nor less than one year." There is one element common to both indictments, namely, an unlawful attempt to obtain the property of another. In one it was charged that with menaces and threats to do bodily injury to Gaiser, the accused parties demanded of him the sum of four thousand dollars. In the other it was charged, in substance, that the same parties, on the same day and at the same place, attempted to gain the same property through robbery. Both sections of the statutes whose violation was alleged in the respective indictments are found in the same title and chapter, under the title of "Crimes against the person."

The two indictments had a common root. Gaiser, on appearance before the grand jury, furnished the facts from which both indictments sprang. The dual form of the charge was at the instance, no doubt, of the counsel for the state. Again, had the indictment for assault with intent to rob been prosecuted to the conviction of Hurleman, he would have been convicted for the transaction of January 2, 1901, for

the occurrences of that day would have been marshaled to secure such conviction.

The action in the trial court for malicious prosecution which we are reviewing was commenced on the 14th of August, 1901, and the indictment for assaulting Gaiser with intent to rob was pending ²⁷⁹ until November 25, 1902, and of course the prosecution on that indictment was not legally terminated when the action was commenced. That the criminal prosecution had ended prior to the beginning of the civil suit for damages on account of the same is of vital importance. As said by Bigelow in his work on Torts, marginal page 183: "If the suit for the alleged malicious prosecution should be permitted before the prosecution itself is terminated, inconsistent judgments might be rendered—a judgment in favor of the plaintiff in the action for the prosecution, and a judgment against him in that prosecution; and it is often said that judgment against the party prosecuted would show, and that conclusively, that there was probable cause for the prosecution." This statement is qualified in the next section, where the author says: "But since conviction would show that the charge was not false, the prosecution could not have been wrongful." The termination of the prosecution need not be by a verdict of acquittal, but may be by an authorized *nolle prosequi*, or other form of legal discharge.

In Newell on Malicious Prosecution, 358, the author says: "It is a well-settled rule of law that when a party is arrested and bound over on a criminal charge, he must show, in order to prove a discharge and a termination of the prosecution, that no bill was found against him by the grand jury. The complaint in such case, being only a preliminary step, is regarded as part of the proceedings which are subsequently continued in the court to which the party is bound to answer to that which may be found against him by the grand jury. But it does not follow that the prosecution originally ²⁸⁰ commenced by complaint before a magistrate is terminated because the accused party is not charged by indictment with precisely the same offense as that set out in the complaint. If, on the same evidence, the grand jury present an indictment for a different offense from that charged before the magistrate, it does not destroy the identity of the prosecution, but only shows that different minds arrive at different conclusions from proof of the same facts. The prosecution

commenced against the party still continues, and cannot be said to be at an end until the indictment found by the grand jury is finally disposed of."

This authority is precisely in point in the case at bar, and, if sound, controls its decision. Is it sound?

In *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804, it appears that on the 27th of December, 1879, Norton, Wagstaff, and another, through a mistake of boundary lines, went upon the land of Schippel and cut down and carried away one or more trees standing and growing thereon. Immediately thereafter Schippel consulted the county attorney, and stated to him the facts, and the attorney advised the commencement of a criminal prosecution against Norton and the others. Such prosecution was commenced before a justice of the peace of the county on December 31, 1879, the county attorney having charge of the same. On January 6, 1880, the county attorney dismissed this prosecution, and on the same day commenced a new prosecution against the same parties in the district court for the same offense. Afterward, and before the latter prosecution was ended, Norton brought suit against Schippel for malicious prosecution. The supreme court held that: "Where a criminal prosecution is commenced ²⁸¹ before a justice of the peace, and is afterward dismissed, with the intention of commencing it again in the district court, and on the same day it is commenced in the district court, the criminal prosecution before the justice of the peace cannot constitute the basis of an action for a malicious prosecution while the criminal prosecution is still pending in the district court."

In *Bacon v. Towne*, 58 Mass. (4 Cush.) 217, it is held that: "If, in an action for a malicious prosecution in instituting proceedings before a magistrate against the plaintiff on a criminal charge upon which the plaintiff was bound over and subsequently indicted, it appear that the indictment has been withdrawn by a *nolle prosequi* on account of a formal defect therein, and that a second indictment has been returned upon the same evidence, for the same or a substantive part of the same charge, the original complaint and the proceedings thereon must be considered as the actual cause of the second indictment." The opinion of the court was rendered by Chief Justice Shaw.

In *Bacon v. Waters*, 84 Mass. (2 Allen) 400, it was held that, "if one who is charged with larceny in a complaint before a magistrate is held under recognizance to answer before the superior court, but not at the next or any regular term thereof, and at the next term of that court is indicted by the grand jury, on the same evidence which was before the magistrate, for fraudulently receiving the stolen goods, and not for the larceny, and the indictment is placed on file and not pleaded to, the finding of the indictment is to be regarded as a continuance of the same prosecution, and placing it on file is not a termination thereof so as to authorize the person ²⁸² indicted to maintain an action for malicious prosecution."

The opinion of the court by Bigelow, C. J., furnishes cogent reasons for the foregoing proposition.

It is claimed by the defendant in error that the indictment for assault with intent to rob was not instigated by Gaiser, because it was indorsed, "Indictment found on testimony sworn and sent to the grand jury at the request of the prosecuting attorney," and therefore such indictment was not a continuance of the prosecution instituted by Gaiser before the justice of the peace. But we think such is not the function or effect of the indorsement. Section 7207 of the Revised Statutes provides: "No indictment for a misdemeanor shall be found a true bill by the grand jury unless the name of the prosecuting witness is indorsed thereon, unless such bill is found upon testimony sworn and sent before the grand jury at the request of the prosecuting attorney, or of the foreman of the grand jury, in which case the fact that the bill was so found shall be indorsed on the bill; but it shall not apply," etc., to indictments under certain sections of the statute.

Each of the indictments we are considering charged a felony, and not a misdemeanor, and there was no requirement or authority for the indorsement upon the indictment. Not being authorized, it proves nothing upon the subject. Besides we have found from the evidence introduced by the plaintiff and from the circumstances attending it that both indictments were found upon the same evidence on the same day, and that they were a continuance of the prosecution which Gaiser instituted before the justice—all growing out

of the ²⁸³ single alleged criminal transaction on the second day of January, 1901.

We are of the opinion, therefore, that the criminal prosecution was not ended prior to the commencing of the action under consideration, and that this appears without contradiction in the plaintiff's evidence, upon which the court should have directed a verdict in favor of defendant.

The court of common pleas heard the entire case, but there was nothing offered by the defense to show that the prosecution had ended. It was a part of the answer that the prosecution was not ended prior to the filing of the petition for malicious prosecution.

These views lead us to reverse the judgments of the circuit and common pleas courts, and on the ground that it clearly appears that the criminal prosecution was not ended when the action for damages was commenced, we render judgment for the plaintiff in error.

Judgment reversed.

Shauck, C. J., Summers, Davis and Spear, JJ., concur.

The Malicious Prosecution of criminal actions is the subject of a monographic note to Ross v. Hixon, 26 Am. St. Rep. 127-164; the malicious prosecution of civil actions is the subject of a note to McCormick Harvesting etc. Co. v. Willan, 93 Am. St. Rep. 454-474.

GENERAL CARTAGE AND STORAGE CO. v. COX.

[74 Ohio St. 284, 78 N. E. 371.]

EVIDENCE.—An Agent's Authority cannot be Proved by His Declarations. (p. 960.)

AGENCY.—One Who is Permitted, Temporarily, in the Absence of the Manager of a Company, to assume authority and discharge the functions of such manager, has for the time being the same power as if he were the regular manager. (pp. 960, 961.)

AGENCY, Implied Authority of Agents, Estoppel to Controvert. When a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it. (pp. 961, 962.)

STORAGE COMPANY, Implied Authority of Agents of.—An agent of a storage company, acting as its general manager, has implied

authority to agree to effect insurance on goods being stored with it, and the company is liable for damages resulting from the failure to perform such agreement, though it had not in fact given such agent authority to enter into it. (p. 962.)

Action against the defendant storage company to recover damages for the breach of its alleged agreement to effect insurance on property stored with it by the plaintiff. The transaction at the time of the storage was conducted by an employé of the company named Smith, who, though not the regular manager, represented himself at the time to be such, and was by the company permitted to act in place of its manager, he being temporarily absent. The defendant offered evidence showing that Smith was not authorized to bind it by contracts to procure insurance, and that he did not report to it any insurance effected on the goods. Verdict and judgment for the plaintiff, and defendant prosecuted a writ of error.

White, Johnson, McCaslin & Cannon, for the plaintiff in error.

E. J. Thobaben, for the defendant in error.

292 SHAUCK, C. J. It cannot be claimed upon the evidence that the storage company was accustomed to insure goods left in its care, nor that Smith had express authority to make the particular contract set out in the petition or like contracts for insurance with others who deposited their goods with the storage company. Nor can it be said that such authority was implied in the sense that the making of the contract to insure was indispensable to the execution of his authority to receive goods for the company on bailment. Nor should there be any dissent from the legal proposition which counsel for the company advances in support of the criticisms of the rulings of the trial judge as to the competency of evidence and his instructions to the jury, viz., that the authority of an agent cannot be proved by his own declarations. But the question by which the liability of the storage company must be determined is. Was it within Smith's apparent authority to make the contract counted upon in the petition? It does not seem important that Smith was not in fact the company's manager, for he appeared in that capacity at the time of this transaction when the manager was absent, and it is clear that in the absence of the manager he was authorized

to act in his stead in the reception of goods for storage. His authority would not have been greater if he had regularly occupied the position of manager for the company. Counsel for the company insist that in determining whether Smith ²⁹³ had such apparent authority to make the contract for insurance that Cox might rely upon it, it is the conduct of the company that is to be considered. The soundness of this proposition should be conceded, for it is supported by the decided cases and by the reasons involved. The company fixed the character of its business, and employed Smith in the capacity in which he was presented to those who appeared in response to its invitation to the public to store goods with it for hire. It was not an employment of a transient character or to represent it in the conduct of an isolated transaction, but in the general conduct of a business of established and defined character and scope. In the relation into which the parties were brought by the regular and usual conduct of that business, the bailee, though not authorized to issue policies of insurance, was authorized to secure insurance upon goods stored with it, even without the express assent of the bailor, and to effect such insurance for the benefit of both parties to the contract of bailment. If insurance is effected by the bailee apparently for his own exclusive benefit, he will, nevertheless, by legal construction, be held to be a trustee for the bailor as to the surplus. The frequency with which this authority is exercised by bailees of the character of plaintiff in error is suggested by the reported cases. A number of them are cited in the briefs submitted in the present case, and they are in entire accord with respect to the doctrine stated. It is to the relation into which the parties were thus brought by the express and confessedly authorized contract of bailment in connection with the facts found in the statement of the case that we are to apply the rules of law respecting the apparent authority of an agent. A correct ²⁹⁴ statement of the matured view of that subject will show that it does not have exclusive regard to the immunity of the principal without consideration of the rights of those who accept his invitation to enter into contract relations with him. That view is comprehensively and accurately stated in *Johnston v. Milwaukee etc. Inv. Co.*, 46 Neb. 480, 64 N. W. 1100: "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, con-

versant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped as against such innocent third person from denying the agent's authority to perform it." It is an obvious limitation upon the liability of the principal that he who deals with the agent must act in good faith, respecting every restriction upon the agent's authority of which he may have notice. The most careful scrutiny of the record in the present case discovers no suggestion of the want of usual prudence or good faith on the part of the bailor. The rulings of the trial judge respecting the competency of evidence and instructions to the jury are consistent with these views, and the judgment is affirmed.

Price, Crew, Summers, Spear and Davis, JJ., concur.

Where a Principal has Placed His Agent in such a position in reference to a transaction, that a person of ordinary prudence, conversant with business usages, is justified in presuming him authorized to perform on behalf of his principal a particular act, the latter will be estopped, as against such innocent third person, after the performance of such act, to deny the authority of his agent in the premises: *Harrison Nat. Bank v. Austin*, 65 Neb. 632, 101 Am. St. Rep. 639; *Union Stockyard etc. Co. v. Mallory*, 157 Ill. 554, 48 Am. St. Rep. 341.

GILL v. FLETCHER.

[74 Ohio St. 295, 78 N. E. 433.]

MINES AND MINERALS.—A mining right may be separated from the surface, the surface being held by one person and the mining right by another. (p. 964.)

MINES AND MINERALS.—The Severance of a Mine and the Surface of Lands may be Accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception of the mines and minerals. (p. 964.)

MINES AND MINERALS, Exception of, What Amounts to.—A conveyance of a tract of land providing that the grantor reserves to himself "one-half of the plaster or the proceeds thereof which may hereafter be found on such land," "to have and to hold the same, the one-half of the plaster as above designated only excepted," does not amount to a mere reservation of the grantor terminating with his life, but is an exception whereby the grantor retains to himself the fee simple in one-half of the plaster. (p. 965.)

ADVERSE POSSESSION—Mining Property.—The Title to a Mine Which has been Severed from the Surface may be acquired by adverse possession, but this can take place only when the possession is actual, continuous, open, notorious, and hostile. It cannot be accomplished by secret trespasses on the owner's rights. (p. 966.)

ADVERSE POSSESSION.—A Tenant in Common cannot Maintain Title by Adverse Possession against his cotenant except by showing a definite and continuous assertion of an adverse right by overt acts of unequivocal character clearly indicating the assertion of ownership of the premises to the exclusion of the right of the cotenant, and such as must put him upon notice of the adverse claim. (p. 966.)

ADVERSE POSSESSION Against Tenant in Common of a Mining Right.—Where two persons are tenants in common of the right to mine beneath the surface, and one of them is the owner of the surface in severalty, the latter cannot create title by adverse possession to the mining right, though he acquires his title by a conveyance which takes no notice thereof, and holds exclusive possession of the surface, using it for agricultural purposes. (p. 967.)

Action to quiet title to certain lands and to enjoin defendants from interfering with plaintiffs in the premises and preventing them from going thereon and removing one-half of the gypsum therein. The plaintiff claimed under Joseph Gill, and the defendants under Jesse Payne. Gill, being the owner of real property including that in controversy, in the year 1838 executed a grant deed thereof to Payne, "reserving the one-half of the plaster and the profits thereof which may hereafter be found on such land. To have and to hold the same hereby conveyed with all and singular the premises and every part and parcel thereof, with every of the appurtenances (the half of the plaster above described only excepted) unto the said Jesse Payne, his heirs and assigns forever." The plaintiffs were the only heirs at law of Gill. The defendants had acquired the title of Payne by sundry conveyances, none of which made any reservation whatever and all of which were in appropriate form to vest in their respective grantees a complete title in severalty, and the defendants and their grantors had held possession of all the land for more than thirty years prior to the commencement of the action, clearing, cultivating and otherwise improving it for agricultural purposes under a claim of ownership, but no knowledge of such claim was brought home to the plaintiffs, or any of their predecessors in interest, prior to the year 1902. No mining was done on the land claimed by the defendants prior to the year 1900. The circuit court gave judgment in favor of the defendants, and the plaintiffs prosecuted a writ of error.

Scott Stahl and S. P. Alexander, for the plaintiffs in error.

William C. Wierman, for the defendant in error.

302 DAVIS, J. The plaintiffs in error make two contentions: 1. That as to the one-half of the gypsum underlying the land there was a severance of the title in the deed of Joseph Gill to Jesse Payne, so that the grantor withheld to himself a fee simple in one-half of the mineral estate, and conveyed to the grantee all of the other half of the mineral and all other rights in the land; 2. That the plaintiffs in error have not lost their rights in the mineral through adverse possession by the defendant and his grantors.

It is familiar law, already recognized by this court in *Burgner v. Humphrey*, 41 Ohio St. 340, that the surface of the land and the minerals underlying it may belong to different owners. The doctrine is thus stated, with citations of a great number of authorities: "It is well settled that a mine may be severed from the surface, the surface being held in fee by one person and the mine by another. The ownership of a mine after severance is to all intents and purposes the same as the ownership of land, and is attended with all the attributes and incidents **303** peculiar thereto. The mine itself may in turn be divided longitudinally, and each stratum become the subject of a grant, the mine thus becoming the property of as many owners as there are different strata. Severance may be accomplished by a conveyance of the mines and minerals only, or by a conveyance of the land with a reservation or exception as to the mines and minerals": 20 Am. & Eng. Ency. of Law, 2d ed., 771-773.

The defendant in the case at bar insists upon the technical distinction between a reservation and an exception, maintaining that since the language of the deed is, "the said Joseph Gill reserves the half of the plaster, etc., which may hereafter be found on said land," it should be construed as a reservation and not an exception; because the express language is that of a reservation, and because it is a reservation of something which was not known to be in esse at the time of the conveyance, as shown by the words, "which may hereafter be found." Upon the theory that the deed operated only as a reservation to the grantor of something out of the estate granted, it is urged that whatever rights the grantor reserved to himself expired with his life, because there are no

words of inheritance in the reservation. The weakness of this theory lies in the fact that it does not give full force and effect to all the words of the deed. Following and in immediate connection with the language above quoted these words occur, "To have and to hold . . . the half of the plaster as above described only excepted." This language cannot be overlooked nor thrown out of the instrument. The parties meant something in using it, and it can only mean that the grantor excepted out of the estate ³⁰⁴ granted and retained in himself the fee simple, which he already had, in the one-half of the plaster. It cannot be maintained that the plaster was not in esse at the time of the conveyance. With good reason it was at that time believed to exist, although it had not been "found"; and hence the reservation or exception. The court found that it exists now, and the necessary inference is that it existed then. The case is not at all like cases in which an estate is granted, and at the same time some new right or privilege is reserved out of it to the grantor, as, for example, a right of way or other easement.

It is conceded that if the language of the deed constitutes an exception, words of inheritance are not necessary to transmit the estate to the plaintiffs; but the use of the word "reserve" or "reserving," or of other words of similar import, does not necessarily create a technical reservation. The deed may nevertheless operate as an exception. The construction of the deed is to be drawn from the circumstances of each case and from all the words of the instrument, the object being to ascertain and give effect to the intention of the parties. In this case the words are both "reserve" and "except"; and it seems clear to us that not only the language employed, but also the facts found by the circuit court, justify the conclusion that it was not the intention of the grantor to reserve to himself merely an immediate privilege which should expire with his own life, but that it was the intention of the parties to except from the grant an absolute and inheritable estate in the one-half of the plaster beneath the surface of the land conveyed: *Hay v. Storrs*, Wright, 711; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568; *Coal Creek Min. Co. v. Heck*, ³⁰⁵ 15 Lea (Tenn.), 497; *State v. Wilson*, 42 Me. 9; *Bridger v. Pierson*, 45 N. Y. 601; *Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476; *Whitaker v. Brown*, 46 Pa. 197.

A separate estate in one-half of the mineral having been excepted by the grantor, it becomes a material question whether the rights of the plaintiffs are lost to them by adverse possession. It is not disputed that title to a mine which has been severed from the title to the surface may be acquired by adverse possession; but this can take place only when the possession is actual, continuous, open, notorious and hostile. It cannot be accomplished by secret trespass upon the owner's rights, and it has been held in many cases that, where there has been a severance of estates, neither the owner of the surface nor the owner of the mine can claim the other estate merely by force of the possession of his own estate. Nor does the mine owner lose his rights by mere nonuser. His title can be defeated only by acts which actually take the mineral out of his possession. We cite some of the cases which support the foregoing propositions: *Smith v. Lloyd*, 9 Ex. 562; *Arnold v. Stevens*, 24 Pick. (Mass.) 106; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. 284; *Kingsley v. Hillside Coal etc. Co.*, 144 Pa. 613, 23 Atl. 250; *Plummer v. Hillside Coal etc. Co.*, 160 Pa. 483, 28 Atl. 853; *Algonquin Coal Co. v. Northern Coal etc. Co.*, 162 Pa. 114, 29 Atl. 402; *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322.

In this connection it is proper to direct attention to the principle that a tenant in common cannot assert title by adverse possession against his cotenant unless he shows a definite and continuous ³⁰⁶ assertion of adverse right by overt acts of unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the cotenant. This principle has been so generally recognized by the courts that it may be said to be elementary. It has been distinctly declared by this court in *Youngs v. Heffner*, 36 Ohio St. 232. Therefore, when, by the exception and severance of title in the mineral by the deed, the grantor, Gill, and the grantee, Payne, became tenants in common in the mineral, each owning one-half, neither the grantee nor those holding under him could acquire title through the statute of limitations as against the plaintiffs unless they are able to show such open and unequivocally adverse possession of the mineral rights as would put the plaintiffs and their ancestors upon notice. Actual possession of the sur-

face and constructive possession of the mineral under color of deeds will not be sufficient. It must be an actual interference with the seisin of plaintiff's with denial of their title. The record of deeds from Payne's executor, and of mesne conveyances down to the defendant, which deeds convey the full title with no exceptions or reservations, cannot operate as adverse possession, nor as notice of an adverse claim. The deeds being silent as to the mining right in Gill and his heirs, which had been severed by the deed from Gill to Payne, they could only be construed as conveying only such title as Payne or his grantees had. As to the severed mining estate, a distinct title must be asserted and established: *Kineaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289, and cases cited above. There was no open, unequivocal, exclusive and adverse possession in this case; and to hold otherwise, in our opinion, would be inconsistent ³⁰⁷ with the findings of fact and with the line of decisions which we have cited.

Judgment reversed and judgment for plaintiffs in error.

Shauck, C. J., Price, Crew and Summers, JJ., concur.

Reservations and Exceptions in Deeds are defined and distinguished in the recent cases of *Pritchard v. Lewis*, 125 Wis. 604, 110 Am. St. Rep. 873; *Elsea v. Adkins*, 164 Ind. 580, 108 Am. St. Rep. 320. The severance of minerals from the surface of the soil by exceptions and reservations in deeds is discussed in the note to *Lillibridge v. Lackawanna Coal Co.*, 24 Am. St. Rep. 554-557.

If the Title to the Surface of Land has been severed from the title to coal and mineral underneath in place, possession of the surface for the statutory period of limitation does not convey the title to such minerals: *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216; *Houser v. Christian*, 108 Ga. 469, 95 Am. St. Rep. 73.

ORME v. BAKER.

[74 Ohio St. 337, 74 N. E. 439.]

BANKS AND BANKING.—Ordinarily the Relation Between a Depositor and the Bank is that of debtor and creditor, and that relation, when allowed to stand, will not authorize or permit such depositor to obtain a preference over general creditors, although the bank was insolvent when the deposit was made. (p. 971.)

BANKS AND BANKING.—Deposit, Rescinding and Recalling. Mere Insolvency does not furnish a ground for the rescission of a transaction, but to prevent title to the deposit vesting in the bank fraud must be shown in its reception sufficient to entitle the depositor to rescind and recall the deposit. (p. 971.)

BANKS, When Chargeable With the Knowledge of Their Officers.—If the cashier and vice-president of a bank are the only officers taking any active charge of its business, and are by the directors intrusted with the whole management, and it becomes insolvent through their acts, their knowledge of its condition must be regarded as the knowledge of the bank, though other directors constituting a majority of the board had no notice thereof. (p. 977.)

BANKS AND BANKING.—The Board of Directors of a Bank is Charged With Such Knowledge of Its Condition as could have been ascertained by the exercise of ordinary care. (p. 978.)

BANKS AND BANKING.—Deposit with Insolvent Bank. When Recoverable.—If moneys are received on deposit by a bank which is, and long has been, hopelessly insolvent, this is a fraud on the depositor entitling him to rescind the deposit and recover the amount thereof from receivers into whose possession the property of the bank went after their appointment. (p. 978.)

BANKS AND BANKING.—A Deposit is not so Indistinguishably Mixed with the other funds of a bank that it cannot be traced and identified, if it consists partly of moneys not credited to the depositor on the books of the bank until after the appointment of a receiver, and the balance is in checks none of which were collected prior to such appointment. (p. 978.)

Action by Baker to recover of the defendants, as receivers of the Commercial Bank, two hundred and eighty-three dollars by him deposited in that bank June 13, 1904, of which amount one hundred and sixty-nine dollars was in checks payable to his order and drawn on other banks. Judgment for the plaintiff, and the defendants prosecuted a writ of error.

Fred. L. Rosemond, Charles S. Turnbaugh and Robert T. Scott, for the plaintiffs in error.

Mathews & Mathews, for the defendant in error.

342 PRICE, J. The Commercial Bank Company was incorporated under the laws of this state in March, 1901, and it organized by the stockholders electing five directors, con-

sisting of Leonard Orme, H. O. Barber, P. C. Patterson, William Moss and Charles Bell. The directors promptly elected Leonard Orme, president, H. O. Barber, vice-president, William Moss, secretary, and Charles Bell, treasurer. These directors and officers of the bank were afterward re-elected to and occupied the same positions, ³⁴³ respectively, until the close of the bank on the thirteenth day of June, 1904, and subsequent thereto, but the directors never held a meeting after June, 1903.

Under the regulations of the company the directors appointed said P. C. Patterson cashier, and he served in that capacity until June 11, 1904. On that day, "and for a long time prior thereto," the said company "was hopelessly and irretrievably insolvent, of which fact said H. O. Barber and P. C. Patterson, officers and directors aforesaid, had full knowledge." Another fact agreed upon is, "that during the existence of said bank, said P. C. Patterson, as a director and by virtue of his office as cashier, and by the authority of said board of directors, was in control of the property of said bank, and was the active manager of its business. Leonard Orme was old and infirm, resided quite a distance from Cambridge (location of bank), and never took, nor was he, when elected president, expected to take, any active part in conducting the business of said bank." And further, "Charles Bell, treasurer, resided and was engaged in business at New Lexington, Ohio, and William Moss, the secretary, was engaged in business at Cambridge, and neither of them took any part in the management of the business of the bank."

One Dwight Scott was an employé in said bank during its existence, and during the last year, or longer, was, though never so designated or appointed, styled assistant cashier, and served the bank as teller and bookkeeper. During the last two years or more of the bank's life Paul Keyes was employed as bookkeeper. Prior to the thirteenth day of June, 1904, the plaintiff below, Baker, had ³⁴⁴ been a depositor in said bank and had an account therewith which showed a balance due him of about one hundred dollars. There had been no special arrangement with the bank concerning his deposits to treat checks as money, or to draw against them before collected, but his custom when making deposits was to pass his checks indorsed in blank and his money over the counter to the cashier or other person in charge, who would enter the same in plaintiff's pass-book, and then credit plain-

tiff's account with the bank on its books, subject to the right of the bank to charge back any check that might be dishonored. The ninety-nine dollars in money, and the two checks on other banks amounting to one hundred and eighty-four dollars referred to in the petition, were deposited on the thirteenth day of June, 1904, about one-half hour before the bank closed, by handing the same to Dwight Scott, assistant cashier, together with a deposit slip, without any specific instructions, who entered the amount thereof as a credit to plaintiff in his pass-book, which was returned to him. Scott put the ninety-nine dollars cash with the money of the bank, "and the same became indistinguishably mingled with the general mass of the bank's funds then on hand, and that may have been thereafter received" on that day. No entry was made of said deposit to plaintiff's credit on any book of the bank on that day, nor at any time by said bank, or its officers, agents and employes, but after the appointment of the receiver and at his direction on the fifteenth day of June, 1904, the amount of said deposit, cash and checks, two hundred and eighty-three dollars, was entered on the ledger to plaintiff's credit, but these checks, being on other banks, were not collected by the receivers for several days thereafter. When said deposit was made by plaintiff, he had no knowledge ³⁴⁵ of the insolvent condition of the bank, but believed it to be solvent, and when he learned of the appointment of a receiver, on the fifteenth day of June, 1904, demanded payment of him of said money and checks or the proceeds thereof aggregating two hundred and eighty-three dollars, which demand was refused.

On the eleventh day of June preceding, which was Saturday, about midnight, said Barber and Patterson clandestinely absconded, but the same was neither known or suspected by anyone connected with the bank until after the close of business on the thirteenth day of June, 1904, when its total funds, including the amount deposited by plaintiff, amounted to three thousand and twenty-six dollars and sixteen cents, which was placed in the safe and afterward, on the 15th of June, taken possession of by the receiver.

Another fact agreed upon is that "the insolvency of the bank was chiefly, if not wholly, due to said Barber and Patterson, severally, jointly, and in the names of sundry corporations with which they were respectively connected, and in violation of their duties as such officers, becoming in-

debted to said company on notes and for overdrafts in the aggregate of more than one hundred thousand dollars, notwithstanding that each of them was at said time insolvent, said indebtednesses were unsecured, and yet unpaid. . . . Said doings of Barber and Patterson were not known to, or consented to by, said board of directors, but the same and the insolvent condition of said company were by said Barber and Patterson in their personal interest, respectively, concealed from and were unknown to said board of directors." The amount Barber and Patterson owed the bank was more than one-half its paid-up capital stock.

³⁴⁶ It appears also that, prior to the departure of Barber and Patterson, said Dwight Scott, assistant cashier, and Paul Keyes, bookkeeper, had knowledge that said "company was short of funds," and they were informed by Barber and Patterson, or by one of them, that they were going to Cincinnati to procure funds for the bank, and would return Monday, June 13th, or Monday night, with funds for the bank. But they did not return and the bank never opened for business after that day.

Another important fact agreed upon is: "That an examination of the condition of said bank at any time within thirty days before it was closed would have disclosed its insolvency, but no such examination was made by the board of directors or by any person on their behalf."

The foregoing are the facts brought into the record, and what judgment do they demand?

Ordinarily, the relation between a general depositor and the bank is that of debtor and creditor, and that relation, when allowed to stand, will not authorize or permit such depositor to obtain a preference over other general creditors in case the bank was insolvent when the deposit was made. Mere insolvency does not furnish a ground for a rescission of the transaction, but in order to prevent the title to the deposit vesting in the bank, fraud must be shown in its reception sufficient to entitle the depositor to repudiate the deposit and reclaim the same. The plaintiff claims the facts make such a case.

It is alleged in the petition and not denied in the answer, and it is also agreed upon as a fact in the case, that for a long time prior to the making of the deposit in question, the bank was "hopelessly and irretrievably insolvent." These are remarkably ³⁴⁷ strong words, and they character-

ize the condition of the bank for a period not made definite, but left to us as an admonition that hopeless insolvency had existed for a "long time."

The plaintiffs in error, the receivers, insist that although such had been the real condition of the bank for a long time, it was not known to the board of directors and officers of the bank other than Barber, director and vice-president, and Patterson, director and cashier; and that their transactions which involved and wrecked it were in their own personal interest and were concealed from the board of directors. It is argued from this fact that their knowledge cannot be imputed to the bank. In other words, they had been and were occupying a position with reference to the business of the bank adverse to its interests, and while they were agents for the bank for some purposes, and in all things in the line of duty within the scope of their authority, yet they did not represent it in their fraudulent appropriation of its assets. To determine the soundness of this claim we must not overlook one other fact agreed upon, "that Patterson, during the existence of the bank, as a director and by virtue of his office of cashier, and by the authority of said board of directors, was in control of the property of said bank and was the active manager of its business."

It would seem that the board of directors, in whom the law vests the general control and management of the affairs of the corporation, attempted to shift all, or at least a large portion, of its authority and responsibility to the shoulders of the cashier. This is entirely consistent with the other fact, that there had been no meeting of the board within the year next preceding the failure of the bank. The ³⁴⁸ president was old and infirm and resided some distance from the city, the location of the bank. When he was elected it was not expected by the board that he would take any active part in conducting the affairs of the bank. Charles Bell, the treasurer, was engaged in business in another county and William Moss, the secretary, was in business of his own in Cambridge, but neither of them took any part in the management of the business of the bank. These men were also directors, as were Barber, Patterson and Orme. How was the board of directors to receive any information under such circumstances? How could it know what was going on inside of the institution except through those put and left in active charge?

If the wrongs committed by the cashier and vice-president had been confined to a single transaction, or to a few transactions within a brief period, there would be some room for the proposition made, that the bank should not be charged with their knowledge of its insolvent condition. But such was not the case. It had been hopelessly and irretrievably insolvent for "a long time" prior to the deposit involved, and the fraudulent acts of the cashier and vice-president consisted of many acts committed not at once, but during many months, perhaps years, for it is said in the agreed statement that the "insolvency was chiefly, if not wholly, due to said Barber and Patterson severally, jointly and in the names of sundry corporations with which they were respectively connected, and in violation of their duty as such officers, becoming indebted to said company on notes and for overdrafts in the aggregate of more than one hundred thousand dollars." They were insolvent all this time, and the bank had no ³⁴⁹ security for their indebtedness. There was a protracted looting, and the cash in the vaults shrank gradually from time to time as the fraudulent acts proceeded until the final collapse.

In cases resting on facts far more favorable to the bank, let us listen to the voice of the authorities.

In *Smith v. Anderson*, 10 N. Y. Supp. 278, the plaintiff delivered moneys to the president of a bank to be deposited therein, and the latter, without plaintiff's knowledge or consent, deposited them in his own name as her attorney, and afterward unlawfully appropriated a large part thereof to his own use. It was held that the bank is liable, since it is chargeable with the knowledge possessed by its president. On page 279 the court say: "If Warner [the president] had converted the money without the bank having received it, or without credit being given on its books, it would not be liable. But when its president receives funds which go into the bank, it is chargeable with all the knowledge possessed by him; otherwise those dealing with banks would be without remedy in case of fraud or misappropriation on the part of its president." And on page 280, it is said: "The bank created its president, and if, through his fraud, it or a third person must suffer, the maxim protects the customer."

In *Black Hills Nat. Bank v. Kellogg*, 4 S. Dak. 312, 56 N. W. 1071, the cashier took a note payable to himself, as an individual, and transferred it to the bank of which he was cashier. It was held that knowledge of the cashier as to de-

fenses and equities existing against the note was the knowledge of the bank.

In *Le Duc v. Moore*, 111 N. C. 516, 15 S. E. 888, J. had executed his promissory note to M., the ³⁵⁰ president of a bank, who before its maturity and for value, but for his own benefit, indorsed the note over to the bank. The president and cashier composed the discount committee of the bank, and the president participated in discounting the note. It was held that the bank took the note subject to all the equities by which the president as an individual was bound, the presumption being that his knowledge was the knowledge of the bank.

Of like import is *Oak Grove etc. Cattle Co. v. Foster*, 7 N. Mex. 650, 41 Pac. 522. In *Hardy v. First Nat. Bank*, 56 Kan. 493, 43 Pac. 1125, it appeared that the president and cashier, respectively, of a bank were part owners of a note sued on by the bank, which note was taken in the name of S. by the procurement of the president and cashier, who had full knowledge of the transaction in which it was given. It was held that the indorsement of the note by S. without recourse did not operate to transfer it to the bank free from defenses existing between the original parties to it.

The same principle is maintained in *City Bank v. Phillips*, 22 Mo. 85, 64 Am. Dec. 254. In *First Nat. Bank of New Milford v. Town of New Milford*, 36 Conn. 93, it appears that C., who was at the same time treasurer of a town and cashier of a bank, took three thousand dollars from the funds of the bank for his own use, and executed a note to the bank for the amount as treasurer of the town, the note being entered upon the books of the bank in the same manner with other notes taken for money loaned. C. was the principal financial manager of the bank, and had been allowed and accustomed to make loans at his discretion, without consulting the directors. He had already, without their knowledge, embezzled the funds of the bank to a large amount. The town had been in the habit of borrowing ³⁵¹ money at this bank and elsewhere, and upon notes executed by the town treasurer, and these loans had been reported to the town in the annual reports of the treasurer, which reports had been accepted by the town. Occasional votes of the town for thirty years had authorized the treasurers to borrow money for the use of the town. In the suit by the bank against the town on the note mentioned it was held: 1. That the votes of the

town and reports of the town treasurers were admissible in evidence upon the question of the authority of C. to borrow money for the town; 2. That C. was engaged in an extensive fraud upon the bank, and in view of all the facts, it was fairly presumable that he made the note in the form in which he did as a false representation and cover by which to perpetrate a fraud on the bank, and with no intention to bind the town; 3. But that if he intended to bind the town, his own fraud as treasurer was known to him as agent of the bank, and was therefore the knowledge of the bank, and it could not recover.

In *Loring v. Brodie*, 134 Mass. 453, it is held that if a cashier of a bank receives securities on a loan from the bank to a trustee, with knowledge that the securities belong to a trust, the bank is affected with the knowledge of its cashier, and is put upon inquiry as to whether the trustee has authority to pledge the securities. In *First Nat. Bank v. Blake*, 60 Fed. 78, it appeared that the defendant had executed his promissory note to C. and delivered it upon condition that it was to be surrendered to him upon C.'s failure to perform stipulated acts. C. immediately transferred the note by indorsement to a bank of which he was ³⁵² president and general manager. The circuit court of the United States held that as C. himself was the sole representative of the bank, in the transfer of the note to it, the bank is chargeable with his knowledge of the condition to which it was subject, and could not sue on the note until that condition is performed.

In *Farmers' etc. Bank v. Loyd*, 89 Mo. App. 262, it was held that where a bank cashier makes purchase of a certificate of stock as such cashier, he acts within the scope of his authority, and the knowledge that he has of the condition of the stock must be imputed to the bank.

In *Baldwin v. Davis*, 118 Iowa, 36, 91 N. W. 778, it is held that where an agent of a bank has notice that notes and a mortgage securing them were without consideration and fraudulent, the bank cannot hold the notes as collateral, it being charged with the knowledge of its agent. See, also, *Bank v. Smith*, 110 Tenn. 337, 75 S. W. 1065, where the same doctrine is approved.

Goshorn v. People's Nat. Bank, 32 Ind. App. 428, 102 Am. St. Rep. 248, 69 N. E. 185, is a case where a depositor, desiring to withdraw his bank deposit and commit it to a trust company, received from the bank cashier a suggestion as to a

particular trust company, and drawing a check delivered it to the cashier, with instructions to deposit the amount named with the company suggested. Instead of doing so, the cashier substituted the depositor's money for paid checks of his own on the bank which he was carrying as cash. It was held that even on the theory that the cashier was the depositor's agent for the transmission of the fund, the bank was liable for its misappropriation, the transaction amounting to a payment of the ³⁵³ depositor's check merely with the evidences of the cashier's indebtedness, and the bank being cognizant of the fraud through its cashier.

See, also, *Cutting v. Marlor*, 78 N. Y. 454, for similar holding. In that case one Bonnor was the president of the bank involved in one of his fraudulent transactions in converting to his use certain securities delivered to the bank as collateral for a loan. The trustees of the bank left the entire management of it to Bonnor and another who was styled manager. The trustees took the statement of Bonnor without question or examination. The bank was chargeable with knowledge of Bonnor's fraud. On page 460, the court say: "A corporation is represented by its trustees and managers; their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry." See, also, *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532; *Fishkill Sav. Inst. v. Bostwick*, 19 Hun, 354; *Holden v. New York etc. Bank*, 72 N. Y. 286.

In *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. Rep. 428, 28 L. ed. 49, it was held that knowledge of the president of a bank is its knowledge. In *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, the court held that the acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled a depositor to reclaim his drafts or their proceeds.

³⁵⁴ Indeed, there are peculiar and urgent reasons for a more stringent enforcement of the rule against corporations than against individual principals, from the fact that the only way of communicating actual notice to a corporation is

through its agents: *Fulton Bank v. New York etc. Canal Co.*, 4 Paige, 127. "A corporation cannot see or know anything except by the eyes and intelligence of its officers."

There are many other cases in the same channel, but we have cited enough for the present purpose. It is quite true that cases can be found that seem to hold to a doctrine contrary to the foregoing, but they rest on a different character of facts, and usually treat of a single transaction wherein the fraudulent act of the officer or agent of the bank did not bind it. But as before stated, the conduct and acts of Barber and Patterson were of a series, running doubtless through many months; obtaining bank funds on their own worthless notes and on overdrafts from time to time, so that the bank became "hopelessly and irretrievably insolvent," and this condition existed for a long time prior to the making of the deposit in question.

What, then, is the application of the law as we understand it to the facts of this case? The officers named, of course, knew the bank was insolvent, and under the circumstances surrounding them their knowledge was the knowledge of the bank. The board of directors created the cashier and vested in him the broad powers described in the above agreed statement. Not only so, but they seem to have abandoned all supervision and control during the last year of its active existence—abandoned it to whatever fate might overtake it in charge of such ³⁵⁵ officers. The bank did not become insolvent after Barber and Patterson absconded on the night of June 11th, for it had been insolvent a long time prior thereto, and hopelessly so. Through them the bank knew it. The board of directors is chargeable with such knowledge of its condition as would have been ascertained by the exercise of ordinary care.

Nevertheless its doors were again opened on Monday, June 13th, which fact was an invitation to make a deposit when none should have been received. It was a palpable fraud on any innocent depositor to receive his money on that day—such fraud as should vitiate the transaction as a deposit and prevent title from vesting in the bank. In our judgment, no title did pass to the bank in this instance.

It seems useless to say that Barber and Patterson, having absconded on the previous Saturday night, did not represent the bank on the 13th. True, they left it, but they left it as a

mere shell. Scott, who acted as assistant cashier and bookkeeper, and Keyes, as bookkeeper, were in charge on the 13th. They knew the bank was short of funds, so that with what was taken in on that day there was but little over three thousand dollars in its coffers. They were the only persons on duty there, and they knew that if the departing officers did not return with ample means by Monday night, the bank could not open again. They did not return, and as soon as the depositor learned that the bank was closed, he demanded of the receivers the return of his deposit. We think he had a right of rescission and that the receivers held his deposit impressed with a trust to return it.

³⁵⁶ However, it is urged that the money deposited was indistinguishably mingled with the other funds of the bank, and that before a trust can attach, the depositor must be able to trace and identify his particular deposit. As a general rule, this is true, but not always so. In this case there is not much difficulty in applying the rule, for it is agreed that, although the cash deposited was placed and commingled with other cash on hand the evening of the deposit, it was not credited to Barber on the books of the bank until after the appointment of the receiver, and it was done under his direction. As to the checks on other banks which were part of the deposit, they were not collected by the bank, but by the receiver and several days after the appointment. While there were no "earmarks" on the money, the exact amount so deposited was known, and we regard the identification sufficient under the rules adopted by the courts to govern in such circumstances. In *Richardson v. New Orleans Debenture Co.*, 102 Fed. 780, 52 L. R. A. 67, 42 C. C. A. 619, the circuit court of appeals held: 1. "That when a bank receives a deposit after hopelessly insolvent, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise, and prevents the money deposited from becoming the property of the bank, and a trust is the equitable result." 2. "Where a bank receives a deposit on the day of its suspension, when it is known by its officers to be insolvent, and mingles the money with its own funds which, to an amount larger than the deposit, pass into the hands of a receiver, it is not essential to the right of the depositor to recover his deposit from the receiver, that he should be able to trace the identical money

deposited into the receiver's hands, but ³⁵⁷ it is sufficient that the amount which went into his hands was increased by the amount of the deposit."

In *Massey v. Fisher*, 62 Fed. 958, the circuit court for eastern district of Pennsylvania laid down the following rule: "The fact that the money was not marked, and by a comingling with other funds of the bank lost its identity, does not affect the right to recover in full, if it can be traced to the vaults of the bank and it appears that a sum equivalent to it remained continuously therein until removed by the receiver." That court in the opinion cites many supporting cases.

In *Wasson v. Hawkins*, 59 Fed. 233, the circuit court held that "where money and checks are unsuspectingly deposited in a bank, which is known by its managing officer to be hopelessly insolvent, a few minutes before the closing hour on the last day on which it does business, and the checks are subsequently collected by the bank's clerk, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who retains the specific money among the general mass of the bank's funds."

In *Beal v. City of Somerville*, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291, the circuit court of appeals, first circuit, laid down the following proposition: "A city treasurer deposited checks in a bank, indorsed by him 'for deposit,' and the checks were immediately credited to him on his bank-book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated as cash, or that he should draw against them before collection. The bank became insolvent before the checks were collected, and their proceeds passed into the ³⁵⁸ hands of a receiver. Held, that no title passed to the bank except as a bailee, and that the depositor was entitled to the proceeds."

Of like import is *City of Philadelphia v. Aldrich*, 98 Fed. 487. The foregoing decisions on this subject are quite within the case of *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. Rep. 390, 33 L. ed. 683, where it is decided that "when a bank has become hopelessly insolvent, and its president knows it is so, it is a fraud to receive deposits of checks from innocent depositors, ignorant of its condition, and he can reclaim them or their proceeds." Further discussion and citation of authorities seem to be unnecessary.

We believe there is no error in the judgment of the lower court, and it is affirmed. But in rendering this judgment, we are not laying down general rules to be applied indiscriminately, but wish to limit our decision and its scope to the facts of this case, on which alone it is authority.

Shauck, C. J., Crew, Summers and Spear, JJ., concur.

Davis, J., dissents.

The Acceptance of a Deposit by a Bank which is insolvent, and therefore by statute forbidden to continue in business, constitutes such fraud as entitles the depositor to reclaim his money: *Hyland v. Roe*, 111 Wis. 361, 87 Am. St. Rep. 873, and see the cases cited in the cross-reference note thereto. On the criminal liability of the officers of an insolvent bank for receiving deposits, see *State v. Easton*, 113 Iowa, 516, 86 Am. St. Rep. 389, and cases cited in the cross-reference note thereto.

CINCINNATI TRACTION COMPANY v. HOLZENKAMP.

[74 Ohio St. 379, 78 N. E. 529.]

NEGLIGENCE, Presumption of from Accident.—When the thing which caused injury is under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care on the part of the defendant. (p. 983.)

STREET RAILWAYS, Presumption of Negligence from the Falling of a Trolley Pole.—If, when a passenger is about to enter an electric street-car, stopped at the usual place for that purpose, the trolley pole falls upon and injures him, a presumption arises, in the absence of all explanation, of negligence on the part of the street railway company rendering it liable for the damages sustained from the injury. (p. 985.)

Action by the plaintiff, Anna Holzenkamp, to recover of the defendant, the Cincinnati Traction Company, for injuries received by her from the falling of a trolley pole of one of its cars when she was about to step upon it on a street in the city of Cincinnati.

The plaintiff and three other ladies desiring to enter a car of the defendant, one of them signaled it to stop, and it did so. It was operated by means of double trolleys, and the conductor was trying to place the trolleys on the wires when the pole of one or both of them snapped, and one or both

fell, striking the plaintiff before she had entered the car, and inflicting the injury for which she sought to recover.

The court, at plaintiff's request, instructed the jury as follows:

"If the jury find from the testimony that the plaintiff had gone to the corner of Franklin avenue and Harrison avenue, and that thereupon the car of the defendant came to said point and stopped for the purpose of taking the plaintiff on board as a passenger, and that it was at a point near the corner where the cars of the defendant were in the habit of stopping to take on passengers, and that plaintiff was standing in the street adjacent to and by the car track along which the car came going to the city, and that the plaintiff intended to get on the car, and was about to do so, and the car stopped at the point where she was standing to enable her to do so; and if the jury find that just as the plaintiff was about to step on the car she was struck by the broken or falling trolley, then I charge you that for the purposes of this case the plaintiff was a passenger on the car, and if the plaintiff was then and there struck and injured by the trolley breaking and falling upon her from the said car, then the presumption arises, in the absence of other proof, that the traction company was guilty of negligence."

The court also gave a general charge to the jury, in the course of which it said: "The law is, as applied to the facts of a case like this, that if a piece of iron or heavy metal which forms part of an overhead apparatus of a railroad of this character breaks and falls down and injures somebody, even one passing by, but more particularly one who is there in proper position to, and is about to, become a passenger upon this railway, that there the law raises a presumption, out of the mere fact that the thing occurred, that it occurred through the negligence of the defendant.

"And if no evidence is introduced to you to show you by testimony that this apparatus had been properly inspected, that it was properly built, and that it was in all respects such as is usual and proper, and was in a proper condition, and therefore that the accident was simply an accident which no foresight could have prevented, then you are justified in presuming, from the occurrence of the accident itself, that it was through either some defect of the apparatus which could have been remedied, and ought to have been remedied, and would have been discovered by proper inspection, or that it

resulted through some careless and improper handling, whereby it was made to fall down and produce this injury."

Outcalt & Foraker, for the plaintiff in error.

Charles W. Baker, for the defendant in error.

³⁸³ SUMMERS, J. The record does not show an exception to the giving of the special charge, so that the ³⁸⁴ question so ably argued is not presented by the record.

The special charge seems to have been fashioned after the ruling in *Brian v. Bennett*, 8 Car. & P. 724, where an omnibus stopped to take on a person who had hailed it but started just as he was putting his foot on the step, so that he was thrown down and injured. The court said: "I think that the stopping of the omnibus implies consent to take the plaintiff as a passenger, and that it is evidence to go to the jury." It is to be observed that the facts here are materially different, and that the instruction goes farther and that its correctness may be questioned.

The relation of carrier and passenger arises from contract. The passenger must expressly or impliedly have agreed to compensate the carrier or transport him, and the carrier must expressly or impliedly have agreed to carry him, and performance of the contract must have been commenced and the passenger be under the care of the carrier.

But, as has been said, the question is not presented in the record, and even if an exception to the charge had been noted, it would not have been necessary to determine the question, for the court held that the maxim "*res ipsa loquitur*" applied, and in effect instructed the jury that there was a legal presumption that the defendant was negligent from the fact that the trolley fell and injured the plaintiff, although she was not a passenger, but only about to become one.

It has been held in some cases that the maxim applies only where the relation of carrier and passenger exists, but while the presumption may arise when that relation exists from circumstances that, in the absence of such relation, would not give rise to it, ³⁸⁵ attention to the reason of the maxim, and to decided cases as well, will show that it does not depend upon the existence of that relation.

In *Cooley on Torts*, 799, the learned author says: "The rule applied to carriers and passengers is not a special rule to govern only their conduct, but is a general rule which may

be applied wherever the circumstances impose upon one party alone the obligation of special care."

In *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718, which was a case of destruction of property by an explosion of dynamite, Garoutte, J., says: "As was well said by the court in *Rose v. Stevens etc. Co.*, 20 Blatchf. 465, 11 Fed. 438: 'Undoubtedly the presumption has been more frequently applied in cases of carriers of passengers than in any other class, but there is no foundation of authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties.' The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is the duty which the law enjoins upon him; and the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care toward this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the nature of the relations existing between the party insuring and the party insured. The presumption arises from the inherent nature and character of the act causing the injury. Presumption arises from the ³⁸⁶ doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown." The maxim is thus stated by *Shearman and Redfield on Negligence*, fifth edition, section 59: "Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured anyone, is enough to make out a presumption of negligence. When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." The following cases selected at random from a much longer list will serve to illus-

trate the application of the maxim in cases where the relation between the parties was not based upon contract. *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, is one of the earliest and a leading case in this country. In that case the wall of a building fell out and a person standing on the sidewalk was injured by the bricks and mortar. It was held that the maxim applied. In *Scott v. London Dock Co.*, 3 Hurl. & C. 596, an injury had been caused by the falling of bags of sugar on the plaintiff as he was passing by a warehouse. The court said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of defendant or his servants, and the accident ³⁸⁷ is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In *Richmond Ry. etc. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736, the plaintiff's horse took fright from the sudden stopping of an electric car and an unusual volume of smoke coming from under it. In *Campbell v. Consolidated Traction Co.*, 201 Pa. 167, 50 Atl. 829, the plaintiff was seated in his wagon, which was standing on a track of the defendant's road in one of the streets of the city of Pittsburg. In front of him were two cars; the second car in front of him moved across the track on an ascending grade. The trolley pole slipped from the wire and the car stopped and then slipped backward about sixty feet and struck the car back of it, and the force of the collision drove the rear car against the plaintiff's horse and wagon, or the motorman of that car moved it backward to avoid a collision. In *Uggla v. West End St. Ry. Co.*, 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126, the plaintiff, while driving on Park Square in Boston, was struck by a broken iron attached to a wire guy. The iron was part of an ear used to clasp a trolley wire and applied to it a strain from the guy, in order to keep the trolley wire in place around a curve and over the defendant's track. The ear broke with the strain and one part of it fell, striking the plaintiff on his head. In *Manning v. West End St. Ry. Co.*, 166 Mass. 230, 44 N. E. 135, a switch stick flew from the hands of the conductor as he was using it on the top of an electric car and injured a person on the sidewalk in the street. The conductor was using the stick to free a trolley which had caught

in the ³⁸⁸ frog at the junction of some overhead wires. Similar accidents had occurred there half a dozen times before. Held, in an action for personal injuries, that there was evidence of defendant's negligence, either in defective construction of the trolley wires and poles, or in the conductor's use of the switch stick. In *Thomas v. Western Union Tel. Co.*, 100 Mass. 156, the hind wheels of plaintiff's wagon became entangled with one of the defendant's wires which was swinging across a public highway. Held, that the fact, unexplained and unaccounted for, that the wire was in such a condition was in itself evidence for the jury on the issue of negligence of the defendant. In *Hogan v. Manhattan R. R. Co.*, 149 N. Y. 23, 43 N. E. 403, a piece of iron fell from an elevated railroad structure in a city street upon a person lawfully in the street. In *Clarke v. Nassau Electric R. R. Co.*, 9 App. Div. 51, 41 N. Y. Supp. 78, the plaintiff's horse stepped upon one of the rails of the defendant's tracks, sprang into the air, and fell down upon the track, where it died in a few minutes. The plaintiff also received a shock when he seized the hames of the harness. In *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321, one of the span wires that supported the trolley wires of defendant's railroad broke and swung to the sidewalk, where it struck and injured the plaintiff. In *O'Flaherty v. Nassau Electric R. R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96, a trolley wire used in connection with the defendant's railroad broke and fell to the ground, and the current shocked the plaintiff. This case is approved without report in 165 N. Y. 624, 59 N. E. 1128.

The plaintiff was not only lawfully in the street, but she stood where she had an implied invitation from the defendant to stand, and it was the duty ³⁸⁹ of the defendant to use reasonable care to avoid injuring her, and the court was warranted in taking judicial notice of the fact, as it did, that such a thing as the breaking of the trolley pole and the falling of the trolley with a portion of the pole does not happen in the ordinary course of events, unless there was some negligence either in its construction or in the management of it, and, this being so, the court very properly charged the jury that the plaintiff, in the absence of any evidence tending to rebut the presumption of negligence, was entitled to recover for her injuries. The judgment is affirmed.

Price, Crew, and Spear, JJ., concur.

PRESUMPTION OF NEGLIGENCE FROM THE HAPPENING OF AN ACCIDENT CAUSING PERSONAL INJURIES.

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I. Scope of Note.

We shall confine the scope of this note to actions for personal injuries. Hence we shall exclude from our consideration the presumptions of negligence which arise with respect to injuries to cattle, damages caused by fires started by sparks from railway locomotives or otherwise. Nor shall we consider, except incidentally, the presumptions of negligence arising from collisions at sea. And we shall also exclude consideration of questions relating to the rebuttal of the presumption of negligence, and we shall likewise exclude questions relating to the presumption whether the person injured was in the exercise of due care. The earlier cases on the subject of this note were considered in the note to Philadelphia etc. R. Co. v. Anderson, 20 Am. St. Rep. 490, while the presumption of negligence arising when the injury has been suffered and there is no evidence showing who was at fault was discussed in the note to Huey v. Gahlenbeek, 6 Am. St. Rep. 792. The question of the liability for the keeping of explosives was considered in the monographic note to Kinney v. Koopman, 67 Am. St. Rep. 134, while the duties and liabilities of electric corporations were considered in the monographic note to Hebert v. Lake Charles Ice etc. Co., 100 Am. St. Rep. 515, 524.

II. Nature of the Presumption of Negligence.

The presumption of negligence arising from the happening of an accident stands in the place of actual proof of negligence until it is rebutted and overthrown: Cleveland etc. R. Co. v. Newell, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; Union etc. R. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. Rep. 843, 39 L. ed. 1003. Or, in other words, if there is nothing to explain the evidence so as to show that the defendant was in the exercise of due care, the plaintiff is entitled to recover the damages suffered by him from the accident so shown: Louisville etc. R. Co. v. Jones, 83 Ala. 376, 3 South. 902; Augusta etc. R. Co. v. Randall, 79 Ga. 304, 4 S. E. 674; Louisville etc. R. Co. v. Snyder, 117 Ind. 435, 10 Am. St. Rep. 60, 20 N. E. 284, 3 L. R. A. 434; Central etc. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; Graham v. Burlington etc. R. Co., 39 Minn. 81, 38 N. W.

812; *Duerr v. Consolidated Gas Co.*, 86 App. Div. 14, 83 N. Y. Supp. 714.

It will generally be found that where the presumption of negligence is said to exist, the proof which establishes the accident also shows the circumstances from which some negligence or want of care may be attributed to the wrongdoer: *Young v. Bransford*, 12 Lea, 232. In a late case in North Carolina it was said that no presumption of negligence arises from the mere accident, but that the fact of the accident is in some cases permitted to go to the jury as some evidence to be weighed and considered by them, and given such effect as in their opinion is proper: *Isley v. Virginia Bridge etc. Co. (N. C.)*, 53 S. E. 841.

The legislature of a state may declare that the happening of an accident through a defect in cars or appliances of a railway company may constitute prima facie evidence of negligence: *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 56 Am. St. Rep. 695, 42 N. E. 768, 31 L. R. A. 651.

III. General Rule Respecting the Creation of the Presumption of Negligence.

Negligence may be, of course, proved from circumstances: *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 92 Am. St. Rep. 847, 68 Pac. 896, 58 L. R. A. 313. The general rule is that when negligence is the ground upon which a recovery of damages is sought, the burden of proving such negligence is upon the plaintiff: *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 South. 142; *James v. Orrell*, 68 Ark. 284, 82 Am. St. Rep. 293, 57 S. W. 931; *Philadelphia etc. R. Co. v. Stebbing*, 62 Md. 504; *Mitchell v. Chicago etc. R. Co.*, 51 Mich. 236, 47 Am. Rep. 566, 16 N. W. 388; *Renders v. Grand Trunk R. Co.*, 144 Mich. 387, 108 N. W. 368; *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817; *Chicago etc. R. Co. v. Trotter*, 61 Miss. 417; *Omaha v. Bowman*, 52 Neb. 293, 66 Am. St. Rep. 506, 72 N. W. 316, 40 L. R. A. 531; *Pawling v. Hoskins*, 132 Pa. 617, 19 Am. St. Rep. 617, 19 Atl. 301; *Spees v. Boggs*, 198 Pa. 112, 82 Am. St. Rep. 792, 47 Atl. 875, 52 L. R. A. 933; *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5, 31 N. W. 164; *Nitroglycerin Case*, 15 Wall. 524, 21 L. ed. 206; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28 L. ed. 410. As will be shown later on, exceptions to the general rule in this respect are frequently made in cases of common carriers: *Spees v. Boggs*, 198 Pa. 112, 82 Am. St. Rep. 792, 47 Atl. 875, 52 L. R. A. 933.

The mere happening of an accident does not generally raise a presumption of negligence without reference to the attending circumstances: *Jones v. Alabama etc. R. Co.*, 107 Ala. 400, 18 South. 30; *Denver v. Spencer*, 34 Colo. 270, 114 Am. St. Rep. 000, 82 Pac. 590; *Robinson v. Huber (Del.)*, 63 Atl. 873; *Southern R. Co. v. McMillan*, 101 Ga. 116, 28 S. E. 599; *Terre Haute etc. R. Co. v. Leeper*, 60 Ill.

App. 194; Baltimore etc. R. Co. v. Welsh, 17 Ind. App. 505, 47 N. E. 182; Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956; Atchison etc. R. Co. v. McFarland, 2 Kan. App. 662, 43 Pac. 788; Cincinnati etc. R. Co. v. Cook (Ky.), 73 S. W. 765; Henry v. Brackenridge Lumber Co., 48 La. Ann. 950, 20 South. 221; Philadelphia etc. Co. v. Stebbing, 62 Md. 504; Murphy v. Great Northern R. Co., 68 Minn. 526, 71 N. W. 662; Buesching v. St. Louis Gas Light Co., 6 Mo. App. 85; Lincoln St. R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740; Foss v. Baker, 62 N. H. 247; Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Parento v. Taylor & Co., 26 App. Div. 518, 50 N. Y. Supp. 518; Van Orden v. Acken, 28 App. Div. 160, 50 N. Y. Supp. 843; Melchert v. Smith B. Co., 140 Pa. 448, 21 Atl. 755; Stearns v. Ontario Spinning Co., 184 Pa. 519, 63 Am. St. Rep. 807, 39 Atl. 292, 39 L. R. A. 842; Venbuor v. Lafayette Worsted Mills, 27 R. I. 89, 60 Atl. 770; Missouri Pac. Ry. v. Foreman, 73 Tex. 311, 15 Am. St. Rep. 785, 11 S. W. 326; Lyndsay v. Connecticut etc. R. Co., 27 Vt. 643; Sorenson v. Menasha Paper etc. Co., 56 Wis. 338, 14 N. W. 446. But where a contractual relation exists between the parties, such as that of carrier and passenger, the mere happening of an accident is frequently held to raise the presumption of negligence: George v. St. Louis etc. R. Co., 34 Ark. 613; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169; Roberts v. Chicago etc. Ry. Co., 78 Ill. App. 526; Patton v. Pickles, 50 La. Ann. 857, 24 South. 290; Baltimore etc. R. Co. v. Swann, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313; Seybolt v. New York etc. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Kay v. Metropolitan Street R. Co., 29 App. Div. 466, 51 N. Y. Supp. 724; Anderson v. Brooklyn etc. Co., 32 App. Div. 266, 52 N. Y. Supp. 984; Dampman v. Pennsylvania R. Co., 166 Pa. 520, 31 Atl. 244; Mexican etc. R. Co. v. Lauricella, 87 Tex. 277, 47 Am. St. Rep. 103, 28 S. W. 277.

And likewise where a remedy is given by statute for injuries caused by negligence, such as, for instance, against municipal corporations for failure to keep its streets in repair, negligence is presumed without showing notice of the defect: Gibson v. City of Huntington, 38 W. Va. 177, 45 Am. St. Rep. 853, 18 S. E. 447, 22 L. R. A. 561.

The court, in *St. Louis etc. R. Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439, in discussing this question, said: "If the testimony introduced in behalf of the plaintiff in such cases should develop that the injury resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation or maintenance of the railroad, then the burden of proof would not shift to the defendant to account for the accident, for the explanation itself (made by the plaintiff) would exonerate the carrier from the charge of negligence. The gist of the action is want of care on the part of defendant. A presumption of negligence in such cases arises, not from the fact of the injury alone, but from its cause or the circumstances attending it;

and if such circumstances as detailed in the testimony introduced by the plaintiff should show, for instance, that he was shot through a window by a person distant from the track, or that the train was struck by lightning, or that he fell down while the train was standing still, or that the accident happened in some other manner wholly beyond the control of the carrier or its servants, there would be no presumption of negligence for the defendant to rebut, for the reason that the plaintiff had, in his account of the accident, disproved the charge of negligence made by him. The railroad company being held to the highest degree of care which human prudence or foresight can provide, it is sufficient in this class of cases to show *prima facie* that the injury was occasioned by the failure of some portion of the machinery, appliances or means provided for the transportation of passengers, or any other thing which the carrier can and ought to control, as a part of its duty to carry passengers safely: *Meir v. Railroad Co.*, 64 Pa. 225, 3 Am. Rep. 581. A presumption of negligence arises from the occurrence of an accident alone. When it proceeds from an act of such a character that, where due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible: *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160. In *Gleeson v. Virginia etc. R. R. Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. ed. 458, this question was considered by the supreme court of the United States. The accident in that case occurred by reason of a landslide in a railway cut caused by an ordinary fall of rain. It was held that an injury to a passenger, caused by the train coming in contact with the earth which had fallen down upon the track, raised a presumption of negligence on the part of the railway company, and threw the burden of proof of showing that the slide was in fact the result of causes beyond the control of the railway company upon the latter. In passing upon the question the court said: 'The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.' "

In a later case in that same court, it was observed, in speaking of the rule respecting the presumption of negligence on the part of

a carrier arising from proof of an accident to a passenger, that: "It relates to burden of proof, and should not be confused with the question of what constitutes negligence per se. According to this rule, when proof of an accident to a passenger is made, a *prima facie* case of negligence on the part of the carrier is presented, and no more. The defendant is then called upon to explain, but it has the right to make its explanation from the plaintiff's own evidence, if it can; and if, upon that evidence, different minds might reach different conclusions respecting the character of the defendant's conduct, the jury should be allowed to say if a recovery is warranted. The rule is the same in this respect as it is in reference to contributory negligence—a pure matter of defense which may be derived from the plaintiff's own testimony": *Metropolitan St. Ry. Co. v. Warren* (Kan.), 86 Pac. 131.

Likewise the supreme court of Illinois, in expressing the general rule on this subject, observed: "The weight of authority seems to be in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier. The rule is thus stated by Booth in his work on *Street Railway Law*, section 361: 'The mere fact that a passenger has been injured en route, without any evidence whatever as to the manner in which the accident occurred, does not raise a presumption of negligence against either of the parties, but the burden of proof shifts where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it, or where it is caused by the mismanagement of a thing over which the defendant has immediate control, or for the management or construction of which it is responsible.' Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of *vis major*, or the tortious act of a stranger, tending to produce the accident, no such *prima facie* case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident, and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the accident are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery, or safe apparatus, or if it had employed proper and com-

petent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage-coach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway: *Bradner on Evidence*, 422, 424; *Ray on Negligence of Imposed Duties of Passenger Carriers*, 690-697; *Hutchinson on Carriers*, secs. 799-801; *Patterson on Railway Accident Law*, 438; *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Holbrook v. Utica etc. R. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 87 Am. Dec. 717; *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115; *Stern v. Michigan Cent. R. R. Co.*, 76 Mich. 591, 43 N. W. 587; *Wharton on Law of Negligence*, sec. 661. It is reasonable that a presumption of negligence should arise against the carrier in cases where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury, and of explaining how it occurred, while the injured party is generally ignorant of the facts. But where the cause of the accident is outside of and beyond any of the instrumentalities under the control of the carrier, its means of knowledge may not be, and are not, necessarily better than those of the passenger. In the present case, the car in which the appellee was riding was traveling along the public street of a city, which the owners of other vehicles had as much right to use as the owners of the cable cars. Plaintiff's own testimony showed that he was injured by a wagon traveling along the public street, and passing the car in which he was riding. The accident may have been due, so far as plaintiff's evidence showed, to careless driving on the part of the driver of the wagon. Plaintiff's proof was equally consistent with the absence as with the existence of negligence on the part of appellant: *Hutchinson on Carriers*, sec. 799. At any rate, such evidence left it doubtful whether appellant was guilty of negligence or not, and the presumption that the accident was unavoidable was as reasonable as that it was due to appellant's negligence: *Stern v. Michigan Cent. R. R. Co.*, 76 Mich. 591, 43 N. W. 587. Under such circumstances, the nature of the accident was not such as to throw the burden of proof upon the appellant': *Chicago etc. Ry. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238.

But the burden of proving the facts forming the basis of the presumption of negligence rests upon the plaintiff: *Kefauver v. Philadelphia etc. Ry. Co.*, 122 Fed. 966. The quantity or degree of evidence required to sustain an action for personal injuries is determined by the law of the forum, notwithstanding the law where the accident happened makes the mere happening of an accident a

presumption of negligence: *Helton v. Alabama etc. R. Co.*, 97 Ala. 275, 12 South. 276; *Richmond etc. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270; *Johnson v. Chicago etc. R. Co.*, 91 Iowa, 248, 59 N. W. 66; *Jones v. Chicago etc. R. Co.*, 80 Minn. 488, 83 N. W. 446, 49 L. R. A. 640.

The general statements of the court respecting the rule are often misleading by reason of having been made more with reference to the particular case under consideration than with the idea of expressing a rule applicable to all cases. It will be found, we believe, from a consideration of the cases cited in this note, that the presumption of negligence does not arise except where the facts by which the accident itself is proved amount to such circumstances as show *prima facie* negligence on the part of the defendant. In other words, the presumption of negligence is never indulged without proof of facts from which negligence can be inferred.

The effect of the varying circumstances which raise the presumption of negligence or which prevent its creation will be discussed in the subdivisions immediately following.

IV. Necessity for the Circumstances to be Such as to Create a Reasonable Probability of Negligence.

"The presumption," said the court in *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718, in speaking on the subject, "arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown.

"Based upon the foregoing principles a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in *Shearman and Redfield on Negligence*, section 60: 'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of action come equally within its provisions. In speaking to this question, it is said in *Cooley on Torts*, 799: 'The rule applied to carriers of passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one

party alone the obligations of special care.' The author then cites the case of a householder engaged in repairing his roof; a piece of slate falls therefrom and injures a traveler upon the street. He then says: 'True, the act of God, or some excusable accident, may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection.' "

The creation of the presumption of negligence does not depend upon the relation of carrier and passenger, even though the presumption is indulged more frequently in cases involving that relation than in others, but arises in other relations whenever the circumstances warrant: *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 379, ante, p. 980, 78 N. E. 529; *Rose v. Stephens etc. Co.*, 11 Fed. 438, 20 Blatchf. 411.

The presumption of negligence arises out of a consideration of the cause of the accident itself: *Murray v. Pawtucket Valley St. Ry. Co.*, 25 R. I. 209, 55 Atl. 491; *Fagon v. Rhode Island Co.*, 27 R. I. 51, 60 Atl. 672. This idea was well illustrated by Justice Ruggles in *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 242, 64 Am. Dec. 502, wherein he observed: "In actions like the present, the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff. The same rule applies as in an action for an injury to a passenger in a stage-coach. It generally happens, however, in cases of this nature, that the same evidence which proves the injury done proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example: A passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside of the car, and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier. It is incorrect, therefore, to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the causes of the injury or from other circumstances attending it, and not from the injury itself.

"The defendant contends, in the present case, that there was no circumstance attending the injury to the plaintiff from which any presumption of negligence on the part of the defendant can fairly be raised. But this proposition cannot be maintained. The boarding-cars were placed on the adjoining track by the defendant, and

were occupied by workmen in its service. The plaintiff's arm was broken at the moment when the passenger-car, in which she sat, was opposite the boarding-car. The long horizontal mark on the car, and other circumstances, show that the injury could not have been produced by a stone thrown against the car by any person outside. The object which was the immediate cause of the injury must, from the mark left on the car, have been of great strength and of considerable size. It must have been firmly fixed in its position. The shock of its first contact with the car would otherwise have thrown it off; instead of that, it remained upheld in its position until it had passed three windows of the passenger-car, protruding to some extent into each other. There was nothing except the boarding-cars to which the thing which caused the injury could be attached. These circumstances are convincing proof of its connection with one of the boarding-cars; they cannot be accounted for on any other hypothesis. It was the duty of the defendant and its agents to keep the narrow space between the boarding-cars and the passenger train clear and free from obstruction; this was not done; and although the immediate cause of the injury cannot be ascertained, this is the misfortune of the defendant, and not of the plaintiffs. The burden of showing that the injury was accidental and without fault of the defendant lies, under the circumstances above stated, on it.'

The presumption of negligence may arise from an accident if the circumstances are of such a nature that it may be fairly inferred from them that there is a reasonable probability that the accident was caused by a failure on the part of the defendant to exercise proper caution: *Howser v. Cumberland etc. R. Co.*, 80 Md. 146, 45 Am. St. Rep. 332, 30 Atl. 906, 27 L. R. A. 154. Likewise the presumption of negligence may also depend on the nature of the accident and the surrounding circumstances which characterize it, in combination with the measure of care required to be exercised by the respective parties: *Cincinnati etc. Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528. And where the character of the accident is such as to strongly point to a cause which is abnormal and negligent, it devolves upon the defendant to explain that the abnormal cause was not due to want of care: *Memphis Electric Lighting Co. v. Letson*, 135 Fed. 969. But it must be borne in mind that it is not the injury, but the manner and circumstances of the injury, that gives rise to the presumption of negligence: *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 South. 142; *Kohner v. Capital Traction Co.*, 22 App. D. C. 181, 62 L. R. A. 875. The court, in *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922, in speaking of the fact that it was not the injury itself, but the circumstances attending it, that gave rise to the presumption, said: "If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming

in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The res, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue—the defendant's negligence. The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present."

Hence the rule is frequently stated that when an accident happens on a railway train from which a passenger sustains injury by the breaking down of the passenger-car, or the running off of the train, by the spreading or breaking of the rails, the very nature of the occurrence is regarded as prima facie evidence of negligence on the part of the carrier or its servants: *George v. St. Louis etc. Ry. Co.*, 34 Ark. 613; *Chicago etc. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *Pittsburgh etc. R. Co. v. Williams*, 74 Ind. 462; *Tuttle v. Chicago etc. Ry. Co.*, 48 Iowa, 236; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Edgerton v. New York etc. R. Co.*, 39 N. Y. 227; *Mexican Central Ry. Co. v. Lauricella*, 87 Tex. 277, 47 Am. St. Rep. 103, 28 S. W. 277; *Carpue v. London etc. Ry. Co.*, 5 Ad. & El., N. S., 747.

V. Necessity for Defendant to Have Been in Control of the Agency Causing the Accident.

Where an unusual and unexpected accident happens, caused by machinery under the exclusive management or control of defendant, the accident, speaking for itself, creates a presumption of negligence: *Chicago City Ry. Co. v. Eick*, 111 Ill. App. 452; *Bevis v. Baltimore etc. R. Co.*, 26 Mo. App. 19; *Breen v. New York etc. R. Co.*, 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; *Deming v. Merchants' Cotton etc. Co.*, 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Rintoul v. New York Central etc. R. Co.*, 17 Fed. 905, 21 Blatchf. 439. This rule is most frequently applied against carriers where an injury happens to a passenger as a result of the condition of the road, the rolling stock or other appliances, or the management thereof: *Memphis etc. Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Kentucky etc. Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; *Baltimore etc. R. Co. v. State*, 63 Md. 135; *Madden v. Missouri Pac. Ry. Co.*, 50 Mo. App. 666; *Chicago etc. R. Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Meir v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Baltimore etc. R. Co. v. Noell's Admr.*, 32 Gratt. 394; *Carrico v. West Virginia etc. R. Co.*, 35 W. Va. 389, 14 S. E. 12.

But the fact that a passenger is injured by something under the control of the carrier does not necessarily create a *prima facie* case of negligence: *Allen v. Northern Pacific Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804. Hence in order to justify a presumption that a carrier knew of a dangerous defect in its roadbed, it must appear that the defect and its danger were obvious to one at all attentive: *Valley Ry. Co. v. Keegan*, 87 Fed. 849, 31 C. C. A. 255.

VI. Necessity for the Accident to Have Resulted from an Act Which Ordinarily or with Exercise of Ordinary Care Would not Have Happened.

Where an accident proceeds from an act of such a character that when due care is taken in its performance no injury would ordinarily happen, it raises a presumption of negligence against the defendant: *City etc. Ry. Co. v. Svedborg*, 20 App. D. C. 543; *Shuler v. Omaha etc. Ry. Co.*, 87 Mo. App. 618. Thus in the leading English case of *Byrne v. Boadle*, 2 Hurl. & C. 722, in which the plaintiff, who was walking past defendant's shop, was injured by a barrel of flour falling upon him, Pollock, C. B., said: "There are many accidents from which no presumption of negligence can arise, but this is not true in all cases. It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident would be *prima facie* evidence of negligence."

Likewise in the case of *Scott v. London Dock Co.*, 3 Hurl. & C. 596, it was said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

And in the English case of *Kearney v. London etc. Ry. Co.*, L. R. 5 Q. B. 411, affirmed in the exchequer chamber (L. R. 6 Q. B. 759), case which is frequently cited approvingly by the American courts, Cockburn, C. J., said: "Where it is the duty of persons to do their best to keep premises or a structure in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which, it seems to me, may fairly be presumed from the fact that there was the defect from which the accident has arisen."

Consequently, the courts apply this rule in cases where an accident results from allowing a fallen telegraph wire to remain suspended

over the feed wire of an electric railway company, and the like: *Western Union Tel. Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763, 31 L. R. A. 572. And likewise where an iron shank breaks while being properly used in carrying a vessel of melted iron, it raises a presumption that it was unsafe for that use: *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065. But the presumption of negligence does not arise as to a defect in an appliance where it gives way under an extraordinary strain: *Olsen v. Starin*, 43 App. Div. 422, 60 N. Y. Supp. 134. Nor does the fact that a machinist's battering ram, a heavy machine easily overbalanced, fell and injured a person seeking employment, raise a presumption of negligence: *McDonough v. James Reilly Repair etc. Co.*, 45 Misc. Rep. 334, 90 N. Y. Supp. 358. The fact that no accident had ever before happened in descending the shaft of a mine is not conclusive that the mine owner had exercised due care in selecting and keeping in proper repair the hoisting apparatus: *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631. An injury from some defect or imperfection in the appliances of a common carrier or from some omission of duty or negligent act of its servants raises the presumption of negligence as against the carrier: *Hite v. Metropolitan etc. Ry. Co.*, 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33. In some of the cases the courts raise the presumption of negligence from the fact that the injurious thing was inherently and intrinsically dangerous, hurtful and insecure, and that under such circumstances it is necessary for the defendant to show that he was exercising reasonable care at the time of the accident: *Wabash etc. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530.

VII. Necessity for the Cause of the Accident not to be Obscure.

Where the cause of the accident is so obscure that it cannot be fairly ascertained from the evidence that it was due to the negligence of the defendant, no presumption of negligence arises: *State v. Maine etc. R. Co.*, 81 Me. 84, 16 Atl. 368; *Corcoran v. Boston etc. R. Co.*, 133 Mass. 507; *Short v. New Orleans etc. R. Co.*, 69 Miss. 848, 13 South. 826; *Illinois Central R. Co. v. Cathey*, 70 Miss. 332, 12 South. 253; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Jarrell v. Charleston etc. R. Co.*, 58 S. C. 491, 36 S. E. 910.

VIII. Effect Where Several Possible Causes for the Accident Exist, One of Which Would not Render Defendant Liable.

Where there are two adequate causes which may have accounted for the accident, and one of these causes would not render the defendant liable, the court will not indulge a presumption of negligence and will require the plaintiff to establish the defendant's negli-

gence by reasonably direct proof: *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57, 84 N. W. 36.

IX. Effect Where Accident May Have Happened Through Plaintiff's Own Negligence.

Where from the nature of an accident it might as well have happened through the plaintiff's own negligence as through the defendant's negligence, no presumption of negligence will arise from the mere happening of the accident: *Dresslar v. Citizens' St. R. Co.*, 19 Ind. App. 383, 47 N. E. 651; *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. 35.

X. Effect Where Both Plaintiff and Defendant Were Under an Obligation to Exercise Equal Care.

The presumption of negligence does not arise where both the plaintiff and the defendant were chargeable with equal knowledge of the cause of the accident and both were chargeable with the same degree of care with respect to preventing the happening of the accident: *Sauer v. Eagle Brewing Co.* (Cal. App.), 84 Pac. 425; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, 87 Am. Dec. 717; *Fearn v. West Jersey Ferry Co.*, 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366.

XI. Effect Where the Accident Could be Accounted for on the Theory of Inevitable Accident or as an Act of God.

Negligence will not be presumed where the accident belongs to that class of accidents called inevitable accidents or accidents arising through act of God: *Gleeson v. Virginia etc. R. Co.*, 5 Mackey, 356; *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443; *Chicago Union Traction Co. v. Crosby*, 109 Ill. App. 644; *Chicago etc. R. Co. v. Reilly*, 212 Ill. 506, 103 Am. St. Rep. 243, 72 N. E. 454; *Bennett v. Ford*, 47 Ind. 264; *Wabash etc. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Cork v. Blossom*, 162 Mass. 330, 44 Am. St. Rep. 362, 38 N. E. 495, 26 L. R. A. 256; *Lewis v. Flint etc. R. Co.*, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Curran v. Warren etc. Mfg. Co.*, 36 N. Y. 153.

XII. Application of the Doctrine of Res Ipsa Loquitur in Creating Presumptions of Negligence.

Most of the courts which refer to the legal principles sustaining or rejecting the proposition whether there is a presumption of negligence in the particular case under consideration speak of the doctrine of *res ipsa loquitur*. We believe that this doctrine is, without doubt, the real basis of the presumption of negligence.

Thus in the late case of *Wilbur v. Rhode Island Co.*, 27 R. I. 205, 61 Atl. 601, Justice Johnson, in discussing the application of *res ipsa loquitur*, said: "In *Kearney v. London etc. Ry. Co.*, L. R. 5

Q. B. 411, as the plaintiff was passing along the highway under a railway bridge of the defendant a brick fell from the top of one of the pilasters, and injured him. In delivering the opinion, Cockburn, C. J., said: 'My own opinion is that this is a case to which the principle *res ipsa loquitur* is applicable, though it is certainly as weak a case as well can be conceived, in which that maxim would be taken to apply.'

'These cases are clearly distinguishable from the case at bar, as are all the cases cited by the plaintiff's counsel. In this class of cases it is not the fact of injury alone which speaks for itself, so as to give evidence of negligence on the part of a defendant. The mere fact that a person is injured does not speak as to the negligence of anybody. An injury having been sustained, however, it may be, and often is, the case that the attendant circumstances are such that the mind naturally and necessarily infers negligence therefrom. As was said by McSherry, C. J., in *Benedick v. Potts*, 88 Md. 52, 56, 40 Atl. 1067, 1068; 41 L. R. A. 478: 'The maxim does not go to the extent of implying that you may from the mere fact of an injury infer what physical act produced that injury; but it means that when the physical act has been shown or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know what did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury.'

'There is, therefore, a difference between inferring from a conclusion of fact what it was that did the injury and inferring from a known or proven act, occasioning the injury, that there was negligence in the act that did produce the injury. To the first category the maxim *res ipsa loquitur* has no application. It is confined, when applicable at all, solely to the second. In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies, because, when the thing which produced the injury is unknown, it cannot be said to speak or to indicate the existence of causative negligence': See, also, *Fagan v. Rhode Island Co.*, 27 R. I. 51, 60 Atl. 672. In the case at bar the fact that the plaintiff caught her shoe in the running-board [of a street-car], and the heel of the shoe was torn off, and she was thrown, does not speak as to the negligence of the defendant. Proof of such fact would not raise a presumption of negligence, which it would be necessary for the defendant to rebut. It would be necessary for the plaintiff to go further and show some circumstance attendant upon the accident of such a character as to justify the jury in inferring negligence as the cause of the accident: *Paynter v. Bridgeton etc. Trac-*

tion Co., 67 N. J. L. 619, 52 Atl. 367; *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478."

The doctrine of *res ipsa loquitur* does not raise a presumption in favor of plaintiff, but merely carries the case to the jury, permitting it to infer negligence, and find on all the evidence whether plaintiff has sustained his burden of proof: *Ross v. Double Shoales Cotton Mills*, 140 N. C. 113, 52 S. E. 121, 1 L. R. A., N. S., 298. "The doctrine *res ipsa loquitur* is that the thing itself speaks. Whether it applies in a given case is said to 'become a simple question of common sense'": *National Biscuit Co. v. Wilson* (Ind. App.), 78 N. E. 251. It is based on the apparent fact that the accident could not have happened without negligence on the part of the carrier or upon the literal meaning of the expression that the thing itself speaks, and shows *prima facie* that the carrier was negligent: *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 111 Am. St. Rep. 990, 82 Pac. 995, 2 L. R. A., N. S., 392. In other words, a jury under this rule are warranted in finding from their knowledge of the world that such accidents do not usually happen except through the defendant's fault: *Pinney v. Hall*, 156 Mass. 225, 30 N. E. 1016. Where the physical facts surrounding the accident are such as to create a reasonable probability that the accident was the result of negligence, the rule of *res ipsa loquitur* is said to be applicable, since the physical facts themselves are evidential: *Seybolt v. New York etc. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380. And likewise where a certain course of action has been pursued for a considerable length of time without injury to others, and upon being changed does injure a person, it is said that the accident, unexplained, speaks for itself to the effect that the cause of the accident was negligence: *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167. A frequent application of the rule of *res ipsa loquitur* arises where the thing causing the accident is shown to be under the management of the defendant or his agents, and the accident is such as does not ordinarily happen if those managing the thing exercise proper care: *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443; *Mumma v. Easton etc. R. Co.* (N. J. L.), 65 Atl. 208; *Breen v. New York etc. R. Co.*, 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; *Waterhouse v. Schlitz Brewing Co.*, 12 S. Dak. 397, 81 N. W. 725, 48 L. R. A. 157; *Richmond etc. Electric Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736. In the recent case of *Duhme v. Hamburg-American Packet Co.*, 184 N. Y. 404, 112 Am. St. Rep. 569, 77 N. E. 386, the court, in speaking on this subject, observed: "We may admit that the doctrine of '*res ipsa loquitur*' is not, or should not be, confined to cases of contractual relations, such as those sustained with a carrier, or a bailee (*Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922); but that does not advance the argument for the appellant. That doctrine, plainly, is based upon the general consideration that, where the management and con-

trol of the thing which has occasioned the injury are in a defendant, it is within his power to produce evidence of the actual cause of the accident, which the plaintiff may be unable to do. 'Its application,' as was observed by Judge Cullen, in *Griffen v. Manice*, 'presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence.' When it is claimed that the accident is such as, in the ordinary course of the business, does not happen with the exercise of reasonable care, and, therefore, that it speaks for itself, as imputing neglect to the defendant, the case should be one where, if not the relations of contract between the parties, the circumstances that bring them into relation, are such as to create a duty to exercise care, which an injured party may legally complain of if neglected. If the plaintiff were a passenger, that relation would require the exercise of the important degree of care commensurate with the contract of carriage. It would render the defendant liable for the slightest neglect against which human prudence and foresight might have guarded, as to results from defective conditions found to exist in machinery, appliances or other matters essential to safety of operation: *Stierle v. Union Ry. Co.*, 156 N. Y. 70, 684, 50 N. E. 419, 834; *Morris v. New York etc. R. Co.*, 106 N. Y. 678, 13 N. E. 455; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199, 23 N. E. 462; *Breen v. New York etc. R. Co.*, 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502. In all these cases the conditions may be such as to warrant the application of the rule of '*res ipsa loquitur*.' Its operation where the relations are not of a contractual character can only be, as in *Griffen v. Manice*, where there are actually shown such facts and circumstances, in the nature of the defendant's undertaking and of the accident itself, from which the jury are able, if not compelled, to draw the inference of negligence. It was not intended that it should exempt the plaintiff from the burden of proving affirmatively negligence, or circumstances making negligence a legitimate, if not an irresistible, inference."

The doctrine of *res ipsa loquitur* is a mere mode of proving negligence as a matter of evidence: *Lyles v. Brannon Carbonating Co.*, 140 N. C. 25, 52 S. E. 233. It does not dispense with the necessity that the plaintiff prove the fact of negligence: *Stewart v. Van Deventer Carpet Co.*, 138 N. C. 60, 50 S. E. 562. The rule of *res ipsa loquitur* is always applied with caution: *Kight v. Metropolitan R. Co.*, 21 App. D. C. 494. And it is not applicable where the act causing the injury is the voluntary and intentional act of someone: *Illinois Steel Co. v. Zolnowski*, 118 Ill. App. 209. Nor does it apply in favor of a trespasser or one who is at the place of injury under a permission or mere naked license: *McLain v. Chicago etc. Ry. Co.*, 121 Ill. App. 614.

XIII. Effect of Contractual Relations Between the Parties in the Presumption of Negligence.

a. **In General.**—As has been shown in previous subdivisions of this note, the presumption of negligence arises from the circumstances surrounding the accident and not from the mere fact that the parties sustained certain contractual relations toward each other. It is quite true that the fact that the plaintiff and defendant sustain certain contractual relations may make certain circumstances constitute negligence on the part of the defendant which would not constitute negligence in the absence of such relations. This idea is well illustrated by the principal case (*Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 379, ante, p. 980, 78 N. E. 529), wherein the court, in referring to the maxim *res ipsa loquitur* in connection with the presumption of negligence, observed: "It has been held in some cases that this maxim applies only where the relation of carrier and passenger exists, but, while the presumption may arise when that relation exists from circumstances that in the absence of such relation would not give rise to it, attention to the reason of the maxim and to decided cases as well will show that it does not depend upon the existence of that relation. In *Cooley on Torts*, 799, the learned author says: 'The rule applied to carriers and passengers is not a special rule to govern only their conduct, but is a general rule, which may be applied wherever the circumstances impose upon one party alone the obligation of special care.' In *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718, which was a case of destruction of property by an explosion of dynamite, *Garoutte, J.*, says: 'As was well said by the court in *Rose v. Stephens etc. Co. (C. C.)*, 11 Fed. 438, 20 Blatchf. 411: "Undoubtedly, the presumption has been more frequently applied in cases of carriers of passengers than in any other class, but there is no foundation of authority or reason for any limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties." The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is the duty which the law enjoins upon him, and the law also enjoins the duty upon this appellant, and all others, in the conduct of their business, to exercise a certain degree of care toward this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the nature of the relations existing between the party insuring, and the party insured. The presumption arises from the inherent nature and character of the act causing the injury.' "

Where no contractual relations exist between the parties, negligence will not be presumed from the mere happening of an accident

unless the accident would not likely have happened if due care had been exercised: *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 63 Am. St. Rep. 807, 39 Atl. 292, 39 L. R. A. 842.

The court in *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259, criticised the doctrine laid down in some of the cases, to which we have adverted. The court, speaking through Judge Parker, said: "The court failed to recognize a distinction which has been carefully guarded by the courts of this state as well as by nearly all other jurisdictions in this country, between actions founded in negligence where a contract relation existed between the parties, and those in which the defendant owed no other duty than to use ordinary care and caution, as the nature of his business demanded, to avoid injury to others.

"Its omission to do so may have been induced by the opinion of the court in *Rose v. Stephens etc. Co.*, 11 Fed. 438, 20 Blatchf. 411, which was cited with approval. In that case it is said, 'that the presumption originates from the nature of the act, and not from the nature of the relations between the parties.'

"This assertion does not seem to have been well considered. In actions founded on negligence, the onus of establishing it rests upon the plaintiff. In determining whether he has sustained this burden, it is necessary in certain cases to inquire whether an inference of the fact of negligence can be drawn from other facts proven. When it can be, then it is said that a presumption of the fact of negligence is permissible. And of necessity it embraces not only the doing or omission to do the thing complained of, but also the relations of the parties; i. e., whether in that which he did or omitted to do he failed to discharge some duty owing to the plaintiff. *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, furnishes an illustration in point. It is there held that, 'Where the owner of land expressly or by implication invites others to come upon his premises, if he permits anything in the nature of a snare to exist thereon, he is responsible for an injury resulting therefrom to one availing himself of the invitation. But if he gives but a bare permission to cross the premises, the licensee takes the risk of accidents while using the premises in the condition in which they are.' In both cases the act is the same; but in the one case he owes a duty not to maintain a snare; in the other, not. In view of the relations of the parties, he is held to be negligent in the first case, but not in the second.

"Sometimes, it is true, the duty which the defendant owes to the plaintiff is of such a nature that proof of the happening of the accident under certain circumstances and given conditions will be of such legal value as to afford presumptive evidence of negligence, and cast upon the defendant the burden of explanation.

"This rule has been applied to the carrier of passengers, especially in conveyances propelled by steam, where the consequences of an ac-

cident are frequently fatal to human life, and the public interests require that in such cases the carrier shall use every precaution which human skill and foresight can provide to prevent accident, and its results. Even in those cases there must be reasonable evidence of negligence before a defendant can be called upon to relieve itself from the presumption of negligence. 'But, when the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part': *Breen v. New York etc. R. Co.*, 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; *Seybolt v. New York etc. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75.

'But, 'it is believed,' says Mr. Thompson, 'that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to plaintiff, without more, will amount to *prima facie* proof of negligence on the part of the defendant': 2 Thompson on Negligence, 1227. This rule is recognized in *Huff v. Austin*, 46 Ohio, 386, 15 Am. St. Rep. 613, 21 N. E. 864, the court saying: 'Whether the defendants can be held liable for the injury caused by the explosion of the boiler owned and used by them on their own premises, without affirmative proof of negligence beyond the mere fact of the explosion, is not to be determined by the rule of negligence governing the common carriers of passengers and goods.' To the same effect is the reasoning of Mr. Justice Field, in the *Nitroglycerin Case*, 15 Wall. 524, 21 L. ed. 206.

'The supreme court of Indiana recognizes that carrier cases constitute an exception to the general rule, in *Wabash etc. Ry. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391. After a statement of the extent of the care which the defendant was bound to observe for the protection of the plaintiff and the public, the court continued: 'The case, therefore, stands upon a different footing from the cases which involve the duties of carriers, who contract to carry passengers safely to a particular destination. In such cases proof of an injury ordinarily establishes a *prima facie* case of negligence in favor of a passenger, which the carrier must overcome.' ''

And referring to the leading case of *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, in which damages were recovered for the falling of a brick wall upon the plaintiff, while passing on the street, the court explained that case by saying: 'Now, while the court discussed the case from the standpoint of presumptions in the law of evidence, it will be observed that there was far more than the mere happening of the accident which was held to give rise to it in that case. There were certain conditions proven, which, taken in connection with the fall of the wall, permitted an inference of fact that the defendant was negligent. Buildings properly constructed

do not fall without adequate cause. So the plaintiff, to establish his cause of action, proved: 1. That the wall did fall; and 2. That there were no special circumstances of storm or violence to produce that result; and the court held that the falling, under the circumstances and conditions proven, raised a presumption of negligence."

b. Rule Applicable as Between Master and Servant.—Considerable discord exists amongst the authorities as to whether the presumption of negligence will arise as between a master and servant. We believe, however, that this want of harmony is more apparent than real.

The courts, in holding that no presumption of negligence has arisen in a suit by a servant for injuries, very often make a general statement that the rule of *res ipsa loquitur* does not apply as between master and servant, but they fail to state that there are some circumstances when it is applicable. Perhaps, in the majority of instances, the presumption of negligence does not arise because the circumstances surrounding the accident indicate that the cause of the accident was something which did not constitute a duty of the master toward the servant, or that it was a defect which constituted risk assumed by the servant, or that it was an act done by a fellow-servant.

As we have indicated before, we believe that this presumption of negligence is merely a presumption arising from the circumstantial evidence afforded by the facts necessarily stated in describing the accident.

It may be stated as a general rule that the presumption of negligence will arise as between master and servant where the cause of the accident is such as amounts to negligence on the part of the defendant: *Tennessee etc. Ry. Co. v. Hayes*, 97 Ala. 201, 12 South. 98; *Armour v. Golkowska*, 95 Ill. App. 492; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353; *Doyle v. Chicago etc. R. Co.*, 77 Iowa, 607, 42 N. W. 555, 4 L. R. A. 420; *Bomar v. Louisiana etc. R. Co.*, 42 La. Ann. 983, 1206, 8 South. 478; *Haggarty v. Hallowell Granite Co.*, 89 Me. 118, 35 Atl. 1029; *Donnelly v. Hurricane Isle etc. Co.*, 90 Me. 110, 37 Atl. 874; *Winkleman etc. Drug Co. v. Colladay*, 88 Md. 78, 40 Atl. 1078; *Hearn v. Quillen*, 94 Md. 39, 50 Atl. 402; *Moynihan v. Hellis Co.*, 146 Mass. 586, 4 Am. St. Rep. 348, 16 N. E. 574; *Coleman v. Mechanics' Iron Foundry*, 168 Mass. 254, 46 N. E. 1065; *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33; *Olsen v. Great Northern R. Co.*, 68 Minn. 155, 71 N. W. 5; *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737; *Sackewitz v. American Biscuit Co.*, 78 Mo. App. 144; *Shuler v. Omaha etc. Ry. Co.*, 87 Mo. App. 618; *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Lentino v. Port Henry etc. Co.*, 71 App. Div. 466, 75 N. Y. Supp. 755; *Colelli v. New Jersey etc. Concentrating Works*, 87 Hun, 428, 34 N. Y. Supp. 310; *Van Sickel v. Ilsley*, 75 Hun, 537, 27 N. Y. Supp. 1113, affirmed in 149 N. Y. 569, 43 N. E. 990; *Grant v. Raleigh etc. R. Co.*, 108 N. C. 462, 13 S. E. 209;

Wilkie v. Raleigh etc. R. Co., 127 N. C. 203, 37 S. E. 204; Folk v. Schaeffer, 186 Pa. 253, 40 Atl. 401; Louisville etc. R. Co. v. Worthington, 91 Tenn. 56, 17 S. W. 880, 16 L. R. A. 268; Texas etc. R. Co. v. Crowder, 63 Tex. 502; McCray v. Galveston etc. Ry. Co., 89 Tex. 168, 34 S. W. 95; Missouri etc. R. Co., v. Crowder (Tex. Civ. App.), 55 S. W. 380; Gulf etc. R. Co. v. Wood (Tex. Civ. App.), 63 S. W. 164; Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Puget Sound Iron Co. v. Lawrence, 3 Wash. Ter. 226, 14 Pac. 869; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565.

But numerous cases may be found in which the court refused to apply the rule of presumption of negligence as between master and servant. In some of these cases, we believe that the court erred in not applying the presumption, but in the majority of instances the court very properly refused to consider that a presumption of negligence was created, although the reasons when given do not always appear to be sound. Such presumptions have been refused in the following cases: Mary Lee Coal etc. Co. v. Chambliss, 97 Ala. 171, 11 South. 897; Tuck v. Louisville etc. R. Co., 98 Ala. 150, 12 South. 168; Kansas etc. Coal Co. v. Brownie, 60 Ark. 582, 31 S. W. 453; Brymer v. Southern Pacific Co., 90 Cal. 496, 27 Pac. 371; Denver etc. R. Co. v. McComas, 7 Colo. App. 121, 42 Pac. 676; Minty v. Union Pac. R. Co., 2 Idaho, 471, 21 Pac. 660, 4 L. R. A. 609; Colfax Coal etc. Co. v. Johnson, 52 Ill. App. 383; Wabash R. Co. v. Farrell, 79 Ill. App. 508; Chicago Edison Co. v. Moren, 86 Ill. App. 152, affirmed in 185 Ill. 571, 57 N. E. 773; Omaha Packing Co. v. Murray, 112 Ill. App. 233; Kchus v. Wisconsin etc. R. Co., 70 Iowa, 561, 31 N. W. 868; Lane v. Missouri etc. Co., 64 Kan. 755, 68 Pac. 626; Vissman v. Southern Ry. Co. (Ky.), 89 S. W. 502; Pellerin v. International Paper Co., 96 Me. 388, 52 Atl. 842; Drum v. New England etc. Co., 180 Mass. 113, 61 N. E. 812; Sargee v. Clark Can Co., 126 Mich. 508, 85 N. W. 1105; Freeberg v. St. Paul Plow Works, 48 Minn. 99, 50 N. W. 1026; Efferson v. Postal Tel. Cable Co., 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; Chicago etc. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462; Baldwin v. Atlantic City R. Co., 64 N. J. L. 232, 45 Atl. 810; Bien v. Unger, 64 N. J. L. 596, 46 Atl. 593; Olsen v. Starin, 43 App. Div. 422, 60 N. Y. Supp. 134; Fink v. Slade, 66 App. Div. 105, 72 N. Y. Supp. 821; Tunney v. Carnegie, 146 Pa. 618, 23 Atl. 207; Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102; Surles v. Kistler, 202 Pa. 289, 51 Atl. 887; Green v. Catawber Power Co. (S. C.), 55 S. E. 125; Moore v. Jones, 15 Tex. Civ. 391, 39 S. W. 593; Moore Lime Co. v. Johnston's Admr., 103 Va. 84, 48 S. E. 557; Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Spille v. Wisconsin Bridge etc. Co., 105 Wis. 340, 81 N. W. 397; Cosgrove v. Filler etc. Co., 112 Wis. 457, 88 N. W. 220; Butler v. Frazee, 25 App. D. C. 392; Patton v. Texas etc. Ry. Co., 179 U. S. 658, 21 Sup. Ct. Rep. 275, 45 L. ed. 361.

"The general rule is not disputed that as between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master: *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183; *Redmond v. Delta Lumber Co.*, 96 Mich. 545, 55 N. W. 1004. The proof to warrant such inference must be brought forward by him who charges the negligence, and upon whom is the burden of proof. The inference of negligence cannot be established by conjecture or speculation, or drawn from a presumption, but must be founded upon some established fact": *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201. Hence it is said that as between master and servant mere proof of an accident and injury therefrom is not sufficient unless the circumstances attending the accident establish negligence without other direct proof: *Missouri etc. Ry. Co. v. Crowder* (Tex. Civ. App.), 55 S. W. 380.

"But," said Judge Sanborn in *Northern Pacific Ry. Co. v. Dixon*, 139 Fed. 737, "the doctrine '*res ipsa loquitur*' is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow-servants and the other ordinary dangers of the work, the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machinery or place of work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes, the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred, and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of fellow-servants and latent and undiscoverable defects in places on machinery which may have produced it: *Chicago etc. Ry. Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421; *Westland v. Gold Coin Mines Co.*, 101 Fed. 65, 41 C. C. A. 199, 200; *Texas etc. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. Rep. 707, 41 L. ed. 1136; *Patton v. Texas etc. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. Rep. 275, 45 L. ed. 361; *O'Connor v. Illinois etc. Ry. Co.*, 83 Iowa, 105, 48 N. W. 1002; *Brownfield v. Chicago etc. Ry. Co.*, 107 Iowa, 254, 77 N. W. 1038; *Brymer v. Southern Pac. Ry. Co.*, 90 Cal. 496, 27 Pac. 371; *Huff v. Austin*, 46 Ohio

St. 386, 15 Am. St. Rep. 613, 21 N. E. 864; *Wormell v. Maine etc. R. R. Co.*, 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; *Grant v. Pennsylvania etc. R. Co.*, 133 N. Y. 657, 31 N. E. 220. The happening of the accident, and the absence of contributory negligence of the servant constitute no substantial evidence of this casual negligence, and are insufficient to support a finding or judgment against him for the injury which resulted from it."

Likewise in *Jones v. Kansas City etc. R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434, 77 S. W. 890, a case in which the plaintiff's decedent, who was a locomotive engineer, was killed by his freight engine colliding with three freight-cars which, while being unattended, escaped from a sidetrack onto the main track during a storm, the court, after stating the general rule to be that proof of the mere fact that the servant was injured in the master's service is not sufficient to make out a prima facie case for the plaintiff, observed: "But when cars are found running loose and unattended on the main track at a time and place when and where they are liable to cause the wreck of a regular train, it cannot be said that the danger so incurred is one of the usual and ordinary hazards incident to the business. It is not a usual and ordinary occurrence in a prudently managed business for cars to be found running loose in that manner; it does not ordinarily occur unless someone has neglected his duty, and it is not, therefore, a risk assumed by the servant. And since it is an occurrence not likely to happen in the orderly course of business, when it does happen and a servant is injured in consequence, it calls for an explanation. Upon whom does the burden of making the explanation devolve? It devolves either on the injured servant or on the master. If it was the duty of the injured servant to attend to those cars on the sidetrack, to see that they did not escape, then the burden of making the explanation devolved upon him. But if he had nothing to do with securing the cars in their position on the sidetrack, if his duty related only to the operation of the locomotive engine, then there is no explanation due from him."

That the mere relationship of master and servant in itself does not affect the raising of the presumption of negligence is shown by the case of *Shuler v. Omaha etc. Ry. Co.*, 87 Mo. App. 618. In that case the plaintiff who was a servant of the defendant railroad company; employed in track construction work, was injured in a collision. The court, after referring to the general presumption of negligence arising from a railway collision, observed: "But, since the collision may have resulted from the act of some chief officer of the railway company—the company itself—or from the act of one of the ordinary servants of the company, mere proof of the collision will not disclose which of these was culpable. And since the company would not be liable to one of its servants (as it would to a passenger), for the act of his fellow-servant, the mere proof of a collision

will not be considered proof of actionable negligence in a suit brought against the company by an employé: *Kansas P. Ry. Co. v. Salmon*, 11 Kan. 83.

"But in this state the legislature has adopted the policy of allowing an employé an action against the railway company for the negligence of his fellow-servant: *Rev. Stats. 1899, sec. 2873; Stubbs v. Omaha R. R. Co.*, 85 Mo. App. 192. It must therefore follow that since the company is liable to a servant whether the negligence is its own or that of a fellow-servant, proof of collision of trains makes a prima facie case for an employé against the company equally as well as if he had been a passenger."

But, on the other hand, it is held that the fall of a derrick set up by another servant raises no presumption of negligence, since it may have fallen by reason of the negligence of a fellow-servant: *Fallon v. Mertz*, 110 App. Div. 755, 97 N. Y. Supp. 417. Likewise an injury to a lineman from the fall of a defective pole while he was ascending it to change wires is insufficient to establish negligence by the mere fact of the accident, since the weakness of old poles is one of the assumed risks of the employment: *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475, 72 Pac. 609.

XIV. Application of the Rule as to Presumptions of Negligence to Varying Circumstances.

a. In General.

1. Falling of Walls, Buildings, Building Material, Tools from Building Under Construction, or Other Falling Objects.—The falling of a building, or of the walls of a building without apparent cause, raises a presumption of negligence: *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443; *Ryder v. Kinsey*, 62 Minn. 85, 54 Am. St. Rep. 623, 64 N. W. 94, 34 L. R. A. 557; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Scharff v. Southern Illinois Construction Co.*, 115 Mo. App. 157, 92 S. W. 126; *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 33, 91 N. W. 336. But it has been held in Maryland that negligence will not be presumed merely because a wall cracks or falls: *Serio v. Murphy*, 99 Md. 545, 105 Am. St. Rep. 316, 58 Atl. 435. And it has also been held that the mere fall of a stand erected in a public park for the accommodation of the public raises no presumption of negligence: *Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590.

The fall of a chimney raises a presumption of negligence: *Travers v. Murray*, 87 App. Div. 552, 84 N. Y. Supp. 558. The fall of construction material from a building into the street raises a presumption of negligence: *Wolf v. American Tract Society*, 25 App. Div. 98, 49 N. Y. Supp. 236. But not so where it falls within a private inclosure: *Van Orden v. Acken*, 28 App. Div. 160, 50 N. Y. Supp. 843; *May v. Berlin Iron Bridge Co.*, 43 App. Div. 569, 60 N. Y. Supp. 550. The fall of a roof while being raised by jack-screws has been

declared to create a presumption of negligence: *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33. The fall of a staging cannot be said to raise a presumption of negligence where the cause of its fall is shown by the defendant and does not seem to have been disputed: *Parsons v. Hecla Iron Works*, 186 Mass. 221, 71 N. E. 572. The falling of lumber piles does not raise a presumption of negligence as against the owner of the lumber: *Nigro v. Willson*, 99 N. Y. Supp. 344; *Laforrest v. O'Driscoll*, 26 R. I. 547, 59 Atl. 923. Sometimes, however, the piling of lumber where it may fall upon the highway is regarded as a nuisance rather than as a question of negligence: *Smith v. Davis*, 22 App. D. C. 298. The mere giving away of a floor which an employé was scrubbing was held not to raise a presumption of negligence: *Surles v. Kistler*, 202 Pa. 289, 51 Atl. 887.

The dropping of a chisel from a scaffold erected over a sidewalk raises a presumption of negligence: *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268, 20 L. R. A. 698. Likewise does the falling of a box of goods from an upper story: *Lyons v. Rosenthal*, 11 Hun. 46. The falling of a barrel of flour from the upper story of a warehouse onto a person passing along the highway raises a presumption of negligence: *Byrne v. Boodle*, 2 Hurl. & C. 722. Likewise does the falling of bags of sugar upon a person who was lawfully on the premises: *Scott v. London etc. Dock Co.*, 3 Hurl. & C. 596. But where the person who was using an ax which fell from the fifth story of a building upon a person in the area outside shows that he used due care, and there is no proof of negligence on the part of the owner of the building, a nonsuit is properly entered in a suit against the owner to recover for the damages inflicted: *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 63 Am. St. Rep. 807, 39 Atl. 292, 63 Am. St. Rep. 807. Negligence has been presumed from the falling of a cake of ice on a person sitting on a doorstep: *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633; and from the fall of a door which had been taken from its hinges and placed standing against the wall on the platform of a store: *Klitzke v. Webb*, 120 Wis. 254, 97 N. W. 901; and also from the falling of a window over an opening from which railroad employés were paid: *Carroll v. Chicago etc. R. Co.*, 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176. The falling of a heavy sign over a sidewalk on a much frequented street raises a presumption of negligence: *St. Louis etc. Ry. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189. But the fall of a derriek, set up by one servant, upon a fellow-servant does not raise a presumption of negligence because it may have fallen by reason of having been set up by the fellow-servant: *Fallon v. Mertz*, 110 App. Div. 755, 97 N. Y. Supp. 417. Though, on the other hand, the falling of a bucket of ore, which was being unloaded from a ship, upon a servant engaged in a different part of the ship had been held to raise the presumption of negligence: *Cummings v. National Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665. But no presumption of neg-

ligence arises where a servant is injured by the slipping and falling of a plank in a gangway built by competent builders, and which was in a good condition a few minutes before the accident: *Shaw v. Highland Park Mfg. Co.* (N. C.), 35 S. E. 433. The fall of a bust, used as a decoration in a concert-hall, upon a patron of the place raises no presumption of negligence: *Kendall v. Boston*, 118 Mass. 234, 19 Am. Rep. 446. With respect to accidents particularly relating to pedestrians, see, also, subdivision 6 of this subdivision.

2. **Falling Rock or Debris in Mining Operations.**—The fact that a mine caved in raises no presumption of negligence: *Mountain Copper Co. v. Van Buren*, 123 Fed. 61. Neither does the falling of slate from the roof of a coal mine raise a presumption of negligence: *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999. But it has been held that the sudden and unexplained giving away of a place in a mine over which the plaintiff was required to pass in order to reach his work makes a prima facie case of negligence: *Lentino v. Port Henry etc. Co.*, 71 App. Div. 466, 75 N. Y. Supp. 755.

3. **Fallen, Broken, Trailing or Otherwise Dangerously Exposed Electric Wires.**—The obligation of those who maintain electric wires over public streets is not that of insurers, and hence they are not generally liable for the breaking of such wires where the breaking is caused solely by something over which the owner of the wire has no control, as, for instance, a collision caused by runaway horses or a storm of extraordinary severity: *Williams v. Louisiana Light etc. Co.*, 43 La. Ann. 295, 8 South. 938; *Ward v. Atlantic etc. Co.*, 71 N. Y. 81, 27 Am. Rep. 10. But the general rule is that a presumption of negligence arises upon proof that an electric wire charged with a dangerous current of electricity is broken and lying or trailing in a public street or on a sidewalk in a city: *Denver C. E. R. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Larson v. Central R. Co.*, 56 Ill. App. 263; *Western Union Tel. Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763, 31 L. R. A. 572; *Gannon v. Laclède Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Ruddy v. Newark etc. Power Co.*, 63 N. J. L. 357, 46 Atl. 1100, 57 L. R. A. 624; *Clarke v. Nassau Electric R. Co.*, 9 App. Div. 51, 41 N. Y. Supp. 78; *Dwyer v. Buffalo Gen. Electric Co.*, 20 App. Div. 124, 46 N. Y. Supp. 874; *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; affirmed in 165 N. Y. 624, 59 N. E. 1128; *Smith v. Brooklyn Heights R. Co.*, 82 App. Div. 531, 81 N. Y. Supp. 838; *Wolpers v. New York etc. Power Co.*, 91 App. Div. 424, 86 N. Y. Supp. 845; *O'Leary v. Glenn Falls Gas etc. Co.*, 107 App. Div. 505, 95 N. Y. Supp. 232; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344, 26 L. R. A. 810; *Boyd v. Portland Gen. Electric Co.*, 41 Or. 336, 68 Pac. 810; *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807, 75 S. W. 719;

Norfolk etc. Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733, 39 L. R. A. 499. On this general subject, see the monographic note on the duties and liabilities of electric corporations, attached to Hebert v. Lake Charles etc. Co., 100 Am. St. Rep. 515. The decision in Kepner v. Harrisburg Traction Co., 183 Pa. 24, 38 Atl. 416, held that the unexplained breaking of a trolley wire raised no presumption of negligence.

But in several very recent cases in Pennsylvania the court has held that negligence will be presumed under the rule of *res ipsa loquitur* where a person is killed from an electric shock from an ordinary electric lamp: Alexander v. Nauticoke Light Co., 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; Crowe v. Nauticoke Light Co., 209 Pa. 580, 58 Atl. 1071. And it has been also held by that same court that the rule *res ipsa loquitur* applies where a person is killed by an electric current while using a telephone, the court saying: "Electricity is the agent by which telephones become the means of communication from one point to another, and it may be conceded, as the appellant contends, that the current needed for their use is not a dangerous one. In this case it may be still further conceded that the current with which the deceased came in contact did not come from the exchange of the appellant; but at the same time it cannot be questioned that it came over one of its wires leading to the telephone of one of its patrons. Though this wire was intended to conduct only a harmless current, the appellant was bound to know that it could become the conductor of a deadly one, and that such a current would pass over it if it was not properly insulated, and should come into contact with a wire heavily and dangerously charged. It was, therefore, as much the duty of the company to see that no such current should thus pass over its wires as it was to send only a harmless one from its own exchange. Its duty to its patrons was to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source. This is the implied undertaking of every telephone company, and in towns and cities threaded with dangerous electric wires the duty of the company is, by constant supervision of its wires, to prevent their becoming conductors of a dangerous current from others. When they do become conductors of it, there is reasonable evidence that there has been a neglect of duty, and the burden is cast upon the telephone company of showing that it had not been negligent. As it is not an insurer of its patrons against the danger of electric currents on its wires, the law will not hold it responsible for what it cannot help, and for what may happen in spite of its exercise of the care and vigilance required of it; but when, as here, there is an accident, which in itself affords reasonable evidence of negligence, it must show why it should be relieved from liability": Delahunt v. United Tel. etc. Co., 215 Pa. 241, 114 Am. St. Rep. 000, 64 Atl. 515.

But where a hotel guest is injured by an electric fixture falling upon him and producing a short circuit, though it is not shown that the defendant had knowingly or even negligently sent into the hotel a dangerous current of electricity, the rule of *res ipsa loquitur* will not apply: *Harter v. Colfax Electric Light etc. Co.*, 124 Iowa, 500, 100 N. W. 508. In some jurisdictions the rule is followed that where an injury results from contact with an electric wire which is imperfectly insulated, that negligence will be presumed: *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Clements v. Louisiana etc. Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348; *Winkleman v. Kansas City etc. Co.*, 110 Mo. App. 184, 85 S. W. 99; *Perham v. Portland Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 24, 40 L. R. A. 799. A severe shock from an electric wire within easy reach of a window raises a presumption of negligence: *Walters v. Denver etc. Light Co.*, 17 Colo. App. 192, 68 Pac. 117. Likewise does the death of a painter from coming in contact with a live electric wire on the side of a house: *Consolidated Gas Co. v. Brooks* (N. J.), 53 Atl. 296. And where plaintiff's decedent was killed by electric shock while removing a sign hanging in front of a store, from an electric wire which was insufficiently insulated, it raised a presumption of negligence: *Geismann v. Missouri etc. Electric Co.*, 173 Mo. 654, 73 S. W. 654. And a presumption of negligence is raised where a person was killed while turning on an electric light in a house, the deadly current being caused by the crossing of primary and secondary wires at a transformer in the street: *Memphis etc. Co. v. Letson*, 135 Fed. 969. Death from the breaking of an electrical transformer has also been held to raise a presumption of negligence: *Reynolds v. Narragansett etc. Co.*, 26 R. I. 457, 59 Atl. 393. And where an electric company permits a wire charged with twenty-three thousand five hundred volts to remain for nearly twenty hours fastened to a picket fence adjacent to a highway, it constitutes a *prima facie* case of negligence: *Carroll v. Grande Ronde Electric Co.*, 47 Or. 424, 84 Pac. 389.

4. Explosions of Steam Boilers, Gasoline, Dynamite or Other Explosives.—The general principles underlying the liability for the keeping of explosives was discussed in the monographic note on that subject attached to *Kinney v. Koopman*, 67 Am. St. Rep. 134. The keeping of large quantities of dynamite is sometimes regarded as a nuisance: *Kleebauer v. Western Fuse etc. Co.* (Cal.), 69 Pac. 246; *Reilly v. Erie R. Co.*, 72 App. Div. 476, 76 N. Y. Supp. 620, affirmed in 177 N. Y. 547, 69 N. E. 1130. The courts are not harmonious on the question whether a presumption of negligence will arise from a mere explosion. The weight of authority is to the effect that no presumption of negligence is created: *Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099; *McGahan v. Indianapolis etc. Gas Co.*, 140 Ind. 335, 49 Am. St. Rep. 199, 37 N. E. 601, 29 L. R. A. 355; *Walker v. Chicago etc. R. Co.*, 71 Iowa, 658, 33 N. W. 204; *Marshall v. Wel-*

wood, 38 N. J. L. 339, 20 Am. Dec. 394; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Schaum v. Equitable Gaslight Co.*, 15 App. Div. 74, 44 N. Y. Supp. 284; *Crowley v. Rochester Fireworks Co.*, 95 App. Div. 13, 88 N. Y. Supp. 483; *Brunner v. Blaisdell*, 170 Pa. 25, 32 Atl. 607; *Earle v. Abrogast*, 180 Pa. 409, 36 Atl. 923; *Sowers v. McManus*, 214 Pa. 244, 63 Atl. 601; *Young v. Bransford*, 12 Lea, 232; *Veith v. Hope Salt etc. Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410. A few of the courts, however, have held that such an explosion does raise a presumption of negligence: *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020, 29 L. R. A. 718; *The Sydney*, 27 Fed. 119; *Grimsley v. Hankins*, 46 Fed. 400; *Warn v. Davis Oil Co.*, 61 Fed. 631. And where it is shown that nitroglycerin, if impure, is likely to explode spontaneously, a presumption of negligence in its manufacture will arise from the fact of its explosion, where no other explanation is given: *Bradford Glycerin Co. v. Kizer*, 113 Fed. 894, 51 C. C. A. 524. But the mere explosion of a gasoline pear burner while filling it with air according to directions is not sufficient to raise a presumption of negligence: *Talley v. Beaver*, 33 Tex. Civ. 675, 78 S. W. 23.

A distinction has, however, been recognized in Ohio between the act of storing highly explosive substances, such as nitroglycerin, on one's premises, and that of conducting a business in which steam boilers are used, even though explosions are apt to happen with respect to such steam boilers. The liability with respect to the highly explosive substances is generally placed on the ground of constituting a nuisance: *Bradford Glycerin Co. v. St. Mary's etc. Mfg. Co.*, 60 Ohio St. 560, 71 Am. St. Rep. 740, 54 N. E. 528, 45 L. R. A. 658.

With respect to steam-boiler explosions, the court, in *Huff v. Austin*, 46 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864, said: "It is contended, however, that the defendants are responsible in the first instance for the immediate consequences of the bursting of the steam boiler in use on their premises, irrespective of any further question as to negligence or want of skill on their part, and that the accident, in the absence of explanation, is, of itself, evidence of negligence. It is urged that, where the instrument or machinery is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. But instances are not infrequent of steam-boiler explosions where there has been no want of ordinary care and skill in their management, and even where there has been the greatest care; and explosions of steam boilers have happened of so mysterious a character that they could not, with confidence, be assigned to any known cause. Considering the extent to which the agency of steam is now so necessarily and usefully employed, we are not prepared to hold that the owner of a

steam boiler used on his premises shall be deemed virtually an insurer against all damage and injury to person or property resulting from an explosion, unless, in the event of an accident, he assume the burden of proving that there has been no fault or negligence on the part of himself or his agents." And continuing, the court observed: "Whether the defendants can be held liable for the injury caused by the explosion of the boiler owned and used by them on their own premises, without affirmative proof of negligence beyond the mere fact of the explosion, is not to be determined by the rule of negligence governing common carriers of passengers and goods. The carrier of goods is an insurer, unless his extraordinary responsibility is limited by special contract. And the carrier of passengers, while not an insurer of their safety, is bound to the observance of the utmost care and diligence for their safety, and is responsible for any, even the slightest, neglect."

The mere fact that a steam boiler explodes does not raise a presumption of negligence on the part of the owner: *Vieth v. Hope etc. Co.*, 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410; *Texas etc. Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. Rep. 707, 41 L. ed. 1136. And the mere fact of the explosion of the heating apparatus in a hotel is not sufficient to charge the owner with negligence as against one not in contractual relations: *Kirby v. President etc. of Delaware etc. Co.*, 20 App. Div. 473, 46 N. Y. Supp. 777.

5. Sudden Starting or Abnormal Actions of Dangerous Machinery.

No presumption of negligence arises from the fact that a dangerous machine starts suddenly and thereby injures an employé, but it must also be observed in these classes of cases that the question of contributory negligence and assumption of risk by the employé often have an important part in determining whether any presumption of negligence will be indulged: *Ross v. Pearson Cordage Co.*, 164 Mass. 257, 49 Am. St. Rep. 459, 41 N. E. 284; *Kenneson v. West End Street R. Co.*, 168 Mass. 1, 46 N. E. 114; *Dingley v. Star Knitting Co.*, 134 N. Y. 554, 32 N. E. 25; *Towle v. Stimson Mill Co.*, 33 Wash. 305, 74 Pac. 471. The case of *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149, however, holds that a prima facie case of negligent construction is shown where a grinding mill suddenly starts in motion while being cleaned.

But in some of the cases which hold that a presumption of negligence is created by the sudden starting of a machine, it will be seen that there was also evidence of previous sudden starts of the same machine: *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 28 N. E. 352; *Vorbrich v. Gender etc. Mfg. Co.*, 96 Wis. 277, 71 N. W. 434. But in a late case in North Carolina it was held that the question of whether there was actionable negligence from the sudden starting of a machine used in cotton-mill, it being shown, however, that the belt shifter was imperfect, was a question for the jury:

Ross v. Double Shoales Cotton Mills, 120 N. C. 43, 52 S. E. 121, 1 L. R. A., N. S., 298.

The presumption of negligence is often denied in suits to recover damages from the operation of laundry machines, in which the machines by jerky or abnormal actions crush the fingers or hand of the operator, but the question in most of such cases is one of assumption of risk or contributory negligence: *Butler v. Frazee*, 25 App. D. C. 392; *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469; *Kupkowski v. Spiegel*, 135 Mich. 7, 97 N. W. 48; *Blom v. Yellowstone Park Assn.*, 86 Minn. 237, 90 N. W. 397; *Keenan v. Waters*, 181 Pa. 247, 37 Atl. 342; *Higgins v. Fanning*, 195 Pa. 599, 46 Atl. 102; *Tuckett v. American etc. Laundry (Utah)*, 84 Pac. 500.

6. Accidents to Pedestrians from Collisions, Runaway Horses, Defects in Streets or Other Public Places.—In a general way it may be said that a person using the streets of a city has a right to act upon the presumption that the streets are sufficiently safe for ordinary travel: *Spring Valley v. Gavin*, 81 Ill. App. 456. Hence the fall of a portion of a shed over a sidewalk, injuring a pedestrian, raises a presumption of negligence: *Lubelsky v. Silverman*, 49 Misc. Rep. 133, 96 N. Y. Supp. 1056. Likewise does the falling of a piece of stone out of a window sill twenty feet above the sidewalk: *Papazian v. Baumgartner*, 49 Misc. Rep. 244, 97 N. Y. Supp. 399. And the fall of a brick from a building in the course of construction, injuring a person in the street, raises a presumption of negligence, but before the plaintiff can recover damages, where there are numerous independent contractors, he must connect some one of them as being responsible for its fall. The court in this connection observing: "We agree with the court below that this is a case where the maxim, '*Res ipsa loquitur*,' applies. There is a presumption that the plaintiff's injury was the result of negligence: *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Hogan v. Manhattan R. R. Co.*, 149 N. Y. 23, 43 N. E. 403; *Kearney v. London etc. Ry. Co.*, 5 Q. B. 411; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870. But that presumption did not complete the proof which it was incumbent upon the plaintiff to make before the case could be submitted to the jury. In a case like this, where the building in process of construction is in charge of numerous contractors and their workmen, each independent of the other, and none of them subject to the control or direction of the other, some proof must be given to enable the jury to point out or identify the author of the wrong. There is no principle that I am aware of that would make all of the contractors or all the workmen engaged in erecting this building liable in solido. And yet there is just as much reason for that as there is for holding two of these contractors, for no other reason than that one of them had charge of the carpenter work and the other of the mason work. The plaintiff, we must assume, suffered injury from the negligence of some one; but I am not aware of any

ground, in reason or law, for imputing the wrong to the two contractors who are defendants, or for selecting them from all the others as responsible to the plaintiff, unless they can conclusively show that they are not. When there is no proof where the brick came from, except that it came from the building, and nothing to identify the person who set it in motion, it cannot be said that the plaintiff has made out a case for the jury. The presumption does not go far enough, since the party chargeable with the act from which the injury resulted has not been identified, but that important fact is left entirely to conjecture. There is no principle of law that will permit the plaintiff to proceed upon the theory that anyone in any way connected with the work, or any one or more of them that he chooses to select, must respond to him in damages for the injury. If the plaintiff was unable to give proof pointing to the party responsible for the injury, that is no reason why the innocent and the guilty should be held in a body, upon a presumption that some or all were negligent. Each of the nineteen contractors were responsible only for the negligence of his own servants or employés. He was not responsible for the negligence of the servants of the other contractors. The men employed in and about the building in the aggregate were the servants of nineteen different masters. As the person who caused the injury was not identified by the proof, it was, of course, impossible to identify the master responsible for his act. It follows that either the plaintiff's action must fail for want of proof, or we must hold, as the court below did, that any or all the contractors together may be held responsible for the injury. I am quite sure that such a proposition cannot be defended upon principle, and I am not aware of any authority that can possibly lend any support to it. Cases must occasionally happen where the person really responsible for a personal injury cannot be identified or pointed out by proof, as in this case; and then it is far better and more consistent with reason and law that the injury should go without redress than that innocent persons should be held responsible, upon some strained construction of the law developed for the occasion": *Wolf v. American Tract Society*, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241.

But where a person is injured while passing along a street under an elevated railroad by being struck by a broken bolt attached to an iron plate or clip, which falls from the structure above, a presumption of negligence arises: *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870. Likewise a presumption of negligence arises from the fall of a bar of iron from an elevated railroad where workmen having tools were seen upon the structure and one of them came down, picked up the iron bar and returned to the structure with it: *Hogan v. Manhattan R. Co.*, 149 N. Y. 23, 43 N. E. 403. In Massachusetts the mere falling of sawdust, shavings and pieces of wood from an elevated railroad is not regarded as raising a presumption of negligence: *Wadsworth v. Boston El. Ry.*

Co., 182 Mass. 572, 66 N. E. 421. In one New York case it has been held that the mere falling of red-hot cinders from the locomotive of an elevated railway upon a person using the street does not establish a prima facie case of negligence: *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66. But a contrary conclusion was reached under a somewhat similar state of facts in *Wiedmer v. New York Elevated R. Co.*, 41 Hun, 284, wherein the court distinguished the case just cited. On the general subject of accidents from falling objects, see, also, subdivision XIV, a, 1.

Negligence is not presumed from the fact that a child is injured on a public street in a collision between such child and the defendant while riding on a bicycle: *Lee v. Jones*, 181 Mo. 291, 103 Am. St. Rep. 596, 79 S. W. 927. But if one riding a bicycle comes up behind a pedestrian, who is unconscious of the approach of the bicyclist, and without warning collides with him, those facts, unexplained, cast the burden upon the bicyclist of showing that he was in the exercise of due care: *Meyer v. Hinds*, 110 Mich. 300, 64 Am. St. Rep. 345, 68 N. W. 156, 33 L. R. A. 356.

The driver of a team along a street is not an insurer against accidents: *Collins v. Leafey*, 124 Pa. 203, 16 Atl. 765.

Negligence will not be presumed from the mere fact that a horse runs away while in charge of a driver: *O'Brien v. Miller*, 60 Conn. 214, 25 Am. St. Rep. 320, 22 Atl. 544; *Swofford v. Rosenbloom*, 102 Ill. App. 578; *Creamer v. Melvain*, 89 Md. 343, 73 Am. St. Rep. 186, 43 Atl. 935, 45 L. R. A. 531; *Doherty v. Sweetser*, 82 Hun, 556, 31 N. Y. Supp. 649; *Pearl v. McCauley*, 6 App. Div. 70, 39 N. Y. Supp. 472; *Davis v. Kallfelz*, 22 Misc. Rep. 602, 50 N. Y. Supp. 928. But negligence may be presumed where it is shown that it is the third time that the horse has run away: *Thane v. Douglass*, 102 Tenn. 307, 52 S. W. 155. And it has also been held that the fact that a team is found running away upon the streets of a city, without a driver, requires an explanation, and if it is not given, it is not an unfair inference that no satisfactory explanation could be made: *Maus v. Broderick*, 51 La. Ann. 1153, 25 South. 977. Negligence is not presumed against the owner of a racecourse, who is giving public exhibitions of racing, from the mere fact that a horse ran away and inflicted injury upon a spectator, where it does not appear that the horse was the property of, or under the control of, the defendant, nor at what place the plaintiff was when he received his injury: *Hart v. Washington Park Club*, 157 Ill. 9, 48 Am. St. Rep. 298, 41 N. E. 620, 29 L. R. A. 492.

A mere defect in a street does not make prima facie negligence against the city: *City of Atlanta v. Stewart*, 117 Ga. 144, 43 S. E. 443. Hence an injury from a horse taking fright at a disabled steam roller left in a street is not prima facie negligence against the municipality: *District of Columbia v. Moulton*, 182 U. S. 576, 21 Sup. Ct. Rep. 840, 45 L. ed. 1237. But if a traveler upon the public

streets of a city is injured by an unseen instrument exploding within the area of a street over which the city has control, a prima facie cause of action is established: *Beall v. City of Seattle*, 28 Wash. 593, 92 Am. St. Rep. 892, 69 Pac. 12, 61 L. R. A. 583.

The leaving of a feather duster upon the stairway of a department store, causing a customer to slip and fall, raises a presumption of negligence: *Graham v. Joseph H. Bauland Co.*, 97 App. Div. 141, 89 N. Y. Supp. 595.

b. Accidents Resulting from the Operation of Steam Railroads and Street Railways.

1. General Rule Applicable to Accidents to Passengers on Both Steam Railroads and Street Railways.—The general rule with respect to common carriers is that where the accident to a passenger, who is himself without fault, is caused by a defect in any of those things which the carrier is bound to supply, or is the result of a failure in any respect of the carrier's means of transportation or the conduct of its servants in connection therewith, a presumption of negligence arises as against the carrier: *Louisville etc. R. Co. v. Jones*, 83 Ala. 376, 3 South. 902; *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 South. 142; *George v. St. Louis etc. R. Co.*, 34 Ark. 613; *St. Louis etc. R. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Yeomans v. Contra Costa etc. Co.*, 44 Cal. 71; *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2; *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Rio Grande etc. Ry. Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76; *Pattee v. Chicago etc. R. Co.*, 5 Dak. Ter. 267, 38 N. W. 435; *Central R. Co. v. Sanders*, 73 Ga. 513; *Augusta etc. R. Co. v. Randall*, 79 Ga. 304, 4 S. E. 674; *Savannah etc. Ry. Co. v. Flaherty*, 110 Ga. 335, 35 S. E. 677; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979; *Lavis v. Wisconsin etc. R. Co.*, 54 Ill. App. 636; *Illinois Central R. Co. v. Beebe*, 69 Ill. App. 363; *Chicago City Ry. Co. v. Morse*, 197 Ill. 327, 64 N. E. 304; *Springer v. Schultz*, 205 Ill. 144, 68 N. E. 753; *Memphis etc. Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Louisville etc. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Kentucky etc. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. 338; *Terre Haute etc. R. Co. v. Sheeks*, 155 Md. 74, 56 N. E. 434; *Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201; *Tuttle v. Chicago etc. R. Co.*, 48 Iowa, 236; *Atchison etc. R. Co. v. Elder*, 57 Kan. 312, 46 Pac. 310; *Central etc. Ry. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; *Davis v. Paducah Ry. etc. Co.*, 113 Ky. 267, 68 S. W. 140; *Kird v. New Orleans etc. R. Co.*, 105 La. 226, 29 South. 729; *Stevens v. European etc. R. Co.*, 66 Me. 74; *Baltimore etc. Road v. Leonhardt*, 66 Md. 70, 59 Am. Rep. 156, 5 Atl. 346; *Philadelphia etc. R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2, 8 L. R. A. 673; *Baltimore etc. R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 31 L. R. A. 313; *White v. Boston etc. R. Co.*, 144 Mass. 404, 11 N. E.

552; *Stoody v. Detroit etc. R. Co.*, 124 Mich. 420, 83 N. W. 26; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Memphis etc. R. Co. v. Whitefield*, 44 Miss. 466, 7 Am. Rep. 699; *Och v. Missouri etc. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Madden v. Missouri etc. R. Co.*, 50 Mo. App. 666; *Furnish v. Missouri etc. R. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800, 15 S. W. 315; *Hamilton v. Metropolitan St. Ry.*, 114 Mo. App. 504, 89 S. W. 893; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *Spellman v. Lincoln etc. Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 316; *Lincoln St. Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074; *Fremont etc. R. Co. v. French*, 48 Neb. 638, 67 N. W. 472; *Lincoln Traction Co. v. Heller (Neb.)*, 100 N. W. 197; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; *Holbrook v. Utica etc. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Breen v. New York etc. R. Co.*, 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 56 N. E. 988; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494, 8 Am. Rep. 508; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Budd v. United Carriage Co.*, 25 Or. 314, 35 Pac. 660, 27 L. R. A. 279; *Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581; *Pennsylvania R. Co. v. MacKenney*, 124 Pa. 462, 10 Am. St. Rep. 601, 17 Atl. 14, 2 L. R. A. 820; *Clow v. Pittsburgh Traction Co.*, 158 Pa. 410, 27 Atl. 1004; *O'Connor v. Scranton Traction Co.*, 180 Pa. 444, 36 Atl. 866; *Zemp v. Wilmington etc. R. Co.*, 9 Rich. 84, 64 Am. Dec. 763; *Cooper v. Georgia etc. R. Co.*, 61 S. C. 345, 39 S. E. 543; *Illinois Cent. R. Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202; *Texas etc. R. Co. v. Suggs*, 62 Tex. 323; *Fordyce v. Withers*, 1 Tex. Civ. 540, 20 S. W. 766; *Baltimore etc. R. Co. v. Wightman's Admr.*, 29 Gratt. 431, 26 Am. Rep. 384; *Baltimore etc. R. Co. v. Noell's Admr.*, 32 Gratt. 394; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021, 16 L. R. A. 808; *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 111 Am. St. Rep. 990, 82 Pac. 995, 2 L. R. A., N. S., 836; *Carrieco v. West Virginia etc. R. Co.*, 35 W. Va. 389, 14 S. E. 12; *Spencer v. Chicago etc. Ry. Co.*, 105 Wis. 311, 81 N. W. 407; *North Jersey St. Ry. v. Purdy*, 142 Fed. 955; *Southern Pacific Co. v. Cavin*, 144 Fed. 348; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 155; *Gleeson v. Virginia etc. R. Co.*, 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. ed. 458.

There is no distinction in regard to the presumption of negligence between the happening of an accident through a defect in the carrier's means of transportation and through the acts of its servants: *Memphis etc. Packet Co. v. McCool*, 83 Ind. 392. A presumption of negligence arises from an accident caused by abnormal conditions in the department of actual transportation: *Western etc. R. Co. v. Shivers*, 101 Md. 391, 61 Atl. 618. But the presumption can only arise from proved or conceded facts from which negligence on the part of

the defendant can be inferred: *Lincoln Traction Co. v. Webb* (Neb.), 102 N. W. 258. Hence no presumption arises where the cause of the accident is something not connected with the business of a common carrier: *Price v. St. Louis etc. Co.*, 75 Ark. 479, 112 Am. St. Rep. 79, 88 S. W. 575; *Kansas etc. Ry. Co. v. Miller*, 2 Colo. 442; *McClary v. Sioux City etc. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534.

The doctrine of *res ipsa loquitur* does not apply where an accident might as well have been caused by the negligence of the passenger as that of the carrier: *Price v. St. Louis etc. Co.*, 75 Ark. 479, 112 Am. St. Rep. 79, 88 S. W. 575. In Michigan, although the courts hold strictly to the rule that in an action by a passenger the burden of proof rests upon the plaintiff to show negligence, still an inference of negligence may be drawn from the fact of an injury and other facts out of the ordinary in a given case: *Thurston v. Detroit United Ry. Co.*, 137 Mich. 231, 100 N. W. 395.

The same rule respecting the creation of a presumption of negligence which applies to a steam railroad applies to a street railway under similar circumstances: *Bosqui v. Sutro R. Co.*, 131 Cal. 390, 63 Pac. 682; *Chicago etc. Ry. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238, 16 L. R. A. 808; *State v. United etc. Co.*, 101 Md. 183, 60 Atl. 249; *Paynter v. Bridgeton etc. Co.*, 67 N. J. L. 619, 52 Atl. 367; *Hawkins v. Front St. etc. Ry. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021.

But one who accepts a ticket with a condition thereon that he will assume all risks of accident and damages to his person, while he may, nevertheless, recover for negligence, is not entitled to the presumption that negligence is to be inferred from the accident, but must affirmatively establish the specific negligence complained of: *Crary v. Lehigh Valley R. Co.*, 203 Pa. 525, 93 Am. St. Rep. 778, 53 Atl. 363, 59 L. R. A. 815. The same presumption of negligence arises in favor of passengers injured on freight trains, while obeying the regulations of the company respecting carriage on such trains, as applies to passengers on any other train: *Georgia etc. Ry. Co. v. Love*, 91 Ala. 432, 24 Am. St. Rep. 927, 8 South. 714; *Woolery v. Louisville etc. Ry. Co.*, 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. 226; *Norton v. St. Louis etc. Ry. Co.*, 40 Mo. App. 642.

• 2. Accidents Resulting from the Manner of Operating the Car or Trains.

A. In General.—A presumption of negligence may arise from an accident caused by a defective track: *McCafferty v. Pennsylvania R. Co.*, 193 Pa. 339, 74 Am. St. Rep. 690, 44 Atl. 435; or where a passenger-coach is thrown from the track: *Cleveland etc. Ry. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; or from operating the train at an unlawful rate of speed: *Chicago etc. Ry. Co. v. Jamieson*, 112 Ill. App. 69; or where an electric street-car is running

along the street with the motive power turned on but no one in charge of the car, the motorman having fallen off from the car: *Chicago City Ry. Co. v. Eiek*, 111 Ill. App. 452; or from a freight car running wild on the main track, having escaped from a side-track because of loosened brakes: *Jones v. Kansas City etc. R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434, 77 S. W. 890; or even from proof of habitual intoxication on the part of the conductor: *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229; or where an engine is backed into depot grounds without a lookout on the rear of the train: *Willis v. Vicksburg*, 115 La. 53, 38 South. 892; or the sudden backing of a train without warning at a railway crossing: *Gulf etc. Ry. Co. v. Hall*, 34 Tex. Civ. App. 535, 80 S. W. 133; or where the injury is caused by the falling of red-hot cinders from the engine: *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. 797; or an injury to a prospective passenger from a piece of coal thrown from the tender of a passing train: *Louisville etc. R. Co. v. Reynolds (Ky.)*, 71 S. W. 516; or from an injury by being struck by a mail pouch suspended at the side of the track: *McCord v. Atlanta etc. R. Co.*, 134 N. C. 53, 45 S. E. 1031. But an injury from the explosion of a signal torpedo found on the planking at a railway crossing is not regarded as making a *prima facie* case of negligence: *Obertoni v. Boston etc. R. Co.*, 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422.

B. Explosions of Locomotive Boilers and Giving Way of Railway Bridges.—The explosion of a locomotive boiler raises a presumption of negligence: *Illinois etc. R. Co. v. Phillips*, 49 Ill. 234; *Illinois etc. R. Co. v. Houck*, 72 Ill. 285. But where the engineer is the person injured, he must show his freedom from contributory negligence: *Illinois Central R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435. The same general rule applies to explosions of boilers on steamboats: *Caldwell v. New Jersey Steamboat Co.*, 56 Barb. 425, 47 N. Y. 282.

C. Accidents While Boarding or Alighting from Trains or Cars or from Jolts, Jerks, Lurches and Sudden Starts or Stops.—Mere fact of accident from foot being caught in running-board of street-car while alighting, tearing off the passenger's heel and throwing him to the ground, is not within the rule of *res ipsa loquitur*: *Wilbur v. Rhode Island Co.*, 27 R. I. 205, 61 Atl. 601. But an injury to a passenger by his heel catching on piece of metal projecting from step of street-car makes a *prima facie* case of negligence: *Rutlan v. Central etc. Ry. Co.* (Mo. App.), 96 S. W. 735.

The general rule respecting the presumptions arising from jerks or lurches of a car was stated in *Hite v. Metropolitan etc. Ry. Co.*, 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33. The court in that case said: "The natural presumption is, that the sudden jerk or lurch of the car was produced by those having control of its movements, and, unless evidence to the contrary appeared as part of plaintiff's case, it devolved upon defendant to show that it was pro-

duced by some cause beyond its control—that is, that it was not caused by reason of any imperfection of the appliances by which the train was operated, carelessness by those in charge thereof, or that plaintiff was guilty of negligence contributing directly to her injury; otherwise, she was entitled to a verdict.

“The rule thus announced has no application where the injury is occasioned by an outside agency and without fault on the part of the carrier: *Smith v. St. Paul etc. Ry.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Federal Street etc. Ry. Co. v. Gibson*, 96 Pa. 83.”

Where a passenger is thrown from his seat upon the ground, and such accident would not have happened under ordinary circumstances, and the passenger is free from contributory negligence, it raises a presumption of negligence: *Fitch v. Mason City etc. Co.*, 124 Iowa, 665, 100 N. W. 618. Hence extraordinary violence and lurching of a train is considered as raising the presumption of negligence: *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30, 44 Atl. 845.

An unusual or sudden jerking or jolting of a train generally raises the presumption of negligence as against the carrier: *Evansville etc. R. Co. v. Mills* (Ind. App.), 77 N. E. 608; *Dougherty v. Missouri etc. R. Co.*, 9 Mo. App. 478; affirmed in 81 Mo. 325, 51 Am. Rep. 239; *Condy v. St. Louis etc. Ry. Co.*, 85 Mo. 79. But several courts have held that the plaintiff must show that the shock or jerk was due to some negligent act of the carrier or its servants: *Stager v. Ridge Ave. etc. Ry. Co.*, 119 Pa. 70, 12 Atl. 821; *Saunders v. Chicago etc. Ry. Co.*, 6 S. Dak. 40, 60 N. W. 148. The mere fact that persons are not ordinarily thrown from their seats in rounding curves on street-cars does not justify the presumption of negligence: *Wilder v. Metropolitan St. Ry. Co.*, 161 N. Y. 665, 57 N. E. 1128. An injury to a passenger from the making of a coupling in the ordinary manner does not raise the presumption: *Yazoo etc. R. Co. v. Humphrey*, 83 Miss. 721, 36 South. 154; *Tully v. Chicago etc. R. Co.*, 41 Mo. App. 432; *Herstine v. Lehigh etc. R. Co.*, 151 Pa. 244, 25 Atl. 104. The fact that a passenger who had left the train to get a quick lunch, while attempting to get on the moving train, was thrown by a sudden jerk raises no presumption of negligence: *Allen v. Northern Pac. Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804. Likewise no presumption of negligence is created by the sudden jerking off of a passenger from the step of a street-car while he was holding to a stanchion with only one hand: *Renfro v. Fresno City Ry. Co.*, 2 Cal. App. 317, 84 Pac. 357; *Gregorio v. New York City Ry. Co.*, 49 Misc. Rep. 249, 97 N. Y. Supp. 373.

The sudden starting of a car or train, as a general rule, raises a presumption of negligence: *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, 8 South. 142; *Joyce v. Los Angeles Ry. Co.*, 147 Cal. 274, 82 Pac. 204; *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 82 Pac. 666; *Griffin v. Pacific Electric Ry. Co.*, 1 Cal. App. 678, 82 Pac. 1084; *United Ry. etc. Co. v. Beidelman*, 95 Md. 480, 52 Atl.

913; *Martin v. Second Ave. R. Co.*, 3 App. Div. 448, 38 N. Y. Supp. 220. The sudden acceleration of speed of a street-car after slackening in response to a signal that a passenger desired to alight raises a presumption of negligence: *Paul v. Salt Lake City R. Co.* (Utah), 83 Pac. 563.

Likewise a presumption of negligence arises where the accident occurs from a sudden and very abrupt stoppage of the car: *Chicago etc. Traction Co. v. Morumsen*, 107 Ill. App. 353; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26. But the presumption will not obtain where the stoppage was not more than usually violent: *Johnson v. Interurban St. Ry. Co.*, 88 N. Y. Supp. 866.

D. Collisions, Derailments or Parting of Trains.—The general rule is that where a passenger is injured by a collision between the car or train upon which he is being transported and some other car or train, a presumption of negligence will obtain as against the carrier: *Choctaw etc. Ry. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768; *Osgood v. Los Angeles etc. Co.*, 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169; *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; affirming 41 Ill. App. 311; *West Chicago St. R. Co. v. Martin*, 47 Ill. App. 610; *Pittsburgh etc. Ry. Co. v. Campbell*, 116 Ill. App. 356; *Pittsburgh etc. R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A., N. S., 1081; *Central etc. Ry. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309, 6 S. W. 441; *Baltimore etc. Ry. Co. v. Hausman* (Ky.), 54 S. W. 841; *Savage v. Marlborough St. Ry. Co.*, 186 Mass. 203, 71 N. E. 531; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *New Orleans etc. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Clark v. Chicago etc. R. Co.*, 127 Mo. 197, 29 S. W. 1013; *Robinson v. St. Louis etc. Ry. Co.*, 103 Mo. App. 110, 77 S. W. 493; *Magrane v. St. Louis etc. Ry. Co.*, 183 Mo. 119, 81 S. W. 1158; *Estes v. Missouri Pac. Ry. Co.*, 110 Mo. App. 725, 85 S. W. 627; *Goodloe v. Metropolitan St. Ry. Co.* (Mo. App.), 96 S. W. 482; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *Falke v. Second Ave. R. Co.*, 38 App. Div. 49, 55 N. Y. Supp. 984; *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; *Wright v. Southern Ry. Co.*, 127 N. C. 225, 37 S. E. 221; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597; *Madara v. Shamokin etc. Ry. Co.*, 192 Pa. 542, 43 Atl. 995; *Campbell v. Consolidated Traction Co.*, 201 Pa. 167, 50 Atl. 829; *Palmer v. Warren St. Ry. Co.*, 206 Pa. 574, 56 Atl. 49, 63 L. R. A. 507; *Abel v. Northampton Traction Co.*, 212 Pa. 329, 61 Atl. 915; *O'Clair v. Rhode Island Co.*, 27 R. I. 448, 63 Atl. 238; *Howe v. Northern Pac. Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949. *Contra*, *Cox v. Wilmington City Ry. Co.*, 4 Penne. (Del.) 162, 53 Atl. 569.

But where the agencies causing the collision were not within the control of the carrier, no presumption of negligence will arise; *Wolf v. Chicago etc. Traction Co.*, 119 Ill. App. 481.

Hence the rule laid down by the weight of authority is that the mere fact of a collision of a car or train with a wagon or other similar vehicle in charge of a third person does not raise a presumption of negligence, and where such a presumption is stated as having been created it will generally be found that there were some circumstances connected with the collision which showed the absence of negligence on the part of the driver of the private vehicle: *Foulk v. Wilmington City Ry. Co.* (Del.), 60 Atl. 973; *Chicago etc. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238; *Chicago etc. Traction Co. v. Mee*, 218 Ill. 9, 75 N. E. 800, 2 L. R. A., N. S., 770; *Deikman v. Morgan's Louisiana etc. R. Co.*, 40 La. Ann. 787, 5 South. 76; *Annapolis etc. R. Co. v. Pumphrey*, 72 Md. 82, 19 Atl. 8; *Black v. Boston etc. Ry. Co.*, 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799; *Thurston v. Detroit etc. R. Co.*, 137 Mich. 231, 100 N. W. 395; *Walsh v. North Jersey St. R. Co.*, 71 N. J. L. 641, 60 Atl. 335; *Grant v. Metropolitan St. R. Co.*, 99 App. Div. 422, 91 N. Y. Supp. 202; *Fagan v. Rhode Island Co.*, 27 R. I. 51, 60 Atl. 672; *Potts v. Chicago City R. Co.*, 33 Fed. 610. The California court in a very recent case held that an injury to a passenger by a collision between a street-car and a truck raises a presumption of negligence: *Houghton v. Market St. Ry.*, 1 Cal. App. 576, 82 Pac. 972. In an earlier case it was held in that same state that in case of such a collision, no presumption of negligence would arise as against both parties to the collision, the court saying: "The bedrock of this principle of presumption of negligence arising from the fact of the injury is that of probabilities, and in the very nature of things it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants wholly independent of each other, it being an open question as to which defendant had control of the particular instrumentality that caused the injury. If it were a conceded fact in such a use that the instrumentalities of both defendants caused the injury, probably the principle could be applied, but not otherwise": *Harrison v. Sutter St. Ry. Co.*, 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608.

A presumption of negligence will obtain where a street-car sprinkler from which the motorman has fallen off collides with a private vehicle: *Chicago City Ry. Co. v. Barker*, 209 Ill. 321, 70 N. E. 624. Likewise such a presumption will arise from the collision of a train with a cow, whereby a passenger is injured: *Louisville Ry. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58.

The mere happening of a collision does not raise a presumption of negligence as against the carrier in a suit by one of its servants for injuries resulting therefrom: *Mobile etc. R. Co. v. Godfrey*, 155 Ill. 78, 39 N. E. 590; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. 83; *Smith v. Missouri etc. Ry. Co.*, 113 Mo. 70, 20 S. W. 896; *Norfolk etc. R. Co. v. Williams*, 89 Va. 165, 15 S. E. 522.

Where a train parts in transit and causes a collision or other accident, it raises a presumption of negligence: *Southern Ry. Co. v. Dawson*, 98 Va. 577, 36 S. E. 996; *Feldschneider v. Chicago etc. Ry. Co.*, 122 Wis. 423, 99 N. W. 1034. But not so with respect to a servant: *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 32 Am. St. Rep. 425, 30 N. E. 169.

Where a passenger is injured by reason of the car or train upon which he is riding having been derailed or thrown from the track, a presumption of negligence arises as against the carrier: *Alabama etc. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65, 9 South. 722; *St. Louis etc. Ry. Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Arkansas etc. Ry. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; *Denver etc. Ry. Co. v. Woodward*, 4 Colo. 1; *Rio Grande etc. Ry. Co. v. Rubenstein*, 5 Colo.-App. 121, 38 Pac. 76; *Central etc. R. Co. v. Sanders*, 73 Ga. 513; *Pittsburg etc. Ry. Co. v. Thompson*, 56 Ill. 138; *Peoria etc. R. Co. v. Reynolds*, 88 Ill. 418; *Louisville etc. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476; *Cleveland etc. Ry. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. 836; *Chicago etc. R. Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. 640; *Cronk v. Wabash R. Co.*, 123 Iowa, 349, 98 N. W. 884; *Atehison etc. R. Co. v. Elder*, 57 Kan. 312, 46 Pac. 310; *Meador v. Missouri Pac. Ry. Co.*, 62 Kan. 865, 61 Pac. 442; *Felton v. Holbrook (Ky.)*, 56 S. W. 506; *Louisville St. Ry. Co. v. Brounfield (Ky.)*, 96 S. W. 912; *Western etc. R. Co. v. State*, 95 Md. 637, 53 Atl. 969; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537, 77 S. W. 127; *Logan v. Metropolitan St. Ry. Co.*, 183 Mo. 582, 82 S. W. 126; *Chicago etc. Ry. Co. v. Zernecke*, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610; *Omaha St. R. Co. v. Boesner (Neb.)*, 105 N. W. 303; *Cheetham v. Union R. Co.*, 26 R. I. 279, 58 Atl. 881; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Edgerton v. New York etc. R. Co.*, 39 N. Y. 227; *Hegeman v. Western R. Corp.*, 16 Barb. 353; *Braun v. Union Ry. Co.*, 100 N. Y. Supp. 1012; *Reading City etc. Ry. Co. v. Eckert (Pa.)*, 4 Atl. 530; *Illinois Central R. Co. v. Porter (Tenn.)*, 94 S. W. 666; *St. Louis etc. Ry. Co. v. Harkey (Tex. Civ. App.)*, 88 S. W. 506; *Galveston etc. Ry. Co. v. Green (Tex. Civ. App.)*, 91 S. W. 380; *Davis v. Galveston etc. Ry. Co. (Tex. Civ. App.)*, 93 S. W. 222; *Minahan v. Grand Trunk etc. Ry. Co.*, 138 Fed. 37. This rule applies, of course, to street railways as well as steam railroads: *Spelman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753, 55 N. W. 270, 20 L. R. A. 216; *Omaha St. Ry. Co. v. Boesen (Neb.)*, 105 N. W. 303; *Adams v. Union Ry. Co.*, 80 App. Div. 136, 80 N. Y. Supp. 264. But the mere fact of derailment does not generally raise a presumption of negligence as against the carrier in a suit by one of its servants for injuries received therefrom: *E. C. Jackson Lumber Co. v. Cunningham*, 141 Ala.

206, 37 South. 445; *Brounfield v. Chicago etc. Ry. Co.*, 107 Iowa, 254, 77 N. W. 1038; *Chicago etc. Ry. Co. v. O'Brien*, 132 Fed. 593.

E. Accidents to Persons not Sustaining Contractual Relations with the Carrier.—Negligence is not presumed from mere proof of an accident on the track of a railway company: *Pennsylvania R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616. The mere fact that a person is found dead on a railroad's right of way raises no presumption of negligence against the railroad company: *Louisville etc. Ry. Co. v. Terry's Admr. (Ky.)*, 47 S. W. 588; *Southern Ry. Co. v. Back's Admr.*, 103 Va. 778, 50 S. E. 257. And of course where a person is struck by a train while lying unconscious on the track from intoxication, there is no presumption of negligence: *Price v. Philadelphia etc. R. Co.*, 84 Md. 506, 36 Atl. 263, 36 L. R. A. 213. Negligence is not presumed from the mere fact that a car strikes a pedestrian walking along the track: *Garwick v. United etc. Co.*, 101 Md. 239, 61 Atl. 138; nor from an injury to a person in the night-time standing at a street crossing by being struck by a piece of scantling protruding about two feet beyond the side of a flat car: *Chicago etc. Ry. Co. v. Reilly*, 212 Ill. 506, 103 Am. St. Rep. 243, 72 N. E. 454. But a presumption of negligence has been allowed where the injury occurred by cross-ties falling from a car on a person walking on a foot-path alongside of the track: *Howser v. Cumberland etc. R. Co.*, 80 Md. 146, 45 Am. St. Rep. 332, 30 Atl. 906, 27 L. R. A. 154.

But no presumption of negligence arises from falling over a fender attached to an unlighted and unguarded car left standing on the street in the night-time: *Adams v. Metropolitan St. Ry. Co.*, 82 App. Div. 354, 81 N. Y. Supp. 553. Nor does such a presumption arise where a person collides in the night-time with a truck belonging to a railroad company and left standing on the sidewalk in front of its depot: *Tibersky v. Chicago etc. Ry. Co.*, 124 Wis. 243, 102 N. W. 549.

3. Accidents to Passengers from the Fall or Giving Way of Things Constituting Part of the Car Equipment or Conveniences.—Negligence will be presumed from the falling of a fire-extinguisher fastened to the side of a car: *Allen v. United Traction Co.*, 67 App. Div. 363, 73 N. Y. Supp. 737; or from the falling of a ventilating window: *Och v. Missouri etc. Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; or from the fall of a car window upon a passenger's hand: *Carroll v. Chicago etc. R. Co.*, 99 Wis. 399, 67 Am. St. Rep. 872, 75 N. W. 176; or from the fall of a porcelain lamp shade: *White v. Boston etc. R. Co.*, 144 Mass. 404, 11 N. E. 552; or from the falling of a partition plank upon a sleeping-car passenger: *Jenkins v. Louisville etc. R. Co.*, 104 Ky. 673, 47 S. W. 761; or from the fall of an upper berth: *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 302, 48 N. Y. 348; or from the falling of a bed frame in the caboose of a mixed train: *Stoody v. Detroit etc. Ry. Co.*, 124 Mich. 420, 83 N. W. 26; or from

the fall of a device for registering fares: *Weir v. Union Ry. Co.*, 98 N. Y. Supp. 268.

Likewise a presumption of negligence will arise from the giving way of a handrail on a street-car used by the passengers to assist in boarding and alighting from the car: *McCarthy v. St. Louis etc. Ry. Co.*, 105 Mo. App. 596, 80 S. W. 7; and also from the opening of a gate on the rear platform of a street, thereby causing a passenger to fall off from the car: *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226, 79 S. W. 999; and from the slipping of the brake on a street-car so that it revolves and strikes a boarding passenger: *Thompson v. St. Louis etc. Ry. Co.*, 111 Mo. App. 465, 86 S. W. 465; and from the failure of the brakes of a street-car to work because of a broken chain: *Dougherty v. Pittsburgh Rys. Co.*, 213 Pa. 346, 62 Atl. 926.

Negligence will also be presumed from the explosion of a lamp on an omnibus: *Wilkie v. Bolster*, 3 E. D. Smith, 327. And negligence will be presumed from the setting of fire to a passenger's dress from the overheating of a plate over a wheel by friction from overloading the car: *Powell v. Hudson Valley Ry. Co.*, 88 App. Div. 133, 84 N. Y. Supp. 337.

4. Accidents Peculiar to Electric Cars.

A. In General.—The subject of this note in respect to electric cars was considered in the recent monographic note on the duties and liabilities of electric corporations, attached to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515. Hence, we shall consider only the more recent cases on the subject.

The fact that an electric car is so charged with electricity as to injure passengers coming in contact with the car establishes prima facie negligence: *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *D'Arcy v. Westchester etc. Ry. Co.*, 82 App. Div. 263, 81 N. Y. Supp. 952. Hence, an electric shock from taking hold of the handrail of an electric car raises a presumption of negligence: *Dallas etc. Ry. Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315.

B. Falling or Breaking of Trolley Poles or Wires.—Inasmuch as the fact that the breaking of a trolley pole and the falling of the trolley wire does not happen in the ordinary course of events unless there is some negligence in its construction or in its management, such falling or breaking raises a presumption of negligence: *Uggle v. West End St. Ry. Co.*, 160 Mass. 351, 39 Am. St. Rep. 481, 35 N. E. 1126; *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321; *O'Flaherty v. Nassau etc. R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; affirmed in 165 N. Y. 624, 59 N. E. 1128; *Clancy v. New York etc. Ry. Co.*, 82 App. Div. 563, 81 N. Y. Supp. 875; *Stern v. Westchester El. Ry. Co.*, 99 App. Div. 491, 90 N. Y. Supp. 870; *Cincinnati Traction Co. v. Holzenkamp*, 74 Ohio St. 379, ante, p. 980, 78 N. E. 529; *Memphis St. Ry. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807, 75 S. W. 719. Decisions to a contrary effect were made in

Bridges v. Jackson etc. Power Co., 86 Miss. 584, 38 South. 788; *Kepner v. Harrisburg Traction Co.*, 183 Pa. 24, 38 Atl. 416. The fall of a switch stick from the hands of the conductor while using it to free the trolley pole from a frog at the junction of the overhead wires raises a prima facie case of negligence: *Manning v. West End St. Ry. Co.*, 166 Mass. 230, 44 N. E. 135. And an injury to a pedestrian from the slot rail of an underground trolley raises a presumption of negligence: *Ludwig v. Metropolitan St. Ry. Co.*, 71 App. Div. 210, 75 N. Y. Supp. 667; *Braham v. Nassau El. R. Co.*, 72 App. Div. 456, 76 N. Y. Supp. 578.

C. Burning Out of Fuses or Controllers.—Where the controller of an electric street-car blows out or burns out, the law presumes that such blowing or burning out resulted from some defect of the controller or other appliance of the carrier, or of the means used by it in its operation, and it devolves on the carrier to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented: *Chicago etc. Co. v. Newmiller*, 215 Ill. 383, 74 N. E. 410; *Brod v. St. Louis Transit Co.*, 115 Mo. App. 202, 91 S. W. 993; *German v. Brooklyn Heights R. Co.*, 107 App. Div. 354, 95 N. Y. Supp. 112; *Paine v. Geneva etc. Traction Co.*, 101 N. Y. Supp. 204; *Richmond Ry. etc. Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736; *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 111 Am. St. Rep. 990, 82 Pac. 995, 2 L. R. A., N. S., 836. See, also, monographic note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 536. The same presumption arises where the controller box is so charged with electricity as to endanger the safety of a passenger who might touch it: *South Covington etc. Ry. Co. v. Smith (Ky.)*, 86 S. W. 970.

But the ordinary burn-out of a fuse used to prevent an excessive amount of electricity from entering motors creates no presumption of negligence: *Cassaday v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285.

c. Accidents from the Falling of Elevators in Buildings.—The fall of an elevator in a building, while carrying passengers, raises a presumption of negligence in the person charged with its operation or of some actionable defect in its mechanism: *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498; *Springer v. Schultz*, 105 Ill. App. 544; *Winkeim v. Field*, 107 Ill. App. 145; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 178; *Spring v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, 59 N. E. 953, 52 L. R. A. 930; *National Biscuit Co. v. Wilson (Ind. App.)*, 78 N. E. 251; *Dehring v. Comstock*, 78 Mich. 53, 43 N. W. 1049; *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873, 4 L. R. A. 673; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922; *Fox v. Philadelphia*, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214; *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869; *Edwards v. Manufacturers' Bldg. Co.*, 27 R. I. 248, 114

Am. St. Rep., p. 000, 61 Atl. 616. But this presumption does not arise in a suit by the operator of the elevator for injuries sustained by the fall of the elevator: *Womble v. Merchants' Grocery Co.*, 135 N. C. 474, 47 S. E. 493.

d. **Accidents While Traveling by Stage, Livery, Steamboat or the Like.**—The overturning of a stage-coach raises a presumption of negligence as against the owner in a suit for injuries received by a passenger by such accident: *Fairehild v. California Stage Co.*, 13 Cal. 599; *Boyce v. California Stage Co.*, 25 Cal. 460; *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 428; *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2; *Wall v. Livezey*, 6 Colo. 465; *Sanderson v. Frazier*, 8 Colo. 79, 54 Am. Rep. 544, 5 Pac. 632; *Anderson v. Scholey*, 114 Ind. 553, 17 N. E. 125; *Stockton v. Frey*, 4 Gill, 406, 45 Am. Dec. 138; *Ware v. Gay*, 11 Pick. 106; *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744. Likewise where a person who hires a team and driver from a liveryman, the upsetting of the coach makes out a prima facie case of negligence against the liveryman: *Payne v. Halstead*, 44 Ill. App. 97.

The same general rule which applies to other carriers is also applicable to carriers by water, such as by steamboats or ferry-boats: *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *Memphis etc. Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Le Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303, 31 South. 766; *Le Baron v. East Boston Ferry Co.*, 11 Allen, 312, 87 Am. Dec. 717; *Joy v. Winnisimmet Co.*, 114 Mass. 63; *Yerkes v. Keokuk etc. Packet Co.*, 7 Mo. App. 265; *Bartlett v. New York etc. Transp. Co.*, 25 Jones & S. 348, 8 N. Y. Supp. 309, affirmed in 130 N. Y. 659, 29 N. E. 1033; *Fearn v. West Jersey Ferry Co.*, 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

WILLIAMSON v. SOUTHERN RAILWAY COMPANY.

[104 Va. 146, 51 S. E. 195.]

RAILWAYS, Persons Walking on Tracks and Rights of Way of, When Mere Licensees and not Invited Guests.—Though a railway corporation builds a bridge across a river for its own use, with a walkway on each side of the tracks, and persons using the bridge are in the habit, after landing, of walking along the right of way of the railway to their homes and places of business, and so have been for many years with the knowledge of the company, such persons are mere licensees and not invited guests, especially if danger signals have been kept posted warning all persons to keep off the tracks. (pp. 1034, 1035.)

NEGLIGENCE, What Necessary to Sustain an Action for.—An action for negligence lies only where there has been a failure to perform some legal duty, owed by the defendant to the plaintiff. (p. 1035.)

RAILWAYS, Duty of to Licensees on Their Tracks.—If the right of way of a railway corporation at a particular point has long been in use as a walkway, and this is well known to the company, it is under the duty of using reasonable care to discover, and not to injure, persons whom it might reasonably expect to be on its tracks at that point. (p. 1035.)

RAILWAYS, Licensees on Tracks, No Duty of Provision Owed to.—Though a railway corporation has reason to expect that its tracks in a particular locality may be used by licensees, it does not owe them any duty of provision, or of making preparations in advance for their protection. Its sole duty is to use reasonable care to discover, and not to injure, such persons. It need not provide its engines with artificial lights for the protection of bare licensees. There is no obligation on the railway to do anything to make the conditions more favorable than the natural surroundings make them. (pp. 1036-1038.)

Meredith & Cocke, for the plaintiff in error.

Munford, Hunton, Williams & Anderson, for the defendant in error.

¹⁴⁷ HARRISON, J. This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The damages were assessed by the jury at fifteen hundred dollars, subject to a demurrer to the evidence, which was sustained and judgment given for the defendant.

The accident which is the subject of inquiry occurred upon that portion of the main line of the defendant which runs along the south bank of James river, at or about its entry of the company's yards in the city of Manchester. A little northwest of the city of Manchester, in James river, is an island called "Belle Isle," upon which is located an iron manufactory. This island is connected with the south bank, or Manchester side, of the river by a railroad bridge built by the defendant company for its use in hauling freight, upon each side of which is provided a walkway for the use of persons going to and from the iron works. These iron works and the railroad bridge connecting them with the main line of the Southern Railway on the Manchester side of the river have been in operation for many years. When the employés from "Belle Isle" cross the bridge and reach the south bank of the river, they have two routes open to them—one leading away from the railroad and into the city of Manchester, and the other along the right of way of the defendant company into the city. These employés had for many years used both routes, the choice depending upon the point of destination in the city. Those who, for their convenience, adopted the latter route, had always enjoyed its use by the passive acquiescence of the defendant.

¹⁴⁸ The plaintiff had been for "three or four months" an employé of the iron works on "Belle Isle." and on the twenty-seventh day of November, 1903, he left the works fifteen minutes before 6 o'clock to go to his home. When he reached the south bank of the river he pursued, as was his regular habit, the route along the right of way of the defendant company. He walked on the pathway at the side of the track a distance of about fourteen hundred feet, but finding the path rough he looked and listened to ascertain if a train was approaching, and being satisfied that no train was coming, he stepped upon the railroad track and walked thereon for a distance of twenty-five yards, when he looked back and found a "work-train" of the defendant company so close upon him that he could not jump out of the

way in time to avoid the injuries complained of. The plaintiff says that it was a very dark night; that the engine was provided with no headlight or lights of any description, and when he looked back it was so dark that he could not see the engine good. He further says that his hearing was poor in one ear, and that it was downgrade at that point, which caused the train to run without making much noise.

It is contended by the plaintiff in error that, when using the track and right of way of the railroad on the south side of the river as a convenient route to his home, he occupied a higher relation to the defendant company than that of licensee, it being insisted that "the defendant so built its bridge, with walkways on each side thereof, that the workmen on 'Belle Isle' could come across to the Manchester side and use its tracks as their route to and from their homes; that no invitation in a practical way could have been more strongly given; that it is idle to say that the company only built the bridge to get the men to the shore, and that it never meant for them to use the tracks as their route home. The two things, the bridge and the route, were too closely connected for them to be separated with fairness. The old bridge and route had been used jointly for fifty years, and the new bridge and the route were intended and expected to be used jointly. The use was in fact by invitation."

¹⁴⁹ We have been unable to find any fact or circumstance in the record to support this contention. No relation is disclosed between the defendant and the iron works other than that of common carrier and shipper, and the defendant can hardly be held to have built its bridge from "Belle Isle" to the shore for the benefit of the workmen there employed. It was built for the use and benefit of the railroad company in hauling freight. The construction of the walkways on each side of the bridge was a mere incident, and while put there for persons to walk on, they served as a proclamation and warning to such persons not to use the track rather than an invitation to use it. When those using the walkways on either side of the bridge reached the shore, they bore no relation whatever to the defendant company. They were uncontrolled and free to go where, when, and by whatsoever route they pleased. Such of them as chose to follow the right of way of the railroad as a convenient route to their homes did so voluntarily and without invitation from the defendant company. On the contrary, two hundred and forty feet

from where the plaintiff was struck there was a large sign four feet square, with the following warning thereon:

“DANGER—BEWARE.

“The public is notified that these railroad tracks and right of way are no thoroughfare; must be used by trains, and are dangerous for pedestrians who are warned to use the public streets and keep off these private tracks.”

This warning is signed by the general manager of the defendant company. It is set up ten feet high and conspicuously in view of the plaintiff every time he passes over the right of way of the defendant in going to his home.

In the light of these facts, our conclusion is that the plaintiff was not using the railroad track on the evening of his injury as the “invited guest” of the defendant company, but was there as bare licensee.

An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.

150 In the case at bar, the evidence shows that the right of way of the defendant company, at the point where the accident occurred, had been for many years in daily use as a walkway by persons from “Belle Isle,” and that this use and the particular hours of such use were well known to the company and its employes. Under these circumstances it was the duty of the company to use reasonable care to discover and not to injure persons whom it might reasonably expect to be on its tracks at that point: *Blankenship v. Chesapeake etc. Ry. Co.*, 94 Va. 499, 27 S. E. 20; *Chesapeake etc. Ry. Co. v. Rodgers’ Admx.*, 100 Va. 234, 41 S. E. 732.

In the case of *Norfolk etc. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846, where the plaintiff was standing on the platform of a freight depot and was injured by a freight train that ran against the platform, this court said: “Being there as a mere licensee, the defendant did not owe him the duty of maintaining its roadbed, switches, and connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings, and machinery on its cars or of properly inspecting the same; or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed. The general rule being that a bare licensee, that is, one who is permitted by the passive acquiescence of the railroad company to come

upon its depot platform for his own purposes in no way connected with the railroad is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there": Citing 2 Shearman and Redfield on Negligence, sec. 705; *Nichol's Admr. v. Washington etc. R. Co.*, 83 Va. 99, 5 Am. St. Rep. 257, 5 S. E. 171; *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129, 98 Am. Dec. 317; *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990.

In the case of *Chesapeake etc. Ry. Co. v. Rodgers' Admx.*, 100 Va. 234, 41 S. E. 732, a case similar in its facts and circumstances to that under consideration, this court approved an instruction which told the jury that the defendant company did not owe the plaintiff's intestate the duty of blowing its whistle, ringing its bell, running its engines at ¹⁵¹ any particular rate of speed, or having a light on said engines or tender; that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to avoid the accident, they must find for the defendant. But that if they believed from the evidence that the servants of the defendant in charge of the engine could, in the exercise of reasonable care under the circumstances surrounding them at the time, by having a proper lookout, have discovered the danger of the plaintiff in time to avoid the accident, they must find for the plaintiff.

The result of these decisions is that a railroad company owes no duty of prevision to a bare licensee. It is under no obligation to make preparation in advance for his protection. Its sole duty is to use reasonable care to discover and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. As said in *Wood's case* (99 Va. 156, 37 S. E. 846), such a person is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there. The uncontradicted evidence of the engineer in the present case is that he did keep a lookout and did not see the plaintiff, who, he says, must have been walking in the middle of the track, where he could not have seen him on account of a curve in the road at that point; that if the plaintiff had been on the side of the track at the edge of the ties, he could have seen him.

It is earnestly insisted that it was not intended in the Rodgers case (100 Va. 234, 41 S. E. 732) to hold that a railroad company was without fault in running a train on a dark night with no light on its engine, thereby depriving itself of the power to keep such reasonable lookout as the law required; that the declaration in the Rodgers case meant to charge that the failure to have proper lights on the engine was negligence in itself, without regard to whether or not they were necessary for the maintenance of a reasonable ¹⁵² lookout; that the evidence bears out this view of the pleading, because it there appears that it was a bright moonlight night, and therefore immaterial whether or not there were lights on the engine; that it would be a strange and striking contradiction, if not a curious absurdity, to announce it to be the duty of a railroad company to keep a reasonable lookout and at the same time to hold that it could so envelope itself in darkness as to prevent its performance of such clearly stated duty.

The argument of the learned counsel on this point may be reduced to this proposition: That if it is a bright moonlight night the railroad may run its trains without lights on its engines, but if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees provide its engines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees.

To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees. For if they must provide lights for their protection on a dark night, it could with equal propriety be urged that on a downgrade, which it is here contended so reduced the noise of the train as to destroy its value as notice, the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances other than lights, should be in order, that competent employes should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensees. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad, but enough has been said to indicate how difficult, if not impossible, it would be

to engraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare ¹⁵³ licensees and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected. This is shown by the instruction approved in the Rodgers case (100 Va. 234, 41 S. E. 732), which told the jury that if they believed from the evidence that the servants of the defendant in charge of the engine could not, in the exercise of reasonable care under the circumstances surrounding them at the time, have known of the danger to the plaintiff's decedent in time to have avoided the accident, they must find for the defendant.

In the case at bar the defendant discharged its duty to the plaintiff when it kept such reasonable lookout at the time as its servants could keep under the conditions then existing, among which conditions was an absence of the moon, and no artificial light provided to take its place. The darkness, which it is contended imposed upon the defendant the duty of providing lights for the protection of the plaintiff, also enveloped the latter when he stepped from a place of safety on the pathway to the defendant's track, and should have suggested to him the increased danger of his situation. Having reached the conclusion, however, that the defendant company has failed in the performance of no legal duty that it owed the plaintiff, it is not necessary to consider the negligence of the latter.

For these reasons the judgment complained of must be affirmed.

Persons Walking Along a Railway Track, using it as a highway, are usually held to assume the risk of so doing: *Schexnadrye v. Texas etc. Ry. Co.*, 46 La. Ann. 248, 49 Am. St. Rep. 321; *State v. Baltimore etc. R. R. Co.*, 69 Md. 494, 9 Am. St. Rep. 436; *Kelly v. Michigan Cent. R. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876. For a modification of this rule, where a passenger wrongfully ejected from a train is walking back along the railway right of way, see *Anderson v. Seattle etc. Ry. Co.*, 36 Wash. 387, 104 Am. St. Rep. 962.

COMMONWEALTH v. WAMPLER.

[104 Va. 337, 51 S. E. 737.]

ASSIGNMENT, What Passes as an Incident.—To pass as an incident of an assignment, the right must constitute a security for the debt, and that cannot be predicated of a mere collateral right of action against a public officer for failing to discharge an official duty, although his misconduct may affect the value of the chose assigned. (p. 1041.)

ASSIGNMENTS, Effect of Virginia Statutes.—Though the statute of Virginia enlarges the common law so as to make choses in action assignable and authorizes the assignee to sue in his own name, it does not create new causes of action, and has no application to a right of which no assignment has been made. (pp. 1041, 1042.)

THE ASSIGNMENT of a Judgment Does not Transfer the Right of an Assignor to Maintain an Action for Damages against an officer and his sureties for failure to return a forthcoming bond taken upon the judgment. (p. 1042.)

Vicars & Peery, for the plaintiff in error.

Ayers & Fulton, for the defendants in error.

337 WHITTLE, J. The single question presented by this record is whether the **338** assignee of a judgment is entitled to maintain an action for damages against an officer and the sureties on his official bond, for a breach of the condition thereof which occurred prior to the assignment, by reason of his failure to return a forthcoming bond taken upon the judgment within the time and in the manner prescribed by statute to give such bond the force of a judgment against the obligors therein.

Upon demurrer to the declaration, the trial court resolved that question in the negative, and rendered judgment for the defendants; whereupon the plaintiff brings error.

The authorities are generally agreed that the assignment of a judgment carries with it "the cause of action on which it was based, together with all the beneficial interest of the assignor in the judgment, and all its incidents": Freeman on Judgments, sec. 431.

Upon the same principle the assignment of a note carries with it all securities provided for its payment.

The doctrine is founded upon the theory that the debt is the principal thing, and the security an accessory. They are not severable, and the security passes by virtue of the

assignment as an inseparable dependent incident: *Carpenter v. Longan*, 16 Wall. 271, 21 L. ed. 313.

It will be observed that the present inquiry does not involve the power of the judgment creditor to assign the right of action in question, but whether that right passed to the assignee as an incident to the assignment of the judgment.

Citizens' Nat. Bank v. Loomis, 100 Iowa, 266, 62 Am. St. Rep. 571, 69 N. W. 443, is the only case to which our attention has been called which directly sustains the pretension of the plaintiff in error. In that case it was held that "the assignment of a judgment in an action in which an attachment has been allowed and property seized thereunder passes to the assignee the judgment creditor's right to recover damages of the sheriff for negligence in the care of property seized by allowing a disposition to be made of it."

³³⁹ The reasoning upon which that decision is based is not satisfactory. It proceeds upon the false premise that the right to sue for the breach of official duty must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must rest in the assignee; whereas, we apprehend, it appears by the weight of authority that the right of action for the previous breach of duty by the officer is a mere personal right which appertains to the judgment creditor.

The right to recover damages for the tort, it is true, is an incident to the judgment in the qualified sense that it belongs to the owner of the judgment at the time the injury is committed; but it is separate and distinct from the right to the judgment, both in its character and in respect to the persons liable to respond in damages for the wrong. It is a collateral right, over which the judgment creditor possesses exclusive dominion, which he may enforce or forbear to enforce, and may assign or withhold at pleasure.

The assumption, therefore, that the right to sue the officer exists in the assignee of the judgment proceeds upon the hypothesis that it is such an incident as must necessarily pass by the assignment of the judgment, a conclusion which the authorities do not sustain.

Bouvier, in defining the word "incident," observes: "This term is used both substantively and adjectively of a thing which either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion (1 Hill

on Real Property, 243); while the right of alienation is necessarily incident to a fee simple at common law, and cannot be separated by a grant: 1 Washburn on Real Property, 54. So a court baron is inseparably incident to a manor in England: Kitch. 36; Coke's Littleton, 151.

"All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto": 1 Bouvier's Law Dictionary, Rawles' revision, 1006.

³⁴⁰ It will be seen from the foregoing definition and illustrations that the distinguishing characteristic of an incident consists in the fact that it "usually or naturally and inseparably depends upon, appertains to, or follows" its principal.

The distinction as to what does and what does not pass by incidental assignment is, in some instances, nice and difficult to draw, but in order for it to pass the incident must, in a legal sense, constitute a security for the debt, and that can hardly be predicated of a mere collateral right of action against a public officer for a quasi tort in failing to discharge an official duty, although his misconduct may affect the value of the judgment.

Accordingly, the supreme court of Kentucky, upon a similar state of facts, held that the assignment of a judgment could not operate to transfer the right to recover for such an injury, for a right to compensation for such an injury and the right to the judgment are separate and distinct rights. They are separate and distinct not only in their origin and nature, but in relation to the persons against whom they must be asserted. The right to compensation for the injury may, indeed, be said to be incident to the right to the judgment in one sense, for it must necessarily belong to the person who was entitled to the judgment at the time the injury was done, but it is clearly not such an incident as must necessarily pass by the assignment of the judgment: *Commonwealth v. Fuqua*, 3 Litt. (Ky.) 41.

In *Redmond v. Staton*, 116 N. C. 140, 21 S. E. 186, it was held that the "clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands. The mere assignment of a judgment does not carry with it a right of action which has accrued

to the judgment creditor against the clerk of the court for his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands." The court then cites with approval the case of *Timberlake v. Powell*, 99 N. C. 233, 5 S. E. 410, as analogous authority, ³⁴¹ where the court says: "The present suit is not upon the judgment, but upon an alleged independent liability incurred by other tort-feasors. . . . The cause of action is separate and distinct from that involved in the former adjudication, and is outside the scope of the assignment."

In *Robinson v. Towns*, 30 Ga. 818, the court held that the assignment of the judgment did not pass any interest in the money which the sheriff had previously collected on the judgment. The court, at page 821, observes: "It was said that the plaintiffs could not maintain the suit, because they had parted with their interest by the assignment. They did part with their interest in the further enforcement of the judgment, but not with their interest in their money which the sheriff had previously collected. The assignee acquired and they lost the right to enforce the judgment as it stood at the time of the assignment—that is, the right to collect what was still due at the time of the assignment out of the defendants in it. Money previously collected and held by the sheriff would not be reached by the exercise of the assignee's right of enforcing the judgment, for such money was the fruit of the previous enforcement of the judgment to that extent. Such money constituted a debt due from the sheriff to the plaintiffs, to be enforced by a rule or suit against him": See, also, *Central etc. Co. v. Brunswick etc. R. Co.*, 87 Ga. 386, 13 S. E. 520.

While the Virginia statute has enlarged the rule of the common law so as to make choses in action assignable, and authorizes the assignee to maintain in his own name any action which the original obligee, etc., might have brought, it does not create new causes of action, and has no application to cases in which there is no assignment.

It would, in our judgment, be impolitic to extend the scope of the statute by judicial construction so as to allow the assignment of a chose in action to invest in the assignee, as an incident, a litigious right against a third party to recover damages for an injury which accrued prior to the assignment.

The conclusion reached in this case is not in conflict with the ³⁴² decision in *National Valley Bank v. Hancock*, 100

Va. 101, 93 Am. St. Rep. 933, 40 S. E. 611, 57 L. R. A. 728, where the court recognizes the established general doctrine that a mere right in litem is not the subject of incidental assignment, but enforces a qualification of the rule called for by the facts of the particular case. In that case the debtor, without consideration, in the interest of his children, divested himself of property to the prejudice of creditors. The diversion as to them was void, and hence they, or their assignees, had the right to follow the property or its proceeds, and subject it to their debts in the hands of the alienee. The debtor's individual liability and diverted property were securities for the debt, and passed as incidents to the assignment.

The case under consideration is wholly different. The effort is not to hold the debtor or his property liable, but to maintain an action to recover damages on an individual liability of a third person to the judgment creditor.

The judgment complained of is without error, and must be affirmed.

The Effect of the Assignment of a Judgment is the subject of a monographic note to *Chilstrom v. Eppinger*, 78 Am. St. Rep. 47-57. The assignment of a judgment in an action in which an attachment has been allowed passes to the assignee the judgment creditor's right to recover damages of the sheriff for negligence in allowing a disposition of the property seized: *Citizens' Nat. Bank v. Loomis*, 100 Iowa, 266, 62 Am. St. Rep. 571. And the assignment by a ward of a judgment against her guardian carries with it the assignor's right or action on the guardian's bond: *Heisen v. Smith*, 138 Cal. 216, 94 Am. St. Rep. 39.

GRAVES v. SCOTT.

[104 Va. 372, 51 S. E. 821.]

MALICIOUS PROSECUTION, Acquittal on the Merits not Necessary to Maintain.—To support an action for malicious prosecution, it is not indispensable that plaintiff should have been acquitted after trial on the merits. It is sufficient that the prosecution against him has finally terminated so that it cannot be further maintained without commencing a new proceeding. (p. 1048.)

A. H. Woodyard, for the plaintiff in error.

Williams & Farrier and Williams & Williams, for the defendant in error.

³⁷² KEITH, P. This is an action for malicious prosecution in the circuit ³⁷³ court of Giles county, in which the defendants demurred to the declaration. The only question raised is whether or not it is sufficiently averred that the prosecution had been terminated, which was alleged to have been maliciously instituted.

It seems that the defendants had charged Graves with having procured goods and chattels of them under false pretenses, and under a warrant issued by a justice he was arrested and entered into a recognizance for his appearance before the justice upon a day named. When the day arrived, the declaration proceeds to set forth that "the said plaintiff, in obedience to said recognizance, appeared before the said justice at the said place designated for trial, and had with him his witnesses to prove and establish his innocence of the said supposed offense charged in the said warrant and complaint, and announced his readiness for a trial to the said justice and to the said Scotts, and insisted upon a trial then and there, but the said defendants refused and declined to be sworn and give any evidence touching the supposed crime charged in said warrant against said plaintiff, and failed to offer and produce, and refused to offer and produce, when called upon, any evidence whatsoever to prove the charge in said warrant against the said plaintiff, and then and there the said justice aforesaid dismissed the said warrant at the costs of the said Scotts, and then and there caused the said plaintiff to be discharged out of custody, fully acquitted of the said proposed offense, and the said defendants have not further prosecuted the said complaint, but have deserted and abandoned the same, and the said complaint and prosecution is now fully ended."

The demurrer was sustained, and a writ of error brings the case before us for review.

In *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470, this court held that "in an action for malicious prosecution it must be charged and proved, among other things, that the prosecution alleged in the declaration was conducted to its termination, and that it ended in the final acquittal of the plaintiff. An ³⁷⁴ allegation that an offense of which a justice of the peace had jurisdiction was dismissed by him 'without the introduction of any testimony,' or that the defendant, 'without the introduction of any testimony,' caused the plaintiff to be discharged, and not prosecuted for said offense, is not

such an averment of the final termination of the prosecution as will support an action for malicious prosecution. It amounted to no more than a *nolle prosequi*, which was no bar to a further prosecution for the same offense. It did not establish the innocence of the plaintiff, or show want of probable cause on the part of the defendant."

It is obvious, therefore, that the case under consideration must be affirmed if we adhere to the law as propounded in *Ward v. Reasor*, 98 Va. 399, 36 S. E. 470. The conclusion there reached is supported by *Hilliard on Torts*, by *Greenleaf*, by *Mr. Minor in his Institutes*, by *Barton in his Law Practice*, by the supreme court of Massachusetts in *Bacon v. Towne*, 4 Cush. 217, and by a dictum by Judge Burks in *Scott v. Shelor*, 28 Gratt. 891.

The opportunity for a more extensive research and a further consideration of the principles involved have led us to a different conclusion.

It is true that public policy favors prosecution for a crime, and requires that a person who in good faith and upon reasonable grounds institutes proceedings upon a criminal charge shall be protected: 19 Am. & Eng. Ency. of Law, 650.

It is the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offense has been committed. But it is a duty which every man owes to every other not to institute proceedings maliciously which he has no good reason to believe are justified by the facts and the law: *Newell on Malicious Prosecution*, sec. 1.

The difficulty, therefore, presented is to protect the citizen ³⁷⁵ against criminal proceedings which are not justified by the facts and by the law, being at the same time careful not unduly to deter men from the institution of criminal proceedings honestly intended to punish public offenses against the law.

To meet and harmonize these difficulties as far as practicable, the law requires that the plaintiff in an action for malicious prosecution must avail and prove the institution of the suit or proceeding without reasonable cause, malice in the institution of the suit or proceeding, and the complete termination of the suit or proceeding. If a plaintiff in a suit for malicious prosecution can maintain these propositions to the satisfaction of a jury, he may and should recover dam-

ages; nor would the result tend to deter others from the honest and fearless prosecution of offenders against the law.

In *Scott v. Shelor*, 28 Gratt. 891, Judge Burks states that to warrant a recovery in a suit for malicious prosecution it must be proved that the prosecution alleged in the declaration had been set on foot and conducted to its termination. Had he stopped there, he would have been in entire harmony with the law as stated in *Newell on Malicious Prosecution*; but he goes further and says, "and that it ended in the final acquittal and discharge of the plaintiff." It is true that in the case which Judge Burks was considering there had been a final acquittal and discharge of the plaintiff, and it, of course, cannot be questioned that there was a final termination of the prosecution; but that case cannot be binding authority for the proposition that nothing short of a final acquittal constitutes such determination of the proceedings as will support an action for malicious prosecution.

In *Morgan v. Hughes*, 2 Durnf. & E. 225, Justice Buller says: "Saying that the plaintiff was discharged is not sufficient; it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may ³⁷⁶ be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution."

Of course, if in *Morgan v. Hughes* it had been averred that the plaintiff was acquitted, it would have been sufficient, as in *Scott v. Shelor*, 28 Gratt. 891; but it was held that "discharged" was not a sufficient averment in a declaration that the prosecution had terminated. If it had been alleged that he was discharged by the grand jury not finding a bill, that would have been a legal end to the prosecution, and would, therefore, have been sufficient averment of the legal termination of the particular proceeding against the plaintiff to have warranted the institution by him of his suit for malicious prosecution.

In the note to *Ross v. Hixon* (Kan.), 26 Am. St. Rep. 123, by Freeman, it is said that "the prosecution on which the action is based must have terminated without resulting in the conviction of the plaintiff. It is sometimes said that it must have terminated in his acquittal, but this is not true.

A trial on the merits or otherwise is not essential. It is sufficient that the prosecution has ended so that it cannot be reinstated nor further maintained without commencing a new proceeding, but it must have terminated in some of the several modes in which it is possible for a criminal proceeding to reach a stage beyond which the accused cannot be farther prosecuted therein": Citing *Casebeer v. Drahoble*, 13 Neb. 465, 14 N. W. 397; *McWilliams v. Hoban*, 42 Md. 56; *Blalock v. Randall*, 76 Ill. 224; *Gillespie v. Hudson*, 11 Kan. 163; *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804. Further discussing the question, he speaks of a discharge by a committing magistrate, and says that "if the examining magistrate finds that there is not sufficient cause to hold the accused to answer, and therefore discharges him, that prosecution is thereby ended; and the consideration that other prosecutions may be brought against the same person on the same charge, and that the grand jury, on ³⁷⁷ its presentation to them, may find an indictment thereon, cannot prevent the action of the magistrate from having its effect as a termination of the prosecution before him, sufficient to support the civil action." And so with the failure of a grand jury to find an indictment.

With respect to the entry of a *nolle prosequi* he says that "if some action or proceeding on the part of the court, or otherwise, is required to make an entry of *nolle prosequi* operative as a final termination of a prosecution, then of course such action or proceeding must supplement such entry; but when it is manifest that the prosecution is at an end and cannot be revived, it is not material how it came to its end and the right of the party injured by it to seek redress is complete."

And, speaking generally as to other means of terminating a prosecution, this learned author says: "The only reasonable ground for denying that the termination of a prosecution by the entry of a *nolle prosequi* will support an action for malicious prosecution was, that there had been no trial on the merits, and therefore no acquittal of the accused; but it is settled, as we think, beyond dissent that a trial on the merits is not essential. To hold it essential would be to permit a prosecutor to do all the damage which a malicious prosecution can possibly effect, and then deny the accused the opportunity to vindicate himself by a trial, by having the proceeding quashed or dismissed, and thus escaping all liabil-

ity for the wrong unlawfully inflicted. Therefore, any mode by which a prosecution may be dismissed or ended, though without a trial, is sufficient. The indictment may be insufficient, and for that reason may be quashed before trial, or upon trial may require the jury to return a verdict of acquittal. In either event, if the accused is discharged by the court, the prosecution is finally terminated in the sense that an action for malicious prosecution may be instituted and sustained, though there is nothing to prevent the finding of another indictment sufficient in form."

378 This statement of the law by Mr. Freeman is sustained by a great array of authority, which we deem it needless to discuss or cite.

At sections 248 and 249 of Bishop on Noncontract Law it is said that "if, on motion of the state's attorney, a criminal cause is stricken from the docket, with leave to reinstate it, the defendant is not discharged from the indictment, and a suit for malicious prosecution will be premature. But a nolle prosequi ends the indictment past recall, and thereupon the right to a malicious prosecution suit is perfected—a proposition from which a few of our courts, misapprehending the effect of a nolle prosequi, have dissented, making distinctions not necessary to be particularly pointed out here.

"The methods of ending the proceeding are numerous, and they need not all be specified. It is sufficient, for example, if the indictment is quashed and the prisoner discharged by judgment of the court. Only the particular proceeding need be at an end, it being immaterial that the party is subject to a new one. A criminal prosecution, said a learned judge, is 'terminated (1) where there is a verdict of not guilty; (2) where the grand jury ignore a bill; (3) where a nolle prosequi is entered; (4) where the accused has been discharged from bail or imprisonment.' Therefore the court held that a prosecution was not ended while pending before the grand jury. A discharge by the examining magistrate will suffice. In the nature of some proceedings the defendant has nothing to do, and whenever the plaintiff's steps are finished, the right to the malicious prosecution suit is complete; 'as,' it was judicially observed, 'where the plaintiff was committed on articles of peace for a definite term unless he should find sureties for the peace. In such a case the plaintiff is allowed, *ex necessitate rei*, to maintain his action, though he was discharged by the effluxion of the time for which he was com-

mitted, for the reason that he is not at liberty to controvert the statement of the defendants in making ³⁷⁹ the complaint, and therefore could not have a hearing and obtain a favorable decision.' A release on giving surety to keep the peace is a sufficient ending of the proceeding."

To the same effect is Cooley on Torts, second edition, at page 215: "The termination of the proceeding must, in general, be by a final acquittal. It is not enough that the parties in a case which they might lawfully settle have effected a compromise, and thereby terminated it, or that the defendant was discharged because the offense was misnamed in the papers, or because of formal defects. But if the proceeding is *ex parte* to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail; and so he may if on a preliminary examination before a magistrate on charge of crime he is discharged. Whether the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was; but other cases hold the contrary. The reason assigned in these last cases is that the finding of the grand jury is some evidence of probable cause, and another indictment may be found on the same complaint. But the reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."

It would be easy, but we think unnecessary, to cite very many adjudicated cases in support of the views of the eminent text-writers from whom we have quoted. We shall content ourselves with adding to the authorities adduced the statement of the law as given in 19 American and English Encyclopedia of Law, page 681, "that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*."

The judgment of the circuit court is reversed.

For Authorities in Support of the Principal Case, see Page v. Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144; Craig v. Ginn, 3 Penn. 177, 94 Am. St. Rep. 77; notes to Ross v. Hixon, 26 Am. St. Rep. 135-137; McCormick Harvesting Co. v. Willan, 93 Am. St. Rep. 470.

RANKIN v. TOWN OF HARRISONBURG.

[104 Va. 524, 52 S. E. 555.]

EMINENT DOMAIN—Riparian Owners, Right to Compensation for Raising Dam and Waters.—If the effect of a proposed dam must be to impose on the bed of a river a greater quantity, as well as to flood its banks, destroy fords, render adjacent lands more liable to overflow, and greatly alter the natural flow and condition of the stream, the adjacent riparian proprietors are entitled to compensation. (pp. 1052, 1053.)

EMINENT DOMAIN—Agreement of Persons Injured as to the Distribution of the Award of Damages.—Riparian owners may by parol agreement among themselves designate the proportions in which they shall share any damages to be awarded for a dam to be constructed for increasing the water power of a stream, and whereby such stream in front of their lands is made more liable to flood them and to destroy their fords and otherwise injure such lands; and they may carry such agreement into effect by a deed constituting themselves cotenants. (p. 1055.)

EMINENT DOMAIN—Riparian Owners, Compensation for Dam Raising Waters.—Riparian owners, though not cotenants, have the right to have a stream running between their lands continue to do so in its natural condition, and, as against one seeking the right by placing a dam across the stream to raise it and increase the water power, are entitled to unite their rights in one ownership, and their interest so united cannot be taken without just compensation. (p. 1056.)

Sipe & Harris, for the plaintiffs in error.

T. N. Haas and J. B. Stephenson, for the defendant in error.

525 KEITH, P. The town of Harrisonburg gave notice to Henry L. Rankin and others that at the November term of the circuit court of Rockingham county it would apply for leave to raise the dam across the Shenandoah river, which it had acquired under a conveyance from the Rockingham Milling Company, from a height of five feet to fifteen feet, in order to secure water power for an electric light plant for the use of the town. This notice was served upon divers persons owning land abutting upon the river, and in due course commissioners were appointed, who submitted a report to the court, to which numerous exceptions were filed. Some of these exceptions have reference to the form of the proceedings and are brought to the attention of this court in the petition for a writ of error; but at the hearing it was agreed that all errors merely of procedure

should be waived and that our judgment should be rendered upon the controlling question in the case, arising upon the tenth paragraph of the report of the commissioners, which is in the following words:

“From the end of the eddy or backwater of the old dam at the Shaver or Ammon millsite, which was five feet high, up to the river to the end of the eddy or backwater which will be made by the new dam, a distance of about a mile and a half, there is a fall of about ten feet in the river which the applicant gets the benefit of in the development of its power by raising the ⁵²⁶ dam from the elevation of the said old dam to the height of fifteen feet. This ten feet of fall occurs in that part of the river which is abutted by the lands of Dr. Rankin and Mrs. Burke on the east or south and by the lands of Mrs. Walker on the west and north. Your commissioners ascertain that the water power gained by the applicant by this ten feet of fall through the lands of Rankin, Burke and Walker, as aforesaid, is worth the sum of three thousand dollars (\$3,000), and that the applicant shall pay the sum of \$3,000 as compensation therefor.

“It appeared by statement of counsel of Mrs. Walker, Mrs. Burke and Rankin that it was agreed by their said clients that the compensation to be allowed for this water power owned by them should be divided among them in the proportion of one-half to Mrs. Walker, one-fourth to Dr. Rankin and one-fourth to Mrs. Burke. Your commissioners therefore report that, of the said sum of \$3,000 to be paid by applicant as compensation for said ten foot fall in the river, through the lands Mrs. Walker, Mrs. Burke, and Dr. Rankin, as aforesaid, \$1,500 thereof shall be paid to Mrs. Walker, \$750 thereof shall be paid to Mrs. Burke, and \$750 thereof shall be paid to Dr. Rankin.”

The town of Harrisonburg excepts to paragraph 10 of the report, by which it is required to pay \$3,000 as compensation for the water power, on the ground that “the said supposed water power for which said compensation or damages of \$3,000 is found and allowed, is not proper to be taken into consideration as an element of damages to be compensated for by applicant, because there is no developed or existing water power in the distance mentioned in said report through which the eddy water of the proposed dam of applicant will extend, and no such power can, under the physical conditions existing, be created or developed without the construction of a

dam across the river, and neither the said three persons, nor any two of them, as cotenants, nor any one of them in severalty, own ⁵²⁷ or owned both banks of the river, or land on both banks, in the distance measured by said eddy water, nor do they or any two of them, as cotenants, or any one of them severally, own the right to abut a dam on both banks of the river at any place within the said distance, but they, the said three persons, own their lands in severalty, the land of Mrs. Walker lying on one side of the river, and the lands of Mrs. Burke and Dr. Rankin lying on the other side of the river, the middle of the river being the boundary of said lands; wherefore it cannot be said that any one of them separately possesses, or that all or any two of them jointly possess, a water power to be damaged or compensated for as such."

Upon the issue thus presented the circuit court decided in favor of the town of Harrisonburg, and refused to allow any compensation to Henry L. Rankin, Columbia J. Burke and Emma E. Walker, but provided that the town of Harrisonburg should, at its expense, "construct where the private ford now is across the said Shenandoah river, just above the three springs, and connecting the land of said Henry L. Rankin, on the east side of the river, with the land of said Emma E. Walker, on the west side, or immediately nearby, and in lieu of and as compensation for the destruction of said ford by the reflux water, a suitable and adequate ferry, which ferry the applicant shall forever maintain and keep in repair, but shall not be required to man or operate it, the same to be appurtenant to the farms of said Henry L. Rankin, Columbia J. Burke and Emma E. Walker and for the use of the owners thereof without charge," etc.

To this order, Rankin, Burke and Walker obtained a writ of error.

The facts set out in paragraph 10 of the report of the commissioners, and in the exceptions filed by the town of Harrisonburg, show that there has been an actual taking of the property of plaintiffs in error for the use of the defendant in error. The plaintiffs in error own the lands abutting upon the stream; ⁵²⁸ they own its banks and the bed over which the water flows. The effect of raising the dam to an additional height of ten feet is to throw back the water of the river for a long distance beyond the boundary line of plaintiffs in error, to flood its banks, impose upon the bed a greater volume of water, destroy the ford, render the adja-

cent lands more liable to overflow, and greatly to alter the natural flow and condition of the stream. This would of itself entitle the plaintiff's in error to compensation.

“Although, as will be seen in a subsequent section, there are a few cases which apply to the damming back of water, the rule that to entitle one riparian owner to complain of acts of another he must show that he has been injured, those decisions are not only against the weight of authority, but also are unsupported by principle. Any swelling of the stream over the line is in invasion of the rights of the upper owner, who has a right to the stream in its natural condition, which he may protect, not only for present needs, but for possible future ones. It constitutes a direct trespass upon his property which he may seek the aid of the courts to redress, and he is not bound to show that he is specially injured to maintain the action. The right of the upper owner is strengthened if injury is done to him, as by the flooding of a building, or of a mining claim, or of a ford. . . . As a general rule, a riparian proprietor is restricted in the management of his property by the maxim, ‘Sic utere tuo ut alienum non laedas,’ and he cannot take the initiative and construct a dam on a stream that will cause the water to overflow and injure the land of his neighbor, that may lie opposite or above his own premises, either when the water is at its usual height or in an ordinary freshet; or that so obstructs its flow as to prevent the land of the other riparian proprietor from being properly drained. The maxim of the common law that the owner of the soil has absolute dominion over it above and below the surface, and that damage caused to others by his rightful command over his own soil is ⁵²⁹ *damnum absque injuria*, has no application to such a case. Throwing the water back on the upper land is a nuisance in and of itself, of which the upper owner may complain whenever he desires to do so, whether it is a direct injury to him or not. He has a right to have his land free from the water and he can object to its presence whenever he chooses; and the lower owner has no right in the premises”: 2 Farnham on Waters and Water Rights, sec. 547.

Nor do we find anything in the case of *Mumpower v. City of Bristol*, 90 Va. 151, 44 Am. St. Rep. 902, 17 S. E. 853, which militates against this view of the law. In that case it was held that “the owner of a dam cannot enjoin the owner of a dam above from damming backwater for operating his ma-

chinery, although such use at times keeps back the water to the extent of depriving the lower owner of water." The facts in that case and the law applicable to them bear no analogy to the subject now under consideration.

It further appears that, anticipating the objection successfully urged before the circuit court by the town of Harrisonburg, plaintiffs in error entered into a verbal agreement that the "compensation to be received for the said water power, whether the same should be granted by the owners or taken and appropriated against their consent, should be distributed among those owning the premises in the proportion of one-half to Mrs. Walker and one-fourth each to Rankin and Mrs. Burke"; and on the 25th of January, 1905, while this proceeding was pending before the circuit court, they executed a deed, inter se, by which they bound themselves to carry into effect this verbal agreement. When, in answer to the objection urged by the town of Harrisonburg, that no one of plaintiffs in error "separately possesses, or that all or any two of them jointly possess, a water power to be damaged or compensated for as such," this agreement was offered in evidence, objection was made ⁵³⁰ to the verbal agreement on the ground that it was void under the statute of frauds, and to the deed, that it could not take effect because it undertook to change the title to the property in dispute pendente lite.

If the statute of frauds applies, it must be because it is a contract for the sale of real estate, or for the lease thereof for more than a year. There is no other provision of the statute of frauds which can have any bearing upon it. If the parol agreement must be held to be void upon that ground—that is, as being a contract for the sale of real estate—it would seem to be conclusive of the first question considered—that is to say, that an interest in real estate belonging to plaintiffs in error was being taken for the use of defendant in error. But assuming—and there is nothing to the contrary—that that parol agreement was fairly entered into between the parties, it was mutually binding upon them, and it was proper for them to execute the deed which carried it into effect.

But however that may be, there is another view of the case which seems to be conclusive. It is not denied by defendant in error that plaintiffs in error in severalty own parcels of real estate which, if united in one ownership, or if held as cotenants, would constitute an entirety of much value. The contention is, that "there is no developed or existing water

power in the distance mentioned in said report through which the eddy water of the proposed dam of applicant will extend, and no such power can, under the physical conditions existing, be created or developed without the construction of a dam across the river, and neither the said three persons nor any two of them as cotenants, nor any one of them in severalty, own or owned both banks of the river, or land on both banks, in the distance measured by said eddy water, nor do they or any two of them as cotenants, or any one of them severally, own the right to abut a dam on both banks of the river at any place within the said distance." They owned, however, in severalty, rights as abutting owners upon the river, which if held as cotenants, ⁵³¹ or if brought under the control of a single owner, constitute a valuable property right. If that be so, it is plain that the right to constitute themselves cotenants (as they unquestionably had a lawful right to do before the interference with that right on the part of the town of Harrisonburg), would be made valuable by which interests held in severalty, and which existing in severalty are valueless according to the argument of the town of Harrisonburg, is of itself a thing of value; and that right is destroyed if the town of Harrisonburg be allowed to come in and condemn the share of one or of two as completely as though the whole had been taken.

And again, it cannot be denied that if the town of Harrisonburg can acquire the rights now held by plaintiffs in error, it will have obtained property of very considerable value. Can it be that it can come in and by force of the right of eminent domain take without compensation the several parts constituting a valuable entirety? The sum of the parts is equal to the whole, in law and in logic, and if the entirety be of value, the parts which constitute the entirety must potentially be of an equal value.

Water privileges and water power can now be put to uses not dreamed of in the past. By the generation of electricity power can be transmitted to a distance, no absolute limit to which has yet been fixed, and thus becomes subservient to all the uses to which, in the marvelous growth of modern industry, force in its varied manifestations of heat, light and motion is applied. Water power, therefore, so far from being less valuable than heretofore, acquires an additional value as the possibilities of the generation and transmission of force by means of electricity are from day to day disclosed, and the

courts should be careful not to introduce or to sanction refinements, by which the value of those rights to riparian owners may be diminished or impaired.

Having reached the conclusion that plaintiffs in error were ⁵³² entitled to recover damages, we think the evidence sufficient to justify the amount awarded them in paragraph 10 of the report, and that the judgment of the circuit court should be reversed.

The Permanent Flooding of Land by the erection of artificial obstructions in a natural watercourse amounts to a taking of the land, within the meaning of the constitutional provision that private property shall not be taken for public use without just compensation: See the notes to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 611; *Sheehy v. Kansas City Cable Ry. Co.*, 4 Am. St. Rep. 404; and the subsequent cases of *In re Minnetonka Lake Improvement*, 56 Minn. 513, 45 Am. St. Rep. 494; *Yazoo etc. R. R. Co. v. Davis*, 73 Miss. 678, 55 Am. St. Rep. 562. If a municipal corporation enlarges a pier supporting one of its bridges to enable it to bear the additional weight of a sewer, and thereby diverts the current of a stream so as to overflow and destroy private property and undermine the support of a house standing thereon, there is such a taking as demands compensation: *Barron v. Memphis*, 113 Tenn. 89, 106 Am. St. Rep. 810.

DONABLE'S ADMINISTRATOR v. TOWN OF HARRISONBURG.

[104 Va. 533, 52 S. E. 174.]

A MUNICIPAL CORPORATION is Restricted to Its Corporate Limits, as a general rule, in the exercise of its powers. (p. 1058.)

A MUNICIPAL CORPORATION in Operating a Rock Quarry Beyond Its Corporate Limits is Performing an Act Ultra Vires, though its purpose is to procure stone necessary for use on its public streets. (p. 1059.)

MUNICIPAL CORPORATIONS, Liability of for Injuries Due to Ultra Vires Acts.—A municipal corporation is not liable for negligence in the doing of an ultra vires act. (p. 1060.)

Sipe & Harris, Charles A. Hammer and D. O. Dechert, for the plaintiff in error.

T. N. Haas, for the defendant in error.

⁵³³ **CARDWELL, J.** This is an action on the case against the town of Harrisonburg, ⁵³⁴ to recover damages for the death of plaintiff's intestate, caused by an explosion of

dynamite at a rock quarry operated by the defendant outside of its corporate limits, at which quarry the decedent was employed as a laborer.

The defendant demurred to the declaration upon the ground that the operation of a rock quarry by the defendant outside of its corporate limits was an ultra vires undertaking, and, therefore, the defendant was not responsible in damages for the injuries to the decedent, which demurrer was sustained, and to that judgment of the circuit court this writ of error was awarded.

It is sought to distinguish this case from that of *Duncan v. City of Lynchburg*, decided by this court February 8, 1900, and reported in 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331, by the fact alleged, that the stone gotten out by the decedent and others was to be for use on the streets of the defendant town, whereby this getting out of the stone was a mere incident of the work in which the town was engaged in the repair and maintenance of its streets—a work not only authorized but imposed upon the town as a duty by its charter. In other words, that the work in progress being primarily the repair and maintenance of the streets of the town, which is not only within the powers of the town but one of its absolute duties, and one of the considerations for the granting of its charter, for the failure in the performance of which duty the town is liable to respond in damages to any person injured in consequence of such failure, it is within the discretion of the town council, so long as the means adopted by it are such as to meet the requirement that the streets shall be kept in proper and safe condition for travel, to determine what means of repair and maintenance shall be used.

If that proposition could be maintained, a municipality might engage in limitless undertakings not authorized by its ⁵³⁵ charter in express words, or necessarily and fairly implied in or incidental to the powers expressly granted, the result of which would be to expose the resources of the municipality to constant danger of exhaustion.

The following statement of the law by Dillon, in his work on *Municipal Corporations*, section 89, has been often quoted with approval by this court, viz.: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: 1. Those granted in express words; 2. Those necessarily or

fairly implied in or incidental to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied": *City of Winchester v. Redmond*, 93 Va. 711, 57 Am. St. Rep. 822, 25 S. E. 1001; *Wallace v. City of Richmond*, 94 Va. 217, 26 S. E. 586, 36 L. R. A. 554; *Lynchburg Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331.

It is equally well-settled law that a municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers: *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331; *Becker v. City of LaCrosse*, 99 Wis. 414, 67 Am. St. Rep. 874, 75 N. W. 84, 40 L. R. A. 829; *Mayor of Detroit v. Park Commrs.*, 44 Mich. 602, 7 N. W. 180; *Tiedeman on Municipal Corporations*, sec. 62; 2 *Dillon on Municipal Corporations*, sec. 565.

In *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 331, the city of Lynchburg was operating a rock quarry outside of the city limits, in the course of which a nuisance was created, and suit was brought to recover damages of the city by reason of the nuisance; but it was held that the operation of the rock quarry was *ultra vires*, and therefore the city was not liable in damages, the grounds upon which the undertaking was held to be *ultra vires* being: 1. ⁵³⁶ Because neither the charter nor the general law gave the city authority to operate a rock quarry; and 2. Because the operation of the quarry was carried on outside of the corporate limits.

The general law was the same at the time of the accident out of which the suit arises as it was when the case of *Duncan v. City of Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 311, arose, and the charter of Harrisonburg grants no power to operate a rock quarry, either within or without the town, unless it arises by implication out of the powers granted to keep its streets in order, to provide workhouses and houses of correction and reformation, and to establish and operate a sewer system, waterworks, gas-works, electric lights works, etc., all of which powers were conferred upon the city of Lynchburg by its charter; so that the principle of law applied in the case of *Duncan v. Lynchburg*, 2 Va. Dec. 700, 34 S. E. 964, 48 L. R. A. 311, is clearly applicable to this case.

In the former case, speaking with reference to the opinion expressed by Judge Dillon, that for some purposes, such as for the establishment of a pesthouse or cemetery, a municipal corporation may acquire land outside of its territorial boundaries, the opinion by Buchanan, J., says: "If this be true, it must be because the lands are indispensably necessary to enable it to protect the health and well-being of its people"; and further: "It might be convenient for a municipal corporation to own and operate a rock quarry, but it is manifestly not indispensably necessary that it should do so in order that it may accomplish the objects of its creation."

The case of *Becker v. City of LaCrosse*, 99 Wis. 414, 67 Am. St. Rep. 874, 75 N. W. 84, 40 L. R. A. 829, is an authority in point here, not only for the proposition that a municipal corporation is not liable in damages for an ultra vires act, but also for the proposition that an undertaking carried on by a municipality outside of its limits is, in the absence of express authority, ultra vires: See, also, *Cavanagh v. City of Boston*, 139 Mass. 926, 52 Am. Rep. 716, 1 N. E. 834, and *Albany v. Cuneliff*, 2 N. Y. 165.

⁵³⁷ Authorities are cited by the plaintiff for the proposition that private corporations are liable for damages arising out of a tort, though the act in which the tort was committed be ultra vires, but they have no application here. While the powers of a private corporation are bestowed and limited by charter, they act for themselves, in their own right, and in the pursuit of gain. On the other hand, municipal corporations exercise delegated powers and act through their officials as a local agency for the exercise of governmental functions. With reference to the liability of municipal corporations for damages arising out of the negligence of its agents, Judge Dillon says: "To create such a liability it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers, as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be ultra vires in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances."

The argument of the learned counsel for the plaintiff in this case that "to hold that although it is one of the imperative, unescapable duties of the town to keep its streets in repair, yet all the work and transactions incidental thereto

must be wholly performed within the corporate limits of the town, would be to impose most unfortunate limitations upon the town," might be much more properly addressed to the law-making power of the state than to the courts. It might be convenient, and even profitable, for the defendant to operate a rock quarry outside its corporate limits, in order to obtain material suitable for repairing and keeping in order its streets, but without legislative authority it has no power to do so, and clearly no such power is in express words conferred in its charter, nor necessarily or fairly implied in or incidental to the powers expressly granted.

538 It follows that the defendant was not liable in damages for the death of the plaintiff's intestate, that the demurrer was properly sustained by the trial court, and that the judgment must be affirmed.

A City May do Business Outside Its Boundaries so far as is reasonably necessary to carry out the express powers granted to it. Thus, a city having express authority to improve its streets and to purchase such real estate as is reasonably necessary or convenient for the city's use, has power to purchase real estate outside its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets: *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996, and see the cases cited in the cross-reference note thereto. As to the authority of a city to construct a bridge outside the city limits, see *Manning v. Devils Lake*, 13 N. Dak. 47.

AILSTOCK v. MOORE LIME COMPANY.

[104 Va. 565, 52 S. E. 213.]

THE MALICIOUS PROSECUTION Before a Court Having No Jurisdiction of an attachment, without reasonable or proper cause, renders the plaintiff liable to the defendant for any damages resulting to him from the levy of the writ. (p. 1065.)

Harvey & Nelson and De Witt V. Lemon, for the plaintiff in error.

Benjamin Haden, for the defendant in error.

565 CARDWELL, J. This is an action on the case, brought by plaintiff in error, J. T. Ailstock, to recover of the defendant in error, the Moore Lime Company, damages for malicious prosecution of a civil suit.

The declaration alleges that the Moore Lime Company "went ⁵⁶⁶ and appeared before one W. R. Carper, then and there being one of the justices of the peace in and for the said county of Botetourt, and then and there before said justice falsely and maliciously, and without any probable or reasonable cause whatever, caused and procured the said justice to issue and grant it a writ of attachment against the said plaintiff and in favor of the said Moore Lime Company, as plaintiff therein, in the words and figures following, to wit:

"Virginia:

Botetourt county, to wit:

"To R. L. Rudersill, deputy sheriff of said county:

"Whereas the Moore Lime Company have this day made before me, W. R. Carper, a justice of said county, a complaint on oath that they verily believe that they have a just claim against J. T. Ailstock for the sum of one hundred and thirty-six dollars and ninety-eight cents (\$136.98) for debt due them for open store account (account herewith attached), and that the said Moore Lime Company has present cause of action therefor, and furthermore, to the best of affiant's belief, that the said J. T. Ailstock has or will have in the hands of W. G. Matthews estate sufficient to satisfy the claim of the said Moore Lime Company.

"These are therefore in the name of the commonwealth to command you to attach the estate of the said J. T. Ailstock now in the hands of the said W. D. Matthews for the amount of the said claim, and make return thereof at Eagle Rock, Virginia, in the said county, on September 9, 1903, at 10 o'clock A. M., before me or such other justice of said company as may be there to try this attachment, showing the day and manner of executing the same.

"Given under my hand this thirty-first day of August, 1903.

"W. R. CARPER, J. P.

"And the said defendant afterward, to wit, on the same ⁵⁶⁷ day of the said writ of attachment, delivered the same to R. L. Rudersill, a deputy sheriff of said county, and then and there maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said deputy sheriff to execute the said attachment on W. G. Matthews, in whose hands was a large sum of money, to wit, two hundred and fifty dollars owing to the said plaintiff; that by reason

of the execution of this writ of attachment the said W. G. Matthews refused to pay to the said plaintiff the whole or any part of the amount owing to him; that afterward, to wit, on the twelfth day of September, 1903, the attachment proceedings were dismissed and abandoned by the said defendant." Then follows the allegation that by the wrongful and unlawful suing out and execution of said writ of attachment the plaintiff was damaged, etc.

To this declaration the Moore Lime Company demurred, which demurrer was sustained, and to that judgment this writ of error was awarded.

The sole question involved in the demurrer necessary to be considered here is, "if an attachment be sued out from a court without jurisdiction, maliciously and without any reasonable or probable cause whatsoever, and damage results from the levy of the said attachment, can the malicious suing out and levy of the said attachment be made the basis for an action for damages?"

This precise question has never been before this court, so far as we have been able to find from the reported cases, and the authorities elsewhere seem hopelessly divided; though it seems to us that the best reasoned cases maintain the proposition that the action will lie.

It is clear from the declaration that the justice who issued the attachment complained of was wholly without jurisdiction. In the first place, the amount sued for (\$136.98) was in excess of his jurisdiction, and his warrant sets out no ground upon which to issue an attachment.

By section 2961 of the code it is provided that a justice ⁵⁶⁸ may issue an attachment against a debtor removing his effects out of the state; and by section 2962, that he may issue an attachment against a tenant removing his effects from the leased premises. But neither of these grounds for the attachment appears in the justice's warrant in this case. It merely shows that the debt sued for was due and owing and was an open store account for one hundred and thirty-six dollars and ninety-eight cents, which is in excess of a justice's jurisdiction, the limitation of the jurisdiction of a justice in such cases being one hundred dollars: Va. Code 1904, sec. 2939.

"It has been considered," says Chitty in his work on Pleading, volume 1, page 204, "that when civil proceedings, in an inferior court having no jurisdiction over the debt, are

adopted by a party with an express malicious intent, though there be a demand recoverable elsewhere, an action on the case may be supported"; and on page 149 of the same volume, citing a number of authorities, the same author says: "If the proceeding be malicious and unfounded, though it were instituted in a court having no jurisdiction, case may be supported, or trespass."

In a note by Hare & Wallace, 1 Am. Lead. Cas. 260, it is said: "An action lies also for maliciously holding to bail, or maliciously attaching property, under the process of a court which has no jurisdiction. And it lies for maliciously suing out an attachment, and attaching the plaintiff's property, where nothing is due or for more than is due. It lies also for maliciously suing out a domestic attachment, where either there is nothing due or the party has not rendered himself legally liable to such process." Among the many authorities in support of the text is the case of *Goslin v. Wilcock*, 2 Wils. 302, which has been cited with approval in the cases which we will hereafter refer to, and in many others.

In *Boon v. Maul*, 3 N. J. L. 862, where it was held that suit lies for maliciously attaching property by writ from a court without jurisdiction, the opinion says: "The counsel for the defendant below, the plaintiff in this court, now insist that ⁵⁶⁹ the declaration is defective, inasmuch as it does not contain an averment that the defendant knew that the common pleas of Philadelphia had not jurisdiction of the cause. In the case of *Goslin v. Wilcock*, 2 Wils. 302, which case very much resembles the present, in point of principle, this averment was not considered essential. It appears to me that if a man maliciously makes use of the process of law, with an intention to vex and distress another, that he does it at his peril; he must see to the legality of the proceedings."

The supreme court of Ohio has uniformly held to the same doctrine: See *Fortman v. Rottier*, 8 Ohio St. 548, 70 Am. Dec. 606, and *Newark Coal Co. v. Upson*, 40 Ohio St. 17. In the last-named case the opinion says: "It may now be considered the approved doctrine that an action for the malicious prosecution of a civil suit may be maintained whenever, by virtue of any order or writ issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use or enjoyment of property of value."

In *Hays v. Younglove*, 7 B. Mon. 545, it was held that where a proceeding was malicious and unfounded, though instituted before a court having no jurisdiction, either trespass or case may be maintained.

To the same effect is *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664, where it was held—citing a number of authorities—that the action would lie, even where there had been no arrest or seizure of property.

In *Morris v. Scott*, 2 Wend. 281, 34 Am. Dec. 236, the supreme court of New York held that “An action on the case for a malicious prosecution lies against a party who falsely and maliciously prosecutes another, although the court in which such prosecution was had was utterly destitute of jurisdiction in the matter”; and that all that was necessary to maintain such an action was the malice and falsehood of the prosecution.

In *Kerr v. Mount*, 28 N. Y. 659, a case very similar to the one under consideration, the opinion by Denio, C. J., says: 570 “The process being void, the party who set it in motion, and all persons aiding and assisting him, were prima facie trespassers. If, though void as respects the party, it were yet regular and apparently valid on its face, it might protect the officer against an action, on the principle of *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181, but this protection, being extended to the officer upon motives of policy, would not at all aid the party. Acts which the officer might justify would be trespasses against the party. There is no principle with which I am acquainted which can shield the defendant from the damages which the plaintiff has sustained by his wrongful act in causing this property to be seized under a void warrant of attachment.”

In *Anteliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019, 10 L. R. A. 621, also similar in many respects to the case we have under consideration, after showing that “latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of a suit for malicious prosecution where no property is seized and the person is not molested,” and that the exact point had not been passed on by that court before, the opinion says: “I am satisfied, however, that if the wrong and injury is done by a malicious suit, it is immaterial, upon principle, whether the court had jurisdiction or not to entertain such suit. For every malicious wrong there is certainly in this day and age

a remedy; and, under our liberal system of pleading in this state, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called." In Michigan there is a similar statute to section 2901 of our code, which provides that an action of trespass on the case may be maintained where an action for trespass would lie.

The line of authorities from which we have made the foregoing citations maintain that it is as much a wrong to disturb one's property or peace, or to injure his reputation and credit by the prosecution, maliciously, of a civil suit, as it is to prosecute ⁵⁷¹ one maliciously and without probable cause, by which the person is wronged, going upon the common-law principle that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. They maintain that when the plaintiff sets the law in motion he is the cause, if it be done groundlessly and maliciously, of the defendant's damage, and that while a void process of law upon which one's property is seized, or he is deprived of his liberty, might, upon motives of public policy, be sufficient to protect the officer executing the process, it would not at all aid the party who began and carried on the action with malice and without probable cause.

There is unquestionably a strong array of authority for the opposite view, but, as we have remarked, the question has never been determined in this state, and we are, therefore, at liberty to adopt the view that we think is founded on the better reason, and that view is in accordance with that taken in the authorities we have cited and as expressed pointedly by Pennington, J., in *Boon v. Maul*, 3 N. J. L. 862, viz.: That if one maliciously makes use of the process of law, with an intention to vex and distress another, he does it at his peril. He must see to the legality of the proceedings. This is the gravamen of the charge made in the declaration in this case, and we are of opinion that the demurrer thereto should have been overruled.

The judgment of the circuit court will, therefore, be reversed and annulled, the demurrer overruled, and the cause remanded for a trial upon its merits.

Actions for Wrongful or Malicious Attachments are discussed in the monographic notes to *Burton v. Knapp*, 81 Am. Dec. 467-480; *Tisdale v. Major*, 68 Am. St. Rep. 266-280; *McCormick Harvesting etc. Co. v. Willan*, 93 Am. St. Rep. 463-465.

ONEY v. WEST BUENA VISTA LAND COMPANY.

[104 Va. 580, 52 S. E. 343.]

EASEMENT of and for a Bridge, When Impaired.—If a plat is made and recorded showing streets and alleys and a bridge connecting the lots with an adjacent city or town, and lots are sold with reference to such plat, the law implies a grant of the bridge as an easement to the property conveyed. (p. 1069.)

EASEMENT, Duty to Repair.—The grantor or dedicator of an easement is generally under no obligation to make repairs. This duty rests on those who use the easement, who, if they fail to keep it in proper condition for the uses for which it was granted or dedicated, must suffer the resulting inconveniences. (pp. 1069, 1070.)

EASEMENT, Abandonment by Failure to Keep in Repair.—If the persons entitled to use an easement fail for an unreasonable time to keep it in repair, this may amount to an abandonment. (p. 1070.)

EASEMENT of and for a Bridge, When not Abandoned. Though persons entitled to the use of a bridge as an easement for the purpose of passing to and from their lands suffer it to become useless except for foot-passengers, yet if the structure, built mainly of iron and steel, is well preserved except as to flooring, and such persons continue to use the bridge, and insist on their right to use it, and to repair and restore it to a condition which will render it useful and safe for the purposes for which it was built, they cannot be held to have abandoned their easement therein. (p. 1070.)

EASEMENT of and for a Bridge, Conditions on Which will be Enforced.—Before a permanent injunction will issue to prevent the constructor of a bridge from tearing down or removing it on the ground that he has granted the complainants an easement to use such bridge in going to and from their lands, such persons should be required to repair the bridge and restore it, within a reasonable time, to such condition as will render it safe and useful for the purposes for which it was constructed, and if they fail to do so, they may be regarded as having abandoned their easement, and the defendant in the suit is entitled to make such use of the materials as he may see fit. (p. 1071.)

Hugh A. White, for the appellants.

E. M. Pendleton and D. E. Moore, for the appellees.

581 **CARDWELL, J.** During what is now commonly spoken of as the "boom" period, the West Buena Vista Land Company, the owner of a tract of several hundred acres of land lying just across North river, from, and west of, Buena Vista, a town then rapidly growing in population, and which afterward became a city, desiring to enhance the value of its property and make sale of its land in town lots for building purposes. etc., laid the same off into lots, blocks, streets, alleys, parks and other public places, and on the twenty-third day of Sep-

tember, 1890, placed a map or plat of said land, so divided, upon record in the clerk's office of the county court of Rock-bridge county according to law. The idea of the West Buena Vista Land Company seems to have been to make its land across the river from Buena Vista practically a part of that town, and to that end determined to build a bridge across the river connecting the prospective town of West Buena Vista with Buena Vista, and this bridge across North river was shown on the map or plat, made and recorded as stated. The streets of West Buena Vista were to be connected continuously with the streets of Buena Vista by this bridge, and Lexington and Moore streets, appearing on the map of West Buena Vista, and which converge together at the west end of the bridge, form with the bridge a continuation of Twentieth street in Buena Vista at the east end of the bridge.

582 After recording the map showing the streets and bridge, the West Buena Vista Land Company proceeded to make sale of its lots, villa sites, etc., and among other sales, it sold to J. L. Oney and his associates a mill, residence and outbuildings shown on said map and known as "Moore's Mill," on March 20, 1891, at the price of six thousand dollars, a "boom" price according to the evidence in this record, and about twice as much as the property would have brought but for the map of West Buena Vista showing the bridge across North river.

This bridge, contemplated and contracted for in 1890, was well under way in construction when Oney and his associates bought the mill property, which was connected by open and convenient streets and alleys with the bridge, and within a few yards of its west end and was subsequently completed, extending not only across the river, but also over the railroad tracks of the Furnace company, the Chesapeake and Ohio, and the Norfolk and Western Railway Companies, and terminated in Sycamore (20th) street in Buena Vista, with the consent of the several companies, but the completion of the bridge was in accordance with the representations of the company in effecting sales of its lands.

By the bridge, "Moore's Mill" was brought within one-half mile of the business center of Buena Vista, while without it the distance was about two miles around by the county road and bridge below. It is admitted that this bridge was built as a passway "for the owners of the West Buena Vista Company," and, after its completion, the public were permitted to use it, and it was used for both horse and foot-

passengers by those desiring to use it; and for a long time, while the county bridge below was down, it was the only thoroughfare into Buena Vista from the western portion of the county; but there has never been any other acceptance of it as a highway by the county of Rockbridge or the city of Buena Vista.

After many years of service to the public, but especially to the persons who had bought land of the West Buena Vista ⁵⁸³ Company, and the owners of "Moore's Mill" in particular, the bridge became in need of repairs and unsafe, the flooring thereon having decayed, and by reason of a complaint from the railroad companies the flooring over the railroads was removed so as to avoid any danger to their traffic. This being the condition of the bridge, in order to continue it as a footway, the owners of "Moore's Mill" and others took up a subscription among the public and raised a fund with which a stairway was built from the ground up to the floor of the bridge at the point from which the flooring had been removed back to the end of the bridge over the railroad tracks, whereby the bridge was made a passageway for pedestrians over North river, and has been used as such since. In May, 1904, while the bridge was being used in the way just stated, particularly by the residents on the West Buena Vista side of the river, the West Buena Vista company, having disposed of all of its other property, made sale of this bridge with the view of dividing the proceeds of sale among the stockholders of the company, and the purchaser thereof began to tear it down; whereupon J. L. Oney and Ella B. Agner, who had become the sole owners of "Moore's Mill," filed their bill in this cause and obtained a temporary injunction restraining the West Buena Vista company and all others from removing the said bridge, or interfering with its use by the public.

In their bill the complainants set out the origin of the bridge, its use, etc., as hereinbefore stated, and charge that they and others similarly situated bought their property in West Buena Vista in good faith on the existence of the bridge as a most valuable easement to their property; that the removal of it would inflict a serious and irreparable injury to the complainants by reason of the fact that they would then be without access to Buena Vista save around by the old county bridge, a distance of two miles; that the West Buena Vista company is insolvent; and that complain-

ants desire to repair and keep in repair the said bridge as an indispensable and valuable easement to their property, etc.

⁵⁸⁴ By its answer the West Buena Vista company admits that the map or plat exhibited with the bill was made and recorded in accordance with what is known as the "Plat Act" (Acts 1887-88, pp. 553, 554); that the bridge was used by everyone who desired to use it, and that it was offered to the county and city as a public bridge; does not deny that complainants bought with reference to the bridge, and would not have paid more than one-half as much for their property without the bridge or bought it at all. While the answer denies that the company sold with reference to the map, the deeds it made to Oney and his associates for "Moore's Mill" show that it was referred to, and the proof is uncontradicted that the bridge was urged as the inducement to the purchases of the company's property.

Upon the hearing of the cause on the bill and answer and the proofs submitted on behalf of the respective parties, the circuit court dissolved the temporary injunction theretofore awarded the complainants, and dismissed their bill; whereupon they obtained this appeal.

While there was, unmistakably, an offer of appellee to dedicate the bridge in question to both the county of Rockbridge and the city of Buena Vista as a part of a public highway, it is not claimed—at least it is not shown—that it was in any manner accepted by either; but it is equally as certain from the facts proved that it was not only the purpose of appellee to dedicate the bridge to the public use, and that the bridge was urged as an inducement to appellants and others to purchase the company's lands, and that it was one of the most important, if not the principal, inducement to them to buy. It is true that neither the bridge nor any part of it was conveyed in the deed to appellants or to any other purchasers of the company's lands, but the map showing the bridge was not only recorded as provided in the "Plat Act," supra, but was referred to in the deeds made to appellants and others; therefore, the law implies a grant of the bridge as an easement to the property conveyed. But the rule is that the grantor or dedicator of an ⁵⁸⁵ easement is generally under no obligation to make repairs, and that this duty rests upon those who use the easement, and if they fail to keep it in proper condition for the uses for which it was granted or dedicated, they must suffer

the resulting inconveniences. This rule is changed only where there is a special agreement or prescriptive right to the contrary: 14 Cyc. 1209; 2 Minor's Institutes, 19; 2 Tucker's Commentaries, 7; 9 Am. & Eng. Ency. of Law, 2d ed., 80.

There is nothing in this record to take the case out of the control of the general rule, so that while appellants and others similarly situated acquired by their purchase of lands from appellees a right in this bridge as an easement incident to their property, the burden rests upon them to keep it in proper condition for the uses for which it was constructed; and a failure to do this for an unreasonable length of time would amount to an abandonment of the easement, as an abandonment will be presumed where the owner of the right does, or permits to be done, any act inconsistent with the future enjoyment of the right: 10 Am. & Eng. Ency. of Law, 435; *Buntin v. City of Danville*, 93 Va. 200, 24 S. E. 830; *City of Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342. Nonuser of an easement, however, unaccompanied by proof of an intention to abandon it, is not sufficient; the evidence must be clear that there was the intention to abandon: See the authorities just cited.

While the evidence shows that the bridge, since the flooring was taken up over the railroad tracks, is absolutely useless except for foot-passengers, it also shows that the structure, built mainly of iron and steel, is, with the exception of the flooring, well preserved, and the materials therein perfectly sound. Therefore, it cannot be said that it has become entirely useless, as appellee contends, as an easement to the property of appellants. Nor can it be said, under the circumstances, that it has been abandoned by the appellants. On the contrary, appellants have been all along and are now using the bridge ⁵⁸⁶ and insist upon their right to repair and restore it to a condition that will render it safe and useful for the purposes for which it was built and used for many years after its construction. It would, we think, be manifestly unjust to permit appellee, after having used this bridge as an inducement to appellants and others to buy its property, and permitted its use as stated, to remove it and thereby deprive these purchasers of a valuable and indispensable easement to their property.

But we are further of opinion that to entitle appellants to a continuing right or interest in this bridge as an easement

they should be required to restore it, within a reasonable time, to such condition as will render it safe and useful for the purposes for which it was constructed, and that if this is not done they should be regarded as having abandoned the easement, in which event appellant will be entitled to make such disposition of the materials in the structure as it may see fit: 13 Cyc. 490; *Bolling v. Town of Petersburg*, 3 Rand. 563; *Harrison v. Parker*, 6 East, 154.

Therefore, the decree appealed from will be reversed, the temporary injunction awarded in the cause reinstated, and the cause remanded to the circuit court with directions to put appellants upon the terms that unless they repair, or cause to be repaired, the said bridge, putting it in a good and safe condition for the uses for which it was constructed and formerly used, within a reasonable time to be fixed by the said court in its decree, the injunction will stand dissolved and their bill dismissed.

It is the Right and Duty of the Grantee of a Private Way to keep it in repair: See the monographic notes to *Dudgeon v. Bronson*, 95 Am. St. Rep. 328; *Bakeman v. Talbot*, 88 Am. Dec. 281.

One Entitled to an Easement May Abandon and extinguish it by acts in pais: *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749; *Jesse French Piano etc. Co. v. Forbes*, 129 Ala. 471, 87 Am. St. Rep. 71.

FOREMAN v. GERMAN ALLIANCE INSURANCE ASSOCIATION.

[104 Va. 694, 52 S. E. 337.]

INSURANCE, Receipt for Premium, When Does not Bind the Insurer.—If a receipt for a premium is given by a person who is the agent both of the insurer and the assured, who in giving the receipt was not acting as the agent of the insurer, but gave it for premiums paid or advanced for a building and loan association on policies in which it was interested, such receipt is not admissible against the insurer. (p. 1073.)

INSURANCE, Forfeiture, Estoppel to Urge.—Any acts, declarations, or course of dealing by an insurer, with knowledge of facts constituting a breach of a condition in a policy, leading the person insured honestly to think by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting on the forfeiture. (p. 1074.)

INSURANCE, Knowledge of Agent, When not Imputed to the Insurer.—If one who is agent of the insurer knows of the breach of a condition in a policy, but acquires such knowledge when acting in

the business of another principal, such knowledge is not imputed to the insurer unless shown to have been in the agent's mind when acting for the latter. (p. 1074.)

INSURANCE, Forfeiture, When not Waived by Knowledge of a Breach of Condition.—The knowledge by an insurer of a breach of condition forfeiting a policy does not amount to a waiver. There must exist, in addition, some positive act of confirmation upon which, in connection with the knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived. (p. 1075.)

Robert W. Matlett, for the plaintiff in error.

White, Tunstall & Thom, for the defendant in error.

695 BUCHANAN, J. This was an action of assumpsit instituted against the German Alliance Insurance Association on a fire insurance policy by C. B. Foreman, for the benefit of the Prudential Building and Loan Association.

The defense of the insurance company was that the premises, after the policy had been issued, became and remained vacant, in violation of that condition of the policy which declared that the entire policy shall be void if the building therein described be or become vacant or unoccupied for ten days.

The plaintiff admitted such vacancy, but claimed that the forfeiture resulting therefrom had been waived by the insurance company. Upon the trial of the cause, the defendant, without introducing any evidence, demurred to the plaintiff's evidence. The court sustained the demurrer, and gave judgment for the defendant. To that judgment this writ of error was awarded.

696 It appears that the policy, which was for one year, was issued on or about the 8th of May, 1902, through Albert Morris & Co., the general agents of the insurance company in the city of Norfolk. A like policy had been taken out by the insured for the previous year, but upon his informing the building and loan association, which had a mortgage upon the property, that he could not pay the premium upon a policy for another year, that association took out the policy sued on in his name, with a provision that the loss, if any, should be payable to the building and loan association as its interest might appear. Albert Morris & Co. were also agents in that city for the Prudential Building and Loan Association, and were authorized to pay the premiums on policies of insurance in which it was interested, when such premiums fell due and were not paid, and could not be collected by them from the

insured. The premium on the policy sued on not having been paid by the insured, Albert Morris & Co. paid it to the insurance company on the 5th of June.

On the 5th of July the insured vacated the premises, and between that time and the 10th of that month gave the key of the house to Albert Morris & Co., as the agents of the Prudential Building and Loan Association, informing them that he could not keep up the payments due the building and loan association on its loan secured upon the property. Albert Morris & Co., about two weeks after that, notified him that if he did not pay the premium they would have to collect it from the building and loan association. The insured did not pay them, nor did he know at that time that they had paid the premium to the insurance company under their agreement with the building and loan association. Between that time and the following October, that association settled with or repaid Albert Morris & Co. the amount which they had advanced in paying the premium on the policy.

697 In November of that year, the buildings on the premises were destroyed by fire. When the insurance company was notified of the loss, it at once denied its liability on the ground that the vacancy clause in the policy had been violated.

During the trial the plaintiff offered to read to the jury a receipt dated in October, 1902, given to the building and loan association by Albert Morris & Co., for eighty-three dollars, the aggregate amount of the premiums on eight insurance policies, one of which was the premium on the policy sued on. The receipt was objected to on the ground that it did not purport to have been given by Albert Morris & Co. as agents of the insurance company. The court sustained the objection and refused to allow the receipt to be read in evidence. That action of the court is assigned as error.

The receipt not only did not show upon its face that it was given by Albert Morris & Co. as the agents of the insurance company, but it appeared from the evidence of Albert Morris, who executed the receipt for his firm and proved their signature thereto, that the receipt was given by his firm not as the agents of the insurance company, but for insurance premiums which they had paid or advanced for the building and loan association under its agreement with them, on policies in which it was interested. This being so, the court was clearly right in not admitting the receipt in evidence.

The next question to be determined is, Has the plaintiff shown that the forfeiture was waived?

It is well settled that any acts, declarations or course of dealing by an insurance company, with knowledge of facts constituting a breach of a condition in the policy, leading the party insured honestly to think that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the insurance company from insisting upon the forfeiture, though it might be claimed under the express letter of the policy: *Georgia Home Ins. Co. v. Kinnier's Admx.*, 28 Gratt. 88; *Morotock Ins. Co. v. Pankey*, 91 Va. 698 259, 21 S. E. 487; *Virginia Fire etc. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 102 Am. St. Rep. 846, 46 S. E. 463, and cases there cited; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841.

Applying that principle to the facts of this case, it is manifest, we think, that the plaintiff in error has failed to show that the insurance company has waived or estopped itself from relying upon the forfeiture set up as a defense. The premium was paid on June 5th, and the building did not become vacant until July 5th, and there is no evidence that the insurance company knew that it became vacant before the fire occurred.

It is argued that its agent, Albert Morris & Co., knew that it was vacant, and that their knowledge was notice to the insurance company. It is true that Albert Morris & Co. did know it, but that knowledge was acquired by them as agents of the building and loan association, and not while attending to the affairs of the insurance company. Knowledge acquired in that manner, in order to be binding upon the insurance company, would have to be present in the agent's mind at the time he did the act which it is claimed constituted the waiver, and the burden is on the party relying upon the waiver to prove this. That such knowledge was in the agent's mind may be shown by circumstances as well as by direct evidence: *Morrison v. Bausemer*, 32 Gratt. 225; *Johnson's Exr. v. National Ex. Bank*, 33 Gratt. 473; 2 *Minor's Institutes*, 4th ed., 980; 1 *Joyce on Insurance*, sec. 544; *Meehem on Agency*, sec. 721; *Martin v. South Salem L. Co.*, 94 Va. 28, 26 S. E. 591.

But even if the knowledge of Albert Morris & Co. was the knowledge of the insurance company, it did no act afterward to the prejudice of the insured, or the beneficiary in the policy, or which can be held to have been a waiver of the for-

feiture. If the insured, when called upon by Albert Morris & Co. to pay the amount of the premium two weeks after the house had been vacated, had paid that sum to them as premium on the policy, believing that they were collecting it as the agents of the insurance ⁶⁹⁹ company, then he might have had the right to rely upon that as a waiver of the forfeiture; but he did not pay it, or pay any attention to their request. Neither did the insurance company, or its agents, Albert Morris & Co., do any act or make any declaration or pursue any course of conduct which gave the building and loan association the right to believe that the forfeiture was or would be waived. The evidence clearly shows that when that association paid Albert Morris & Co. the amount of the premium, it paid it not as a premium due the insurance company, but as a debt due from it to Albert Morris & Co. as its own agents, for money advanced by them to pay the premium before the building had become vacant or the forfeiture had been incurred.

Mere knowledge by the insurance company of the existence of the breach of the contract does not of itself amount to a waiver or an estoppel. There must exist, in addition to a knowledge of the breach, some positive act of confirmation upon which in connection with the knowledge a waiver may be predicated, and by force of which the broken contract may be said to be revived: Richards on Insurance, secs. 78, 79; 2 May on Insurance, sec. 507; Vance on Insurance, p. 374; Gibson E. Co. v. Liverpool etc. Ins. Co., 159 N. Y. 418, 54 N. E. 23.

Having reached the conclusion that the acts and conduct of the agents of the insurance company, conceding that they were binding upon it, were not sufficient to establish a waiver of the forfeiture, or to estop the insurance company from setting it up as a defense, it will be unnecessary to consider the effect of that provision in the policy which declares that no officer, agent, or representative of the company shall have the power or be deemed or held to have waived any condition of the policy unless such waiver shall be written upon or attached to it.

We are of opinion that there is no error in the judgment of the court of law and chancery, and that it must be affirmed.

The Waiver of Conditions and Forfeitures in insurance policies by agents of the insurer is the subject of a recent monographic note to Johnson v. Aetna Ins. Co., 107 Ga. 99-149.

SELDEN'S EXECUTOR v. KENNEDY.

[104 Va. 826, 52 S. E. 635.]

THE GRANT OF LETTERS of Administration on the Estate of a Live Man, as if he were dead, is void. (p. 1077.)

LETTERS OF ADMINISTRATION on the Estates of Absentees.—A statute providing for the taking of an absentee's property and administering on it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party and of which he has no notice, is in violation of his rights under the fourteenth amendment. (p. 1079.)

THE LACHES Which will Defeat the Assertion of a Right must be such as to afford a reasonable presumption of satisfaction or of an abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. (p. 1079.)

LACHES in Suing for a Legacy, When not Fatal.—When one's estate has been administered upon as if he were dead, because of his absence from the state unheard of for more than seven years, and a legacy due him has been paid to his administrator, a suit brought by him to recover such legacy some fifteen years after becoming entitled thereto is not barred by laches, when the party whose duty it was to pay the legacy survives, no evidence has been lost by death, no records have been destroyed or papers lost, no uncertainty exists as to the amount due, and no presumption of payment. (p. 1080.)

Loyall & Taylor, for the appellant.

Burroughs & Brother, for the appellee.

827 **BUCHANAN, J.** This suit was instituted by C. E. Kennedy against C. W. Grandy, surviving executor of Dr. William Selden, deceased, to recover a legacy.

It appears that Dr. Selden, by his last will and testament, which was probated in November, 1887, bequeathed to Charles H. Kennedy the sum of one thousand dollars. Kennedy died before the testator, leaving three children, who under section 2523 of the Code were entitled to the legacy. The executors paid to two of the children their portion of the legacy. Upon the seventh day of January, 1896, the corporation court of the city of Norfolk, upon proof that C. E. Kennedy, the other child, had been a resident of this state and had since gone from and had not returned to the state, more than seven years prior to that date, adjudged, ordered and decreed that he was and should be presumed to be dead, as declared by section 3373 of the code, and appointed T. D. Kennedy, his brother, administrator of his

estate. A few days after his appointment he collected his brother's share of the legacy from the appellant as surviving executor of Dr. Selden.

In 1904 C. E. Kennedy, who had been absent from the state for many years, made a demand upon the surviving executor for his share of the legacy; and upon his refusal to pay the same this suit was instituted, and upon a hearing of the cause a decree was rendered against him for the sum demanded. From that decree this appeal was taken.

The first assignment of error is that the payment made by the appellant to T. D. Kennedy, as administrator of the estate of the appellee, was a valid payment, and that the trial court erred in not so deciding.

⁸²⁸ In order to sustain this contention, it will be necessary to hold that section 3373 of the code, when considered in connection with section 2659, which provides for the granting of letters of administration when a person is dead, authorizes the appointment of an administrator of the estate of the appellee, under the facts disclosed by the record; and if it does, that it is not in conflict with that portion of the fourteenth amendment to the constitution of the United States, which ordains that no state shall "deprive any person of life, liberty or property without due process of law."

Section 3373 is as follows: "If any person, who shall have resided in this state, go from and do not return to the state for seven years successively, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

It may well be doubted whether the legislature intended by that section to authorize the courts to grant letters of administration upon the estate of a person who was once a resident of the state and had been absent therefrom for more than seven years, irrespective of death. But if it be conceded that such was its intention, is not the statute in plain violation of the due process of law clause of the fourteenth amendment?

It is conceded, and if it were not it is well settled, that the grant of letters of administration on the estate of a live man, as if he were dead, is absolutely void.

In the case of *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896, the question of the validity of such letters of administration was fully discussed, the author-

ities, English and American, cited, and the conclusion reached that a court of probate, in the exercise of its jurisdiction over the probate of wills and the administration of estates of deceased persons, had no jurisdiction to appoint an administrator of a living person, and that the appointment of an administrator, after public notice to the next of kin, creditors and the like of the estate of a living person, who had been absent from the state more than seven ⁸²⁹ years, was in violation of the due process of law clause of the fourteenth amendment to the constitution of the United States. And there are general expressions in that opinion which would seem to indicate that a state was absolutely without power to provide by special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death.

But in the recent case of *Cunnius etc. v. Reading School Dist.*, 198 U. S. 458, 25 Sup. Ct. Rep. 721, 49 L. ed. 1125, that court, in considering the validity of certain statutes of the state of Pennsylvania "relating to the grant of letters of administration upon the estates of persons presumed to be dead by reason of long absence from their former domicile," held that the due process of law clause of the fourteenth amendment to the constitution of the United States does not wholly deprive a state of the power to confer jurisdiction on its courts to administer the estates of absentees, irrespective of the fact of death, by special and appropriate proceedings distinct from the general law for the settlement of the estates of decedents. It further held that fixing the period of a person's absence from his last domicile within the state at seven years, or more, before his estate could be administered under the special proceedings, was not so unreasonable as to render the statute repugnant to the due process of law clause of the fourteenth amendment; and that the notice required to be given by order of publication before an administrator could be appointed, and the safeguards provided for the protection of the property of the absentee in case of his return, satisfied the requirements of the fourteenth amendment. But the court expressed the opinion in that case, that a state law which did not provide, among other things, for adequate notice as a prerequisite to the proceedings for the administration

of the estate of an absentee would be repugnant to the fourteenth amendment.

It is said that the expression of the court in that case, that the appointment of an administrator of the estate of an absentee while he is still living, without adequate notice as a prerequisite ⁸³⁰ to such appointment, would be void, was unnecessary to a decision of that case, and therefore a mere dictum. Even if this were so, the principle there announced is in accord with the repeated declarations of that court, as to what is required by the due process of law clause of the fourteenth amendment: *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Scott v. McNeil*, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, 38 L. ed. 896.

Tested by that rule, a statute which provides for the taking of an absentee's property and administering it, when he is alive, without his knowledge or consent and in a proceeding to which he is not a party and of which he has no notice, is clearly in violation of his rights under the fourteenth amendment.

The other assignment of error is that the trial court ought to have denied the relief sought, because of the long delay of the appellee in asserting his claim.

It has always been a principle of equity to discourage stale demands, and laches is often a defense wholly independent of the statute of limitations. But the rule is adopted because after great lapse of time, from death of parties, loss of papers, or death of witnesses, there is danger of doing injustice, and there can be no longer a safe determination of the controversy: *Tazewell's Exr. v. Saunder's Exr.*, 13 Gratt. 354; *Bargamin v. Clark*, 20 Gratt. 544; *Rowe v. Bentley*, 29 Gratt. 756; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861.

Mere delay is not always laches, and laches in the assertion of a right is not always sufficient to defeat it. The laches must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise: *Tazewell's Exr. v. Saunder's Exr.*, 13 Gratt. 354, 362; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861, and cases cited. Whether the lapse of time is sufficient to bar a recovery must of necessity depend upon the particular circumstances of each case:

Aylett's Exr. v. King, 11 Leigh, 486; Rowe v. Bentley, 29 Gratt. 756, 763; Bell v. Wood, 94 Va. 677, 27 S. E. 504.

Tested by these general principles, the facts of this case do ⁸³¹ not make out such a case of laches as ought to bar the appellee of his right to recover. The time between the accruing of his right to collect the legacy and the institution of his suit is about fifteen years—a long time to delay the assertion of his right if he had knowledge of it. It is not shown when he first learned of it, but it does appear that he had been absent from the state for more than seven years before letters of administration on his estate were granted; that during that period he had not been heard from by his nearest relatives; and that he was still a nonresident at the time of the institution of his suit. We think it may be fairly inferred from the record that he had no knowledge of his rights until after his legacy had been paid to his administrator, and probably not until shortly before he made his demand upon the appellant and instituted his suit. But if it be conceded that he knew that the legacy had been left him, the only thing, other than mere lapse of time, that could stand in the way of his right to recover is, that the appellant voluntarily paid it to another who had apparent, but no real, authority to receive it, and who gave a refunding bond for appellant's protection. The appellant whose duty it was to pay, and the appellee, who was entitled to receive the legacy, are both living; no evidence has been lost by death; no records have been destroyed or papers lost; there is no uncertainty as to the amount that is due, and no presumption of payment. In the absence of all of these, the equitable circumstances which generally constitute the grounds for the application of the doctrine of laches, we do not think that the appellee can be said to be guilty of such laches as will bar his right to recover.

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

The Constitutionality of a Statute providing for administration upon the estates of absentees under the presumption that they are dead is upheld in Cunniss v. Reading School Dist., 206 Pa. St. 469, 98 Am. St. Rep. 790, but is denied in Clapp v. Houg, 12 N. Dak. 600, 102 Am. St. Rep. 589; Carr v. Brown, 20 R. I. 215, 78 Am. St. Rep. 855.

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ATTORNEYS.

1. **ATTORNEYS AT LAW—Law Partnership.**—The act of one partner in a firm of lawyers within the scope of its business is the act of all. (Ark.) *Alley v. Bowen-Merrill Co.*, 73.

2. **ATTORNEYS AT LAW—Law Partnership—Authority to Purchase.**—A member of a law partnership is authorized to purchase in the name of the firm such law books as are reasonably necessary for carrying on the firm's business. (Ark.) *Alley v. Bowen-Merrill Co.*, 73.

BAGGAGE.

See Carriers, 15, 16.

BANKRUPTCY.

1. **BANKRUPTCY—Jurisdiction of Claim to, or Lien on Property of Bankrupt.**—A court of bankruptcy has no jurisdiction, except by the consent of the parties, to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate or to have been transferred by him in fraud of the act. Such suits must be prosecuted either in the state courts, or in the circuit courts of the United States, if the citizenship of the parties authorizes the action to be maintained in the latter tribunal. (N. Y.) *Skilton v. Codrington*, 885.

2. **BANKRUPTCY—Jurisdiction of State Courts Over Lien Suits.** Under the bankrupt act parties claiming the property or liens thereon may establish their rights by suits in courts of plenary jurisdiction.

It was not the intention of the act to subject such claims to summary disposition in the bankruptcy court unless the claims are frivolous or made in bad faith. Hence, where a trustee in bankruptcy under order of the bankruptcy court recovered from out of the proceeds of sale of property, covered by a chattel mortgage, a sum to pay liens or claims that might be established against the property, the state court has jurisdiction of a suit against the trustee to enforce the mortgage lien. (N. Y.) *Skilton v. Codington*, 885.

3. BANKRUPTCY.—A Judgment of a State Court in Relation to a Fund or Property in the possession of a bankruptcy court does not authorize such fund or property to be taken from the possession of the bankruptcy court. (N. Y.) *Skilton v. Codington*, 885.

4. BANKRUPTCY.—A Bankruptcy Court May Enjoin the Prosecution of a Suit in the State Court to determine and establish a lien on the fund or property of the bankrupt in possession of the bankruptcy court. (N. Y.) *Skilton v. Codington*, 885.

BANKS AND BANKING.

1. BANKS AND BANKING.—Ordinarily the Relation Between a Depositor and the Bank is that of debtor and creditor, and that relation, when allowed to stand, will not authorize or permit such depositor to obtain a preference over general creditors, although the bank was insolvent when the deposit was made. (Ohio St.) *Orme v. Baker*, 968.

2. BANKS AND BANKING.—Deposit, Rescinding and Recalling, Mere Insolvency does not furnish a ground for the rescission of a transaction, but to prevent title to the deposit vesting in the bank fraud must be shown in its reception sufficient to entitle the depositor to rescind and recall the deposit. (Ohio St.) *Orme v. Baker*, 968.

3. BANKS, When Chargeable With the Knowledge of Their Officers.—If the cashier and vice-president of a bank are the only officers taking any active charge of its business, and are by the directors intrusted with the whole management, and it becomes insolvent through their acts, their knowledge of its condition must be regarded as the knowledge of the bank, though other directors constituting a majority of the board had no notice thereof. (Ohio St.) *Orme v. Baker*, 968.

4. BANKS AND BANKING.—The Board of Directors of a Bank is Charged With Such Knowledge of Its Condition as could have been ascertained by the exercise of ordinary care. (Ohio St.) *Orme v. Baker*, 968.

5. BANKS AND BANKING.—Deposit with Insolvent Bank, When Recoverable.—If moneys are received on deposit by a bank which is, and long has been, hopelessly insolvent, this is a fraud on the depositor entitling him to rescind the deposit and recover the amount thereof from receivers into whose possession the property of the bank went after their appointment. (Ohio St.) *Orme v. Baker*, 968.

6. BANKS AND BANKING.—A Deposit is not so Indistinguishably Mixed with the other funds of a bank that it cannot be traced and identified, if it consists partly of moneys not credited to the depositor on the books of the bank until after the appointment of a receiver, and the balance is in checks none of which were collected prior to such appointment. (Ohio St.) *Orme v. Baker*, 968.

7. BANKS AND BANKING.—Ordinary Checks as Cash.—Although cashier's checks, from their peculiar character and general use in the commercial world, are regarded substantially as the money which they represent, this rule is not extended to the case of ordinary checks

of the depositor drawn on his bank. (N. Y.) *Hathaway v. County of Delaware*, 909.

8. BANKS AND BANKING—Liability for Assisting in Swindling Operations.—If a bank and its officers, knowing that a gang of men are, and long have been, engaged in swindling through a series of fake athletic contests, the result of which was arranged in advance, lent the gang the appearance of respectability that a banking institution affords, and allowed the bank to be used for the exchange and transmission of money, such bank is liable to a person swindled out of his money by such gang in one of such contests. (Mo.) *Hobbs v. Boatright*, 709.

9. BANKS AND BANKING—Liability for Acts of Cashier in Assisting a Scheme to Defraud.—If a person is cheated by a fraudulent scheme through the assistance of a cashier of a bank, he knowing of the scheme and that its object was to defraud, and the acts done by him being in the banking business, such as receiving money, opening an account, and rushing checks off for quick collection, he represents the bank, and renders it, as well as himself, liable. (Mo.) *Hobbs v. Boatright*, 709.

BENEFIT SOCIETY.

1. BENEFIT SOCIETY—Dependence of Beneficiary.—A married woman whose husband is capable of supporting her is not "dependent" on a member of a mutual benefit society, not her husband, so that he can designate her as his beneficiary, when she is not related to him and has no legal or moral claim upon him, except that he advised her to get married and promised to take care of her while he lived, which he did. (Cal.) *Caldwell v. Grand Lodge of United Workmen*, 219.

2. BENEFIT SOCIETY—Dependence of Beneficiary.—The dependence which authorizes a member of a mutual benefit society to designate the person dependent upon him as his beneficiary, is a dependence resting upon some moral, legal or equitable ground, not a dependence which is only a matter of favor, which is founded upon the mere whim or caprice of the member, and which may be cast aside by him without violating any legal or moral obligation. (Cal.) *Caldwell v. Grand Lodge of United Workmen*, 219.

3. BENEFIT SOCIETY—Change of By-laws.—A reasonable amendment to the by-laws of a mutual benefit society limiting the classes of persons who may be designated as beneficiaries is binding upon a member who agreed, when he joined the society, to abide by and conform to the by-laws then in force or subsequently adopted. (Cal.) *Caldwell v. Grand Lodge of United Workmen*, 219.

4. BENEFIT SOCIETIES—Beneficiaries—Member of "Family." A stepfather, not a member of his stepdaughter's household at the time of her death, though previous thereto he had boarded with her for a time, is not a member of her "family" within the meaning of a benefit certificate of insurance issued to her and permitting the payment of her death benefit to a member of her family. (Mich.) *Supreme Lodge Order of Mutual Protection v. Dewey*, 596.

5. BENEFIT SOCIETIES—Beneficiaries.—If an insurance benefit certificate provides that the rights of the beneficiary shall be determined by the laws of the order in force at the time of the death of the member, and at that time the laws of the society provide that, if the designated beneficiary proves to be an unlawful one, the wife or husband of the member shall be recognized as the first

lawful claimant for the benefit, and the policy names as beneficiary the member's stepfather, who cannot take because not a member of her family, her husband has a direct interest in the contract and is entitled to enforce it, although the society is willing to pay the benefit to such stepfather. (Mich.) Supreme Lodge Order of Mutual Protection v. Dewey, 596.

6. BENEFIT SOCIETY—False Report by Medical Examiner.—If an applicant for membership in a benefit society makes truthful answers to questions concerning specific diseases, but the medical examiner incorrectly transcribes them in his report, the society is estopped to assert the falsity of the answers as a defense to an action on the certificate of insurance. (Cal.) Lyon v. United Moderns, 291.

7. BENEFIT SOCIETY—Prior Rejection of Member.—A fraternal association, such as the Woodmen of the World, is not a "company" within the meaning of a question to an applicant for a benefit certificate, "Has any proposal or application to insure your life ever been made to any company upon which a policy has not issued?" (Cal.) Lyon v. United Moderns, 291.

8. BENEFIT SOCIETY—Sufficiency of Proofs of Death.—A requirement in a certificate of insurance in a benefit society of "satisfactory proof of the death of the member and of the identity and right of the claimant and of the validity of the claim," does not exact a showing of the validity of the certificate, but only the proof of the death of the member and of the claimant's right and identity to such benefit as the certificate stipulates. (Cal.) Lyon v. United Moderns, 291.

BILLS OF LADING.

See Carriers, 19-26.

BONDS.

See Appeal and Error, 9, 10; Officers.

BRIDGES.

See Easement, 7, 8.

BROKERS.

1. BROKERAGE, Evidence of Sales Made Through Other Agents After Breach of Contract of.—If a contract whereby brokers are allowed a commission on all sales made by them for their employers within a time specified is broken by the employers without fault of the brokers, and the latter sue for a breach of the contract, evidence of sales made by the employers through another agency within the time covered by the contract is admissible. (Minn.) Emerson v. Pacific Coast etc. Co., 603.

2. CONTRACT for the Sale of Goods on Commission, When not Unilateral.—A contract between a corporation engaged in the business of packing fish and a firm of brokers, whereby the latter are constituted sole agents of the former for the sale of eighty-five per cent of its pack of fish for the period of two years, at a selling price to be agreed upon between the parties, upon a brokerage of five per cent, is not unilateral, and the brokers may recover for a breach thereof without cause. (Minn.) Emerson v. Pacific Coast etc. Co., 603.

BUILDING AND LOAN ASSOCIATIONS.

1. BUILDING AND LOAN ASSOCIATIONS—Mortgage Foreclosure—Amount of Recovery.—On foreclosure of a member's mort-

gage of a building and loan association, it can only recover the amount, with interest, actually paid to, or advanced for the mortgagor, less payments made as dues, premiums, interest and fines. The fact that the association is insolvent and in the hands of a receiver does not alter the rule. (Iowa) *Butson v. Home Saving & Trust Co.*, 463.

2. BUILDING AND LOAN ASSOCIATIONS—Insolvency—Payments by Borrower.—If a building and loan association, by reason of insolvency or otherwise, ceases business, having unpaid stock and loans outstanding, borrowers are released from payments of monthly installments, and the contract will be treated as an ordinary loan at legal interest upon which the payments already made will be credited under the rule governing partial payments. (Iowa) *Butson v. Home Saving & Trust Co.*, 463.

3. BUILDING AND LOAN ASSOCIATIONS—Payments on Loan. Payments made by a borrowing member of a building and loan association on his stock are not deprived of their true character as payments on his loan by the fact that credit therefor may not be applied on the note representing the loan until the time arrives for final settlement, and may then be increased by profits or decreased by losses which have accrued upon the stock. (Iowa) *Butson v. Home Saving & Trust Co.*, 463.

CARRIERS.

Passengers.

1. RAILROADS—Passenger—Persons Remaining on Train.—A person who is on a train as a passenger when it stops at a station, and who desires to continue his journey farther than was originally intended, and who remains on the train for that purpose, whether he has paid fare or notified the trainmen of his intention to continue his journey or not, is still a passenger. (Mo.) *Anderson v. Missouri-Pacific Ry. Co.*, 748.

2. CARRIERS—Negligence—Passengers Who are.—If a person who has notified a train conductor that he intends to travel on his train, in attempting to board it while in motion, is thrown to the ground by a sudden jerk of the train necessary to its movement, the relation of carrier and passenger does not exist, and he cannot recover for the injury received from his fall. (Ala.) *Southern Ry. Co. v. Johnson*, 48.

3. STREET RAILWAYS, Presumption of Negligence from the Falling of a Trolley Pole.—If, when a passenger is about to enter an electric street-car, stopped at the usual place for that purpose, the trolley pole falls upon and injures him, a presumption arises, in the absence of all explanation, of negligence on the part of the street railway company rendering it liable for the damages sustained from the injury. (Ohio St.) *Cincinnati Traction Co. v. Holzenkamp*, 980.

4. RAILWAY'S NEGLIGENCE in Leaving Vestibule Door Open. Though a railway is not bound to have a car vestibuled, yet if it does so, and leads its passengers to believe that the doors of the vestibule will be kept closed between stations and then negligently leaves them open, it incurs liability to passengers injured thereby. (Minn.) *Crandall v. Minneapolis etc. Ry. Co.*, 653.

5. RAILROADS—Negligence—Sufficiency of Complaint.—In an action to recover for the death of plaintiff's husband, a complaint alleging that he was killed by reason of defendant's train, on which he was traveling as a passenger, being run into and wrecked by another of defendant's trains, and that such collision was occasioned by the negligence or unskillfulness of the officers, servants, or employés thereon in running, conducting and managing such train, is sufficient.

and it is not necessary to allege the particular acts of any particular servant or employé which occasioned the collision. (Mo.) *Anderson v. Missouri-Pacific Ry. Co.*, 748.

6. **RAILROADS—Passengers.**—A passenger who has only paid his fare to a certain point of destination is not required to leave the train at that point, and if he desires to continue the journey, he has a right to remain in the car, retaining his status as a passenger, and when demanded of him pay his fare to the farther place of his destination. (Mo.) *Anderson v. Missouri-Pacific Ry. Co.*, 748.

7. **RAILROADS—Passengers—Presumption.**—Everyone riding in a railroad car is presumed, *prima facie*, to be there lawfully as a passenger, having paid, or being liable, when called on, to pay, his fare, and the burden of proof is on the carrier to prove affirmatively that he was a trespasser. (Mo.) *Anderson v. Missouri-Pacific Ry. Co.*, 748.

8. **RAILROADS—Negligence—Brakeman.**—A brakeman is a train servant of a railroad company engaged in the operation and management of the company's train, for whose negligence in causing the death of a passenger the company is liable for a statutory penalty imposed for death caused by negligence. (Mo.) *Anderson v. Missouri-Pacific Ry. Co.*, 748.

Passengers on Freight Trains.

9. **RAILROADS—Passengers on Freight Trains—Presumption.**—If there is a division of the freight and passenger business of a railroad, the common presumption is that a person found on a freight train is not legally a passenger, and if he claims that he is, it devolves upon him to rebut the presumption. (Ark.) *St. Louis etc. Ry. Co. v. Reed*, 78.

10. **RAILROADS—Injury While Riding on Freight Train.**—If a person of mature years rides upon the caboose of a freight train, in violation of the rules of the railroad company, when he knows, or ought to know, that the caboose is not intended for the carriage of passengers, and while so riding is injured in a collision, he cannot recover damages unless the injury was wantonly and willfully inflicted. (Ark.) *St. Louis etc. Ry. Co. v. Reed*, 78.

11. **RAILROADS.**—Passengers Riding in freight or mixed trains must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel on such trains, and are not entitled to insist upon having the same care and attention as may be justly demanded upon regular passenger trains, (Ark.) *Rodgers v. Choctaw etc. R. R. Co.*, 102.

12. **RAILROADS—Passengers on Freight Trains.**—If a railroad company undertakes the carriage of passengers on freight trains it owes such passengers the same high degree of care to protect them from injury as if they were on a regular passenger train, but at the same time the passenger assumes the increased risk incident to the operation and management of such trains. (Ark.) *Rodgers v. Choctaw etc. R. R. Co.*, 102.

13. **RAILROADS—Passengers on Freight Trains—Negligence of Train Men.**—If the conductor on a freight train is aware of the peril of a passenger thereon and can, by the exercise of ordinary care, warn him, and fails to do so, or if he can by the exercise of ordinary care prevent a sudden movement of the train and fails to do so, the railroad company is liable for the injury to a passenger resulting therefrom. (Ark.) *Rodgers v. Choctaw etc. R. R. Co.*, 102.

14. RAILROADS—Passengers on Freight Trains.—Although a passenger on a freight train is negligent in putting himself in a perilous position, yet if the direct cause of the injury to such passenger is the omission of the railroad employes, after becoming aware of his peril, to use a proper degree of care to protect him, the railroad company is liable. (Ark.) *Rodgers v. Choctaw etc. R. R. Co.*, 102.

Baggage.

15. CARRIER—Liability to Parent for Child's Baggage.—A father paying full fare for himself, traveling with a child of such tender years that by custom no fare is demanded for its transportation, may recover upon the contract of carriage for the loss of articles bought and used for the child and packed and carried with the father's baggage. (Mich.) *Withey v. Pere Marquette R. R. Co.*, 533.

16. CARRIER—Liability to Husband for Wife's Baggage.—Where a husband buys railway tickets for himself and wife, and has their baggage checked thereon, he can recover on the contract of carriage for the loss of her jewels which were not furnished her by himself. (Mich.) *Withey v. Pere Marquette R. R. Co.*, 533.

Transportation of Goods.

17. CARRIERS—Liability Until Delivery.—The responsibility of the carrier for the goods continues after their arrival at the place of destination until they are ready to be delivered and the owner or consignee has had a reasonable opportunity to examine them and take them away. After such time the liability of the carrier as carrier ceases, but it is his duty to retain them until they are claimed or store them prudently for and on account of their owner. (Ark.) *Arkansas Southern Ry. Co. v. German Nat. Bank*, 160.

18. CARRIERS—Liability as Warehousemen.—When the responsibility of a carrier as such ceases, he becomes liable for the goods carried as a warehouseman, until the goods are properly delivered and the bill of lading is evidence of such obligation. (Ark.) *Arkansas Southern Ry. Co. v. German Nat. Bank*, 160.

Bills of Lading.

19. BILLS OF LADING—Statutory Regulation—Constitutional Law—Interstate Commerce.—A statute providing that warehouse receipts and bills of lading may be transferred by written indorsement, that the transferee thereof shall be deemed the owner of the property stored, that no property so stored shall be delivered except on surrender of such receipt or bill of lading, and imposing a penalty for violation of its provisions, is not unconstitutional as imposing a burden on interstate commerce, but is valid as to such commerce in the absence of national legislation inconsistent therewith. (Ark.) *Arkansas Southern Ry. Co. v. German Nat. Bank*, 160.

20. CARRIERS—Liability Under Bill of Lading.—If a railway company agrees to carry goods, and issues bills of lading therefor to the shipper's order in care of a third person, at the place of destination, its duty as carrier is not discharged merely by delivering the goods to such third person without the production of such bills of lading properly indorsed, and if after delivery to such third person he delivers the goods to one not entitled to receive them, the railroad company is liable to the indorsee of the bills of lading for the value of the goods. (Ark.) *Arkansas Southern Ry. Co. v. German Nat. Bank*, 160.

Assignment of Bills of Lading.

21. **BILLS OF LADING**.—Assignments of bills of lading are not governed by the commercial law, and an assignee simply acquires the title to the goods described therein. (Ala.) *Hass v. Citizens' Bank*, 61.

22. **BILLS OF LADING**—**Liability of Assignee**.—The assignee of a bill of lading of goods in transit becomes the owner of the goods and assumes the responsibility of delivering them according to the terms of the original contract. (Ala.) *Hass v. Citizens' Bank*, 61.

23. **BILLS OF LADING**—**Liability of Assignee**.—An absolute assignment to a bank of a bill of lading of goods, and of the draft for their purchase price, makes such bank the owner of the goods, and the bill of lading is not held by it as collateral security for the draft. (Ala.) *Hass v. Citizens' Bank*, 61.

24. **BILLS OF LADING**—**Liability of Assignee**.—An assignee of a bill of lading of goods and of the draft for their purchase price becomes the owner of the goods and liable to deliver them according to the terms of the original contract and cannot avoid such liability on the ground that as owner of such draft he is a bona fide purchaser of the goods for value, and as such not responsible for their delivery. (Ala.) *Hass v. Citizens' Bank*, 61.

25. **BILLS OF LADING**—**Assignment of**.—At common law the indorsement and delivery of a bill of lading with intent to pass title to the goods therein specified constitute a constructive delivery of the goods themselves, and the carrier having notice of the assignment is bound to deliver the goods to the assignee. (Ark.) *Arkansas Southern Ry. Co. v. German Nat. Bank*, 160.

26. **BILLS OF LADING**—**Assignment of**—**Stipulation as to Delivery**.—If goods by the terms of a bill of lading are deliverable to the order of the shipper, the carrier should not deliver to another except upon production of the bill of lading properly indorsed by the shipper, for such a stipulation is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods. (Ark.) *Arkansas Southern Ry. Co. v. German Nat. Bank*, 160.

Note.

Carriers, presumption of negligence against from happening of accidents, 990, 992, 997, 1021, 1022.

CERTIORARI.

1. **CERTIORARI**—**Scope of Writ**.—The Writ of Certiorari can issue only when the court under review has exceeded its jurisdiction. (Cal.) *Tinn v. United States District Attorney*, 354.

2. **CERTIORARI** is not a Writ of Right, and may be granted or denied in the discretion of the court according to the showing made in a particular case, and evidence extrinsic to the record may be received before issuing the writ, to show that no injustice has been done. (Ill.) *Deslauries v. Soucie*, 432.

3. **CERTIORARI**—**Evidence**.—On Motion to Quash a writ of certiorari and dismiss the petition extrinsic evidence may be taken, not for the purpose of contradicting or enlarging the record, but to show that public detriment and inconvenience may result from quashing the original proceedings. (Ill.) *Deslauries v. Soucie*, 432.

4. **CERTIORARI**—**Quashing Writ**.—A writ of certiorari to review the record of the organization of a drainage district must be quashed where, owing to lapse of time, incurring debts and levying taxes, great

public detriment will result from quashing the original organization and where the petitioners have acquiesced in the organization and work without objection, and none of the proper parties are complaining of want of notice of such organization proceedings. (Ill.) *Deslauries v. Soucie*, 432.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGES—Waiver of Lien.**—If the holder of a chattel mortgage levies an execution upon the mortgaged property, he thereby waives his mortgage lien thereon. (Ark.) *Liddell v. Jones*, 99.

2. **CHATTEL MORTGAGES.**—Under the Lien Law, a Failure to File a Chattel Mortgage for five years renders it void as against creditors of the mortgagor whose claims accrued prior to such filing. (N. Y.) *Skilton v. Codington*, 885.

3. **CHATTEL MORTGAGES—Unfiled—Right of Bankruptcy Trustee to Attack.**—Under the bankrupt act, the trustee in bankruptcy may attack a chattel mortgage for default in filing, though he could not have done so under the bankruptcy act of 1868. (N. Y.) *Skilton v. Codington*, 885.

4. **CHATTEL MORTGAGES—Subsequently Acquired Property.**—A chattel mortgage, otherwise valid, is not rendered void because it professes to include property that may be subsequently acquired. (N. Y.) *Skilton v. Codington*, 885.

5. **CHATTEL MORTGAGES—Effect of Permission to Sell.**—The fact that a chattel mortgage permits the mortgagor to sell the mortgaged chattels and apply the proceeds in payment of the mortgage does not render the mortgage void, since in such case the proceeds of the sales must be treated as reducing the amount due on the mortgage, even though the mortgagor should misapply them or refuse to pay them to the mortgagee. (N. Y.) *Skilton v. Codington*, 885.

6. **CHATTEL MORTGAGES—Effect of Applying Proceeds of Retail Sales to Expenses of Business.**—A chattel mortgage on a stock of merchandise which provides that the mortgagor may sell and dispose of the property and apply the proceeds to the payment of the debt "excepting such portion thereof as is necessary for the expenses of the business or as he or they may need to replenish or increase the said stock of goods," is fraudulent and void as against the mortgagor's creditors, as a matter of law. (N. Y.) *Skilton v. Codington*, 885.

CIVIL SERVICE.

1. **CIVIL SERVICE LAW—Effect of Rules Made Thereunder.**—The rules prescribed by the state and municipal commissions pursuant to the provisions of the civil service law have the force and effect of law. (N. Y.) *Hale v. Worstell*, 895.

2. **CIVIL SERVICE LAW—Method of Making Promotions.**—The constitutional provisions requiring examinations for appointments and promotions in the civil service contemplate that all appointments and promotions shall be made according to merit and fitness, to be ascertained by competitive examination, unless it is in good faith found that it is impracticable so to determine the relative merit and fitness of persons for a particular position or employment. Special circumstances and acts of personal bravery and heroism may be sufficient in some cases without other test of merit and fitness. (N. Y.) *Hale v. Worstell*, 895.

3. **CIVIL SERVICE LAW—Constitutionality of Statutes or Rules Thereon.**—Any statute or rule contrary to the express language or

true spirit, and intent of the constitutional provisions requiring civil service examinations cannot be enforced, and in every case it is for the courts to determine whether a statute or rule is a valid exercise of the power to determine what employes or class of employes it is not practical to select from lists prepared after an examination or a competitive examination. (N. Y.) *Hale v. Worstell*, 895.

4. CIVIL SERVICE LAW—Promotions and Transfers.—Since a promotion is an advancement to a higher position, an elevation, a preferment, if the practical working of the civil service requires a transfer of one engaged therein, such transfer can only be made when it does not in fact constitute a promotion. Promotions under the name of transfers are evasions, and illegal and contrary to the express terms of the constitution. (N. Y.) *Hale v. Worstell*, 895.

5. CIVIL SERVICE LAW.—The Transfer of a Bath Attendant whose salary was nine hundred dollars per year and whose duties were to take charge and care of a particular bathhouse under the direction and supervision of a superintendent of public baths, who in turn was subject to the control of the borough president, to the position of assistant superintendent of public baths, is in fact a promotion both in grade of work to be done and in compensation to be received therefor, and hence the transfer of such an attendant to the position of assistant superintendent at an annual salary of fifteen hundred dollars, where he was seventh on the eligible civil service list for the position, and the transfer was made without regard to those prior to him on the list, is illegal. (N. Y.) *Hale v. Worstell*, 895.

6. CIVIL SERVICE LAW.—The Transfer of a Third Grade Clerk assigned to the bureau of buildings in the borough of Brooklyn, and whose duties were of a clerical nature and incident to the issuing of slip permits for the alteration of buildings and such other clerical work as was directed by superior order, and whose annual salary was one thousand and fifty dollars, to the position of assistant superintendent of baths at an annual salary of fifteen hundred dollars, is an illegal promotion where he stood seventeenth on the eligible civil service list for the position, and was appointed without regard to those prior to him on the list. (N. Y.) *Hale v. Worstell*, 895.

COMMISSIONS.

See Brokers. *

CONDITIONS SUBSEQUENT.

See Deeds, 5-7.

CONSTITUTIONAL LAW.

Miscellaneous Constitutional Questions.

1. PLACE OF AMUSEMENT—Rights of Ticket-holders—Constitutional Law.—A statute making it unlawful to refuse admission to a proper person holding a ticket to any place of public amusement, and entitling him, if refused admission, to recover his actual damages and one hundred dollars in addition thereto, is constitutional. (Cal.) *Greenberg v. Western Turf Assn.*, 216.

2. CONSTITUTIONAL LAW.—The Right or Privilege of Holding Office is a Right Under the Constitution and Laws of the Several States, and the citizen's right to vote at elections, whether for officers of the state or of the United States, exists by reason of the fact that he is a citizen of, and entitled to vote under the laws of, the state in which he resides. (Minn.) *State v. Weber*, 631.

3. CONSTITUTIONAL LAW—Impairment of the Obligation of Contracts by Judicial Decisions.—To come within the provisions of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts not only must the obligation of a contract be impaired, but it must be impaired by some act of the legislature of the state, and not by a decision of its judicial department only. (Mo.) *King v. Phoenix Ins. Co.*, 678.

4. CONSTITUTIONAL LAW.—Local Option Laws may be Constitutional, but to be so they must apply to the whole state and confer upon the people of each locality the privilege of taking advantage or not of those laws, as they see fit. (Mo.) *State v. Chicago etc. R. R. Co.*, 661.

Statutes Void or Void in Part.

5. UNCONSTITUTIONAL LAW, Effect of.—Sections of Statutes which are void because of being in conflict with some limitation of the constitution are absolute nullities, and must be treated in the construction of the statute as though they had never been passed or approved by the governor. (Ill.) *People v. Olsen*, 371.

6. CONSTITUTIONAL LAW, Law Void in Part Whether Void in Whole.—If the parts of a law are divisible, and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts. (Mo.) *State v. Chicago etc. Ry. Co.*, 661.

7. CONSTITUTIONAL LAW—Statutes Invalid in Part.—Although a part of a statute is unconstitutional, that does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other. (Ill.) *People v. Olsen*, 371.

8. CONSTITUTIONAL LAW—Statutes Invalid in Part.—Constitutional and unconstitutional provisions of a statute may even be contained in the same section, and yet be perfectly distinct and separable, so that the one may stand though the other must fall. The question is not whether they are contained in the same section, but whether they are essentially and separably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. (Ill.) *People v. Olsen*, 371.

9. CONSTITUTIONAL LAW—Statutes Invalid in Part.—Although one section of a statute is not enacted in the mode prescribed by the constitution, this does not render void other sections of the statute not at variance with the constitution, and which are a complete act in themselves, and not dependent upon the unconstitutional section. (Ill.) *People v. Olsen*, 371.

Amendments to Constitution.

10. A CONSTITUTIONAL AMENDMENT cannot be Held Void because of its conflict with the pre-existing provisions of the same constitution. When the amendment is adopted, it becomes, in effect, the same as if it had been originally a part of the constitution. (Mo.) *State v. Chicago etc. R. R. Co.*, 661.

11. CONSTITUTIONAL LAW—Constitutional Amendment Invalid in Part, When Invalid as a Whole.—If a constitutional amendment authorizes the county courts of the several counties of the state, at their discretion, to impose certain road and bridge taxes, but is void because it exempts designated cities, this exemption cannot be disregarded and the constitutional amendment held to apply to all parts of the state, including the cities so exempted. (Mo.) *State v. Chicago etc. R. R. Co.*, 661.

Departments of Government.

12. CONSTITUTIONAL LAW—Delegation to One Department of the Government of Duties Committed by the Constitution to Another. While, as a general rule, the legislature cannot delegate legislative powers to the judiciary, still where the duties are of an ambiguous character and are imposed upon a judicial officer, every doubt will be resolved in favor of the validity of the statute, and the powers conferred will be held to be judicial. (Minn.) *State v. Bates*, 612.

13. CONSTITUTIONAL LAW, Classification of Departments of Government.—There may be a case where a particular power cannot be affirmed to be either executive, legislative or judicial, and if such power is not by the constitution unequivocally intrusted to either the executive or judicial departments, the mode of its exercise and the agency must necessarily be determined by the legislature. (Minn.) *State v. Bates*, 612.

Labor Laws.

14. CONSTITUTIONAL LAW—Hours of Labor.—A statute imposing a penalty on anyone working more than eight hours per day in any mine, smelter or mill for the reduction of ores is not in conflict with constitutional provisions guaranteeing the right to acquire and possess property, and forbidding the imposition of excessive fines or cruel or unusual punishment, but is sustainable as a valid health regulation under the police power. (Nev.) *Ex parte Kair*, 817.

15. POLICE POWER—Expert Evidence.—Validity of Laws enacted in the exercise of the police power of the state cannot be made dependent upon the views of experts as to the necessity of such enactment. (Nev.) *Ex parte Kair*, 817.

16. CONSTITUTIONAL LAW.—The Free and Untrammelled Right to Contract is a part of the liberty guaranteed to every citizen by the federal and state constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health, or moral and general welfare of the public, but subject to such restraint an employer and employé may make and enforce such contracts relating to labor as they may agree upon. (N. Y.) *People v. Marcus*, 902.

17. CONSTITUTIONAL LAW.—Contracts for Labor may be freely made with individuals or a combination of individuals as long as such contracts do not interfere with public safety, health or morals. (N. Y.) *People v. Marcus*, 902.

18. CONSTITUTIONAL LAW—Right to Contract Respecting the Joining of Labor Organizations.—An employer of labor may refuse to employ a person who is a member of any labor organization, or he may make an employment conditional upon the person employed refraining from joining or becoming a member of a labor organization. (N. Y.) *People v. Marcus*, 902.

19. CONSTITUTIONAL LAW—Freedom of Contract—Prohibiting the Joining of Labor Unions.—Penal Code, section 171a, which makes it a misdemeanor for a person to make the employment or the con-

tinuance of an employment of a person conditional upon the employé not joining or becoming a member of a labor organization is unconstitutional, in that it impairs the right to contract. (N. Y.) *People v. Marcus*, 902.

20. MASTER AND SERVANT—Construction of Contract.—The Words "Coerce or Compel," used in Penal Code, section 171a, which made it a misdemeanor for one "who shall hereafter coerce or compel any person or persons, employé or employés, laborer or mechanic, to enter into an agreement, either written or verbal, from such person, persons, employé, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations," do not refer to physical violence or interference with the person of the employé. (N. Y.) *People v. Marcus*, 902.

21. CONSTITUTIONAL LAW—Miner's Washroom Act.—A statute requiring mine owners to provide a washroom at the top of each mine for the use of employés places upon mine owners or operators a burden not borne by other employers of labor, and is therefore special legislation, discriminatory and void. (Ill.) *Starne v. People*, 389.

22. CONSTITUTIONAL LAW—Police Power—Miner's Washroom Act.—A statute requiring mine owners to provide a washroom at the top of each mine for the use of their employés is special legislation, and cannot be sustained as a proper exercise of the police power to enact sanitary laws. The legislature cannot ameliorate the coal miners' condition under the guise of an exercise of the police power, and leaves others unaided who suffer from like causes. (Ill.) *Starne v. People*, 389.

23. CONSTITUTIONAL LAW—Legislation Concerning Mines.—Constitutional provisions requiring the enactment of laws for the protection of miners are designed only to require the passage of laws for the protection of miners against personal injury while in the mine. (Ill.) *Starne v. People*, 389.

Effect to be Given Evidence.

24. CONSTITUTIONAL LAW—Effect to be Given to Evidence.—A statute providing that the failure or refusal of any person who has entered into contract for service and obtained any money or property thereby, to perform such service or refund such money or property without just cause, shall be prima facie evidence of an intent to defraud, is constitutional and valid. (Ala.) *State v. Thomas*, 17.

25. CONSTITUTIONAL LAW—Effect to be Given to Evidence.—Statutes declaring what shall be presumptive or prima facie evidence of any fact are constitutional and valid. (Ala.) *State v. Thomas*, 17.

Restriction on Appellate Jurisdiction.

26. CONSTITUTIONAL LAW—Restriction on Appellate Jurisdiction.—A statute limiting the power of the circuit court to set aside verdicts as excessive is a restriction upon the constitutional appellate power of the supreme court, and for that reason is void. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

27. CONSTITUTIONAL LAW—Restrictions on Appellate Jurisdiction.—A constitutional provision conferring appellate jurisdiction upon the supreme court, "under such restrictions as may from time to time be prescribed by law," does not confer power to limit the right of appeal by statute, but only power to prescribe regulations as to the manner of taking appeals, and the time within which they may be taken. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

28. CONSTITUTIONAL LAW—Restrictions on Appellate Jurisdiction.—If a constitutional provision confers upon the supreme court appellate jurisdiction in all cases of final judgment, a statute which seeks to prohibit in that court an inquiry as to the sufficiency of the evidence to sustain the amount of damages assessed by a jury, or to require a litigant to surrender his right of appeal as a condition upon which he may accept the reduction by the trial court of an excessive verdict, is unconstitutional and void. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

See Civil Service; Criminal Law; Usury.

CONTINUANCE.

CONTINUANCE Because of Counsel's Other Engagements.—It is not an abuse of discretion to refuse a motion for a continuance, based on the sole ground that the party's counsel is detained by previous professional engagements in another county. (Cal.) *Berentz v. Belmont Oil Min. Co.*, 308.

CONTRACTS.

UNLAWFUL CONTRACT—Accounting on Quantum Meruit.—Where an accounting or a recovery is allowed under an unlawful contract, it is not based on the contract, but upon a quantum meruit, disaffirming the contract and holding the defendant liable for the value of the benefits actually received. (Mich.) *White Star Line v. Star Line of Steamers*, 551.

CORPORATIONS.

Seal as Evidence.

1. CORPORATIONS, Seal of as Evidence.—If a contract purporting to be signed by a corporation is under its corporate seal, such contract is admissible in evidence. (Minn.) *Emerson v. Pacific Coast etc. Co.*, 603.

Stockholders' Liability.

2. CORPORATIONS—Nature of Stockholders' Liability—Where Enforceable.—The liability of stockholders to the creditors of the corporation is not a contract, but a statutory liability to be enforced primarily at the home of the insolvent corporation and in the state creating the obligation. (N. Y.) *Knickerbocker Trust Co. v. Iselin*, 863.

3. CORPORATIONS.—Statutes Creating Stockholders' Liability Affect the Remedy Only and apply to actions pending when they were passed. (N. Y.) *Knickerbocker Trust Co. v. Iselin*, 863.

4. FOREIGN CORPORATIONS—Statutory Stockholders' Liability.—An Action at Law by a Single Creditor Against a Single Stockholder of an insolvent Maryland corporation, to enforce the statutory liability of the stockholder on the stock held by him cannot be maintained in New York under the laws of Maryland respecting such stockholders' liability, nor can it be maintained under the stock corporation law of New York. (N. Y.) *Knickerbocker Trust Co. v. Iselin*, 863.

5. FOREIGN CORPORATIONS—Pleading Stockholders' Liability—Effect of General Demurrer.—Where the complaint in a suit to enforce the statutory liability of the stockholders of a corporation of another state alleges that "by virtue . . . of the aforesaid laws of Maryland as defined, construed, administered and enforced by the courts of that state, defendant is personally and individually indebted to the plaintiff to an amount equal to double the amount of stock at par," a demurrer to the complaint, on the ground that it does not

state a cause of action, does not admit the foreign law as stated in the complaint, since a demurrer does not admit any facts not well pleaded. (N. Y.) *Knickerbocker Trust Co. v. Iselin*, 863.

Foreign Corporations.

6. CORPORATIONS, FOREIGN—Doing Business in State.—The institution and prosecution of an action by a foreign corporation does not constitute doing business within the state. (Ark.) *Alley v. Bowen-Merrill Co.*, 73.

7. CORPORATIONS—FOREIGN—Contracts of—Compliance With Statute.—A contract made by a foreign corporation before compliance with the terms of a statute authorizing or permitting it to do business within the state is not void, but may be enforced in the courts of that state after such corporation has duly complied with the statutory requirements. (Ark.) *Woolfort v. Dixie Cotton Oil Co.*, 139.

COURTS.

COURT OF RECORD of Common-law Jurisdiction, What Presumed to be.—A Court of a Sister State having a judge, clerk and seal is a court of record whose jurisdiction is presumed. (Minn.) *State v. Weber*, 630.

See Constitutional Law, 12, 13, 28, 29.

CRIMINAL LAW.

1. CONSTITUTIONAL LAW—Suspension of Prosecution—Right to Speedy Trial.—If one under prosecution for seduction marries the female alleged to have been seduced before the termination of such prosecution, and thereby causes it to be suspended in accordance with statutory provisions, and subsequently deserts her without cause, whereupon the prosecution is reinstated, he cannot complain that the suspension of the prosecution by his marriage has deprived him of his constitutional right to a speedy trial, if he has at no time demanded a speedier conclusion of such trial. (Ark.) *Burnett v. State*, 94.

2. CONSTITUTIONAL LAW—Former Jeopardy.—If a prosecution for seduction is suspended on account of the marriage or the accused and the prosecutrix after a jury has been sworn and evidence introduced, and such prosecution is reinstated upon his willful desertion of her in accordance with statutory provisions, no jeopardy attaches by reason of the former prosecution unless the suspension thereof is ordered without the consent of the accused, express or implied. (Ark.) *Burnett v. State*, 94.

3. CRIMINAL LAW—Former Jeopardy.—If a trial is suspended by the act of the accused, or for his benefit, or at his own request, no jeopardy attaches by reason of that trial. (Ark.) *Burnett v. State*, 94.

DAMAGES.

1. NEGLIGENCE—Exemplary Damages.—Negligence, however gross, will not justify a verdict for exemplary damages, unless the negligent party is guilty of willfulness, wantonness, or conscious indifference to the consequences, from which malice may be inferred. (Ark.) *Arkansas etc. Ry. Co. v. Stroude*, 130.

2. DAMAGES are not Discretionary with the Jury.—It is rule of this court that damages are not a mere matter of discretion of the jury. Therefore, on the breach of a contract to allow brokers to sell upon a stipulated commission for a period of years a specified part of the product of their employers, the latter are liable in dam-

ages for such breach to reimburse the brokers for the loss of profits occasioned thereby. (Minn.) *Emerson v. Pacific Coast etc. Co.*, 603.

3. DAMAGES, Future Profits as a Basis of.—An agent selling on commission, on breach of the contract by his employer without just cause, is entitled to the profits, past and future, he would have realized if the defendant had performed his contract, and evidence of sales made by the defendant within the unexpired period is admissible and should be considered by the jury, upon proper caution by the court to avoid excess in speculation, to show the proper extent of the plaintiff's recovery. (Minn.) *Emerson v. Pacific Coast etc. Co.*, 603.

4. DAMAGES—Failure to Find.—If the recovery of nominal damages, to which a party is entitled, determines and adjudicates some valuable right in real property, the refusal to allow them is reviewable on appeal, and constitutes reversible error. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

See Death.

DEATH.

1. NEGLIGENCE Causing Death—Damages—Loss of Parental Care.—In an action by minor children for the death of their parent, the industry, moral character, and parental care and affection of the deceased may be taken into consideration in estimating the damages. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

2. DEATH BY WRONGFUL ACT—Excessive Damages.—While the damage to infant children caused by the death of their father by wrongful act, and the loss of his care, attention and moral training, can be measured by no fixed rule, yet there is a limit to the amount to be allowed in such case, and it is the duty of the appellate court to see that such limit is not exceeded. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

3. DEATH BY WRONGFUL ACT—Damages to Minor Children.—While no amount of money can fully compensate minor children for the distress of mind suffered by them in the violent and painful death of their father caused by negligence, and in the loss of his affectionate care and attention, yet it is the duty of the court, in determining whether the amount awarded is excessive, to ascertain what amount would constitute fair compensation for the injury inflicted. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

4. NEGLIGENCE CAUSING DEATH—Evidence of Earning Capacity.—In an action to recover for loss of life caused by negligence it may be shown that the deceased was a bright, economical and industrious boy, learning his trade quickly, as a circumstance to go to the jury in fixing his present earning capacity and future expectancy. (Ala.) *Central Foundry Co. v. Bennett*, 32.

5. NEGLIGENCE CAUSING DEATH—Evidence—Wages of Skilled Mechanics.—In an action to recover for loss of life caused by negligence, evidence to show what wages a skilled mechanic earned per day is not admissible when it is shown that the deceased had been learning the trade only about seven weeks, while it required a three years' apprenticeship to become a skilled mechanic. (Ala.) *Central Foundry Co. v. Bennett*, 32.

6. NEGLIGENCE Causing Death—Setoff of Damages.—In an action to recover damages for the wrongful death of a person caused by negligence, damages alleged to have been caused to property of the defendant through the negligence of the deceased cannot be used as a setoff. (Ala.) *Western Ry. v. Russell*, 24.

DEDICATION.

In General.

1. **DEDICATION OF STREETS—Sufficiency of Acceptance.**—If a plat dedicating a street is approved by the board of public works, and is recorded in the office of the register of deeds, and soon thereafter men in the employ of the city plow, scrape and round up the street for public travel, this shows a sufficient acceptance of the dedication. (Mich.) *People v. Wolverine Mfg. Co.*, 544.

2. **OBSTRUCTION OF STREET.**—Where the Dedication of a Street has been accepted by the city opening and working it, abutting owners who have recognized its public character by petitioning the council for its vacation cannot be heard to contend, when prosecuted for obstructing the street, that the prosecution involves title to land, and thereby oust the municipal court of jurisdiction. (Mich.) *People v. Wolverine Mfg. Co.*, 544.

3. **ESTOPPEL Against Municipal Corporations—Dedication.**—If land is dedicated to a city and thereafter used for the very purposes for which the dedication was made and intended, the city is estopped to deny such use. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

4. **DEDICATION—Streets.**—If cotenants plat the common land into lots and blocks, with streets intervening, and divide it among themselves, the fact that the land so divided remains in the ownership of such cotenants or their privies will not prevent the dedication from being effective among themselves. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

Revocation and Abandonment.

5. **DEDICATION—Revocation of.**—If tenants in common plat the common land into lots and blocks, with streets and alleys intervening, but none of the blocks or lots are ever sold to third persons, and the streets and alleys are never thrown open to the public, neither the public nor third persons have any right therein, and it remains within the power of the owners to revoke the dedication. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

6. **DEDICATION.—Revocation of a dedication of land** may be accomplished either by an affirmative act in recalling it or by an abandonment of the scheme, and abandonment occurs where the object of the use for which the property is dedicated wholly fails. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

7. **DEDICATION — Revocation — Abandonment.**—If for twenty years after land has been platted into blocks, lots and streets, and dedicated as an addition to a city, the land is used solely for farming purposes without the sale of any part of it as lots, the dedication must be deemed to have been abandoned and may be revoked. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

8. **DEDICATION — Effect of Abandonment.**—A conveyance of blocks and lots, describing them by numbers only, passes the fee to the center of the streets and alleys on which they abut, subject only to the right of the public to use the streets as highways, and when the streets are vacated or the use abandoned, they revert to the owners of the adjoining lots. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

9. **DEDICATION—Abandonment.**—If a railroad company permits the use of a portion of its depot grounds lying along a river to be used for the landing of boats, with no intent to dedicate any portion thereof to any purpose inconsistent with its own use, the railroad

company is not thereby divested of the title to any part of such grounds, although they were conveyed to it solely for railroad purposes. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

DEEDS.

In General.

1. **DEEDS**—"Children"—"Heirs."—The word "children," used in a deed, may be given the meaning of the word "heirs" when the context requires it to carry out the intention of the grantor. (Ill.) *Dick v. Ricker*, 426.

2. **DEEDS**—"To the Use of."—If the legal and equitable estate are merged in the same person under a deed, the words "to the use of" such person are of no effect, and no trusteeship can be predicated thereon. (Ill.) *Dick v. Ricker*, 426.

3. **DEEDS**—Estate-tail.—A deed granting to a daughter "and to the children of her body begotten," certain described land, "to have and to hold the same to the use" of such daughter, "for and during the term of her natural life and after her death to the use of the children of her body begotten," creates an estate-tail, conveying to such daughter a life estate with remainder in fee to her children. (Ill.) *Dick v. Ricker*, 426.

Delivery.

4. **DEEDS**—Delivery—Presumption.—A strong presumption of the delivery of a deed arises when it is given to one of the grantees and is retained by him for two years and until his death. (Iowa) *Hild v. Hild*, 500.

5. **DEEDS**—Delivery—Death of Grantor.—If a deed from father to son is not delivered until after the grantor's death, when it was signed by the grantor's widow and delivered to such son, no title passes under the deed. (Ill.) *Jolly v. Graham*, 435.

Conditions Subsequent.

6. **DEEDS**.—Conditions Subsequent are not Favored, and no provision in a deed will be interpreted to create such a condition, if the language will bear any other reasonable interpretation. (Cal.) *Hawley v. Kafitz*, 282.

7. **DEEDS**—Condition Subsequent—Covenant to Build.—A provision in a deed that it is given and accepted upon the express agreement of the grantee to build a house of a specified value on the premises within a designated time, and that the agreement is a part of the consideration for the conveyance, creates a personal covenant, and not a condition subsequent. (Cal.) *Hawley v. Kafitz*, 282.

8. **DEEDS**—Condition Subsequent—Evidence.—If a clause in a deed is no wise ambiguous or equivocal, evidence of the understanding of the parties that the clause was intended to create a condition subsequent is not admissible in determining whether or not it does. (Cal.) *Hawley v. Kafitz*, 282.

Note.

Definition of sham answers, 639.

DESCENT AND DISTRIBUTION.

1. **DESCENT AND DISTRIBUTION**—Liability of Heirs for Debts of Ancestor.—Real estate of an intestate decedent descends directly to his heirs, subject, however, to the payment of the ancestor's debts and expenses of administration. (Mich.) *Marvin v. Bowlby*, 574.

2. **DESCENT AND DISTRIBUTION**—Payment of Debts of Ancestor—Order of Subjection.—An intestate's personal estate must first

be subjected to the payment of his debts, after which so much of his real estate as is necessary may be subjected to that purpose. (Mich.) *Marvin v. Bowlby*, 574.

3. DESCENT AND DISTRIBUTION—Subjection of Ancestor's Property to Payment of Debts.—After the personality of an ancestor is exhausted, so much of his real estate as is necessary may be subjected to the payment of his debts, and a grantee or mortgagee of the heir of his interest in such real estate acquires no greater rights than those possessed by the heir. (Mich.) *Marvin v. Bowlby*, 574.

4. DESCENT AND DISTRIBUTION.—Distributive Shares due an heir from the personal estate of his ancestor may be applied by the administrator in payment of a debt due the estate by the heir. (Mich.) *Marvin v. Bowlby*, 574.

5. DESCENT AND DISTRIBUTION—Liability of Heir to Estate.—The distributive share of the real estate of an heir, debtor to the estate of his ancestor, is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof in the hands of the administrator. Such indebtedness must be collected by proceedings brought the same as for collecting any other indebtedness due the estate. (Mich.) *Marvin v. Bowlby*, 574.

DIVORCE.

DIVORCE—Conflict of Jurisdiction Between Courts.—If a wife files a bill for a divorce and places the subpoena in the hands of the sheriff for service, the jurisdiction of the court is not affected by the husband's thereafter filing a bill for a divorce against her in another county where he resides, and obtaining service on her before service is effected on him. (Mich.) *Wells v. Montcalm Circuit Judge*, 520.

DOMICILE.

See Elections, 3, 4.

EASEMENTS.

1. EASEMENT—Interpretation of Grant.—In determining the extent and limits of an easement, the entire instrument granting it is to be considered, in view of the circumstances surrounding its execution and the situation of the parties. (Cal.) *Winslow v. Vallejo*, 349.

2. EASEMENT—Right of Grantee to Change.—When the grant of an easement is general as to the extent of the burden to be imposed, an exercise of the right, with the acquiescence of both parties, determines the extent of its enjoyment, which cannot thereafter be changed at the pleasure of the grantee. (Cal.) *Winslow v. Vallejo*, 349.

3. EASEMENT TO LAY WATER-PIPES—Right to Change.—Where a property owner grants to a city a general easement to lay water-pipes and mains across his land, and the city thereafter lays a single pipe, it is not entitled, after the lapse of several years, to lay an additional and larger pipe to meet the requirements of an increasing population, and may be enjoined from so doing, irrespective of other damages than the obstruction of the free use of the land and the possible ripening of the wrongful action into an easement. (Cal.) *Winslow v. Vallejo*, 349.

4. EASEMENT of and for a Bridge, When Impaired.—If a plat is made and recorded showing streets and alleys and a bridge connecting the lots with an adjacent city or town, and lots are sold with reference to such plat, the law implies a grant of the bridge as an

easement to the property conveyed. (Va.) *Oney v. West Buena Vista Land Co.*, 1066.

5. **EASEMENT, Duty to Repair.**—The grantor or dedicator of an easement is generally under no obligation to make repairs. This duty rests on those who use the easement, who, if they fail to keep it in proper condition for the uses for which it was granted or dedicated, must suffer the resulting inconveniences. (Va.) *Oney v. West Buena Vista Land Co.*, 1066.

6. **EASEMENT, Abandonment by Failure to Keep in Repair.**—If the persons entitled to use an easement fail for an unreasonable time to keep it in repair, this may amount to an abandonment. (Va.) *Oney v. West Buena Vista Land Co.*, 1066.

7. **EASEMENT of and for a Bridge, When not Abandoned.**—Though persons entitled to the use of a bridge as an easement for the purpose of passing to and from their lands suffer it to become useless except for foot-passengers, yet if the structure, built mainly of iron and steel, is well preserved except as to flooring, and such persons continue to use the bridge, and insist on their right to use it, and to repair and restore it to a condition which will render it useful and safe for the purposes for which it was built, they cannot be held to have abandoned their easement therein. (Va.) *Oney v. West Buena Vista Land Co.*, 1066.

8. **EASEMENT of and for a Bridge, Conditions on Which will be Enforced.**—Before a permanent injunction will issue to prevent the constructor of a bridge from tearing down or removing it on the ground that he has granted the complainants an easement to use such bridge in going to and from their lands, such persons should be required to repair the bridge and restore it, within a reasonable time, to such condition as will render it safe and useful for the purposes for which it was constructed, and if they fail to do so, they may be regarded as having abandoned their easement, and the defendant in the suit is entitled to make such use of the materials as he may see fit. (Va.) *Oney v. West Buena Vista Land Co.*, 1066.

EJECTMENT.

EJECTMENT—Burden of Proof as to Title.—The defendant in ejectment may rely upon the weakness of the plaintiff's title, and the burden of proof is upon the latter to show title in himself. (Ark.) *Dowdle v. Wheeler*, 106.

ELECTIONS.

1. **ELECTIONS—Statute Restricting Right to Vote of Persons Who Have Been Admitted to Citizenship for Three Months.**—The provision of the constitution of Minnesota limiting the right of suffrage, as respects naturalized citizens, to those who have been admitted to citizenship three months preceding the election is not in conflict with any provision of the constitution of the United States, and is valid. (Minn.) *State v. Weber*, 631.

2. **ELECTIONS, Right of Suffrage Under the Fourteenth Amendment.**—The fourteenth amendment to the constitution of the United States does not confer the right of suffrage nor affect the power of the states to enact such laws upon the subject of elections as they may deem for the best interests of the public. (Minn.) *State v. Weber*, 631.

3. **ELECTIONS—Residence.**—The word "residence" in election laws is synonymous with the word "home" or "domicile," and means

a fixed and permanent abode or habitation to which a person, when absent, intends to return. (Iowa) *State v. Savre*, 452.

4. **ELECTIONS—Residence.**—The precinct in which an unmarried man rooms, keeps his personal effects, and sleeps, and not the one in which he simply takes his meals, is his place of residence in determining his right to vote. (Iowa) *State v. Savre*, 452.

5. **ELECTIONS—Illegal Voting—"Willfully."**—To vote "willfully," when that word is applied to illegal voting, means "designedly" or "purposely," and involves either knowledge of disqualification or a reckless disregard of the question of qualification. If a person ascertains all the facts, and concludes that he is qualified and votes, his act is not "willful," though in fact he is mistaken and not entitled to vote. (Iowa) *State v. Savre*, 452.

6. **ELECTIONS—Illegal Voting—"Willfully."**—To vote "willfully," when that word is applied to illegal voting, when not qualified, necessarily involves either knowledge of disqualification or a reckless disregard of whether qualified or not. (Iowa) *State v. Savre*, 452.

7. **ELECTIONS—Illegal Voting—Evidence of Intent.**—One charged with illegal voting may show that he acted upon legal advice based upon a fair statement of the facts, as bearing on the question of his intent and that he acted upon the supposition that he had the right to vote. (Iowa) *State v. Savre*, 452.

Note.

Elevators, presumption of negligence from the falling of, 1030.

EMINENT DOMAIN.

In General.

1. **EMINENT DOMAIN—Extension of Street—Evidence.**—In an action under an ordinance to condemn land for the extension of a street terminating at the boundary line of an owner's land, and thus forming a cul-de-sac, evidence of a contemporaneous ordinance for the widening of another street, so that the street as extended and the street as widened will meet and form one highway, is admissible. (Mo.) *Kansas City v. Hyde*, 766.

2. **EMINENT DOMAIN—Opening Streets—Attack on Ordinance.** While the passing of a city ordinance to establish, widen or extend a street is the exercise by the city of a delegated governmental power, legislative in its character, and, therefore not subject to judicial direction, yet after the ordinance has become an established fact, if an attempt is made to apply it to the injury of the property rights of a citizen, he may, if he can, show that its passage was obtained by fraud, or other unlawful means, for an unlawful purpose. (Mo.) *Kansas City v. Hyde*, 766.

3. **EMINENT DOMAIN—Judgment.**—If, in an action under an ordinance to condemn land for the extension of a street terminating at the boundary of an owner's land, thus forming a cul-de-sac unless another street is opened as contemplated by a contemporaneous ordinance and proceedings thereunder, the court should withhold final judgment until judgments are reached in both proceedings, each proceeding depending for its success upon the other. (Mo.) *Kansas City v. Hyde*, 766.

4. **EMINENT DOMAIN—Evidence.**—If the opening or extending of a particular street under the right of eminent domain is but a part of a general scheme, the court is entitled to know what such scheme is, in order to appreciate the value of the particular street in question. (Mo.) *Kansas City v. Hyde*, 766.

5. EMINENT DOMAIN—Evidence.—If the opening or extending of a street under the right of eminent domain is but a part of a general scheme, such scheme may be shown by contemporaneous ordinances, or by the best evidence of which the fact is susceptible. (Mo.) *Kansas City v. Hyde*, 766.

Public and Private Use—Unlawful Purpose.

6. EMINENT DOMAIN—Unlawful Purpose.—A city council has no power to condemn private property for a street, in order to give it over to a railroad company to be used for switching purposes, and such an act is a legal fraud. (Mo.) *Kansas City v. Hyde*, 766.

7. EMINENT DOMAIN—Private Use.—A common council of a city has no authority to establish a street, or system of streets, at the expense of the property owners in the district, for the use of a private individual or a number of individuals, and the willful doing of such an act is a legal fraud. (Mo.) *Kansas City v. Hyde*, 766.

8. EMINENT DOMAIN—Unlawful Purpose.—It is not lawful for a city, in the exercise of the right of eminent domain, to create a street in the name of the public, for the purpose of vacating it in the interest of whom it may concern. (Mo.) *Kansas City v. Hyde*, 766.

9. EMINENT DOMAIN—Public Use.—A city council has power to condemn land for a public use, but it has no power to condemn for a private use, and in this connection "public" means everybody, and if the use is not for everybody it is a private use, or if condemned for an individual, or any number of individuals in such manner as will practically exclude the general public, it is the giving of the property to a private use, a destruction of its public service character, and an unlawful act and fraud. (Mo.) *Kansas City v. Hyde*, 766.

10. EMINENT DOMAIN—Conclusiveness of Ordinance Condemning Land.—The recitals in an ordinance having for its purpose the condemnation of private property to a public use are not conclusive, and the court may go behind them and ascertain the real purpose of the ordinance, by the best evidence obtainable, whether oral or documentary. (Mo.) *Kansas City v. Hyde*, 766.

11. EMINENT DOMAIN—Unlawful Ordinance—Method of Attack.—If a city passes an ordinance having for its ostensible purpose the condemnation of private property for a public use, the property owner is not driven to a suit in equity, to reform the ordinance or attack its integrity or validity, but may do this in the condemnation proceedings. (Mo.) *Kansas City v. Hyde*, 766.

12. EMINENT DOMAIN—Public Use—Question for Court.—It is for the court, and not for the jury, to determine in condemnations whether or not the purpose is to take private property for a public or a private use, and the question may be brought to the attention of the court by a motion to dismiss. When this is done it is the duty of the court to proceed and take the evidence in support of the motion. (Mo.) *Kansas City v. Hyde*, 766.

Compensations for Raising Dam and Waters.

13. EMINENT DOMAIN—Riparian Owners Right to Compensation for Raising Dam and Waters.—If the effect of a proposed dam must be to impose on the bed of a river a greater quantity, as well as to flood its banks, destroy fords, render adjacent lands more liable to overflow, and greatly alter the natural flow and condition of the

stream, the adjacent riparian proprietors are entitled to compensation. (Va.) *Rankin v. Town of Harrisonburg*, 1050.

14. EMINENT DOMAIN—Riparian Owners, Compensation for Dam Raising Waters.—Riparian owners, though not cotenants, have the right to have a stream running between their lands continue to do so in its natural condition, and, as against one seeking the right by placing a dam across the stream to raise it and increase the water power, are entitled to unite their rights in one ownership, and their interest so united cannot be taken without just compensation. (Va.) *Rankin v. Town of Harrisonburg*, 1050.

15. EMINENT DOMAIN—Agreement of Persons Injured as to the Distribution of the Award of Damages.—Riparian owners may by parol agreement among themselves designate the proportions in which they shall share any damages to be awarded for a dam to be constructed for increasing the water power of a stream, and whereby such stream in front of their lands is made more liable to flood them and to destroy their fords and otherwise injure such lands; and they may carry such agreement into effect by a deed constituting themselves cotenants. (Va.) *Rankin v. Town of Harrisonburg*, 1050.

EMPLOYERS' LIABILITY.

See Master and Servant.

EQUITY.

In General.

1. EQUITY JURISDICTION—Extent of Relief.—If a court of equity rightfully assumes jurisdiction for one purpose, it may grant all the relief, whether legal or equitable, to which any of the parties show themselves entitled in the subject matter of the controversy. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

2. EQUITY—Municipal Corporations.—Whoever appeals to equity for relief must do so with clean hands and an apparently clear conscience. This rule applies as well to a municipal corporation as to an individual or other corporation. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

Fraud in Guardianship Matters.

3. EQUITY JURISDICTION—Fraud of Guardian.—An omission to account for money actually received by a guardian is a legal fraud which a court of chancery will correct, whether the omission was intended or by mistake. (Ark.) *Nelson v. Cowling*, 155.

4. EQUITY JURISDICTION—Fraud of Guardian.—A complaint in equity seeking to charge a guardian with rents which he could have collected by ordinary prudence and loyalty to his ward does not state fraud as a cause of action. (Ark.) *Nelson v. Cowling*, 155.

5. EQUITABLE RELIEF from Guardian's Settlement.—While guardian's settlements in the probate court, when confirmed, have the force and effect of judgments, which, if erroneous, may be corrected on appeal, yet courts of equity may interfere to correct fraud therein, or relieve against accident, or upon some other ground of acknowledged equity jurisdiction, to prevent immediate mischief. (Ark.) *Nelson v. Cowling*, 155.

6. EQUITABLE RELIEF from Guardian's Settlement—Fraud.—If fraud is the ground set up for impeaching a guardian's settlement, actual or constructive fraud will suffice, but the acts constituting it must be specifically alleged and proved. (Ark.) *Nelson v. Cowling*, 155.

Laches.

7. **THE LACHES** Which will Defeat the Assertion of a Right must be such as to afford a reasonable presumption of satisfaction or of an abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. (Va.) *Selden's Executor v. Kennedy*, 1076.

Pleading.

8. **EQUITY PLEADINGS.**—Although a complaint in equity fails to state a cause within equity jurisdiction, it should not be dismissed if defendant's cross-complaint states a cause within such jurisdiction. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

9. **EQUITY PLEADING.**—A complaint charging a guardian with having failed to account for money he has received as guardian states a good cause of action within the jurisdiction of a court of equity. (Ark.) *Nelson v. Cowling*, 155.

ESTATES.

See Deeds.

ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators.

ESTOPPEL.*In General.*

1. **ESTOPPEL—Application.**—Principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of a statute under which they are had, as well as where they are sought to be impeached on other grounds. (Neb.) *United States Fidelity etc. Co. v. Ettenheimer*, 783.

2. **ESTOPPEL Against Estoppel** sets matter at large. (Neb.) *United States Fidelity etc. Co. v. Ettenheimer*, 783.

3. **ESTOPPEL.—One Who Successfully Attacks Appellate Proceedings** upon the ground that they are not authorized by law and wholly void is estopped thereafter to assert that they are in any respect valid. (Neb.) *United States Fidelity etc. Co. v. Ettenheimer*, 783.

Municipal Corporations.

4. **ESTOPPEL—Municipal Corporations—Inconsistent Positions.**—If a city in an action involving the title to land asserts title thereto, and alleges that in reliance thereon it has conveyed a portion of the land to a codefendant, it cannot thereafter claim such land from its codefendant, although in such suit no issue or defense was joined in by the city and the codefendant. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

5. **ESTOPPEL.—Public Right to Use and Occupy Streets** and other lands dedicated for public use may be lost by estoppel. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

6. **ESTOPPEL Against Municipal Corporations.**—If a railroad company expends large sums of money in improving property, relying upon a title acquired by it from a city, and such city acquiesces in the use of the land by the railroad company and asserts a conveyance of the land by it to such company in litigation involving the title thereto, it is estopped to subsequently deny the title of the railroad company to the land. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

Public Policy.

7. **ESTOPPEL.**—Public Policy does not permit a person, who was engaged in an unlawful business when his property was attached, to urge that the officer is estopped to set up the unlawfulness of the business as a defense to an action of trover for a failure to set off an exemption. (Mich.) *McCarthy v. Payne*, 548.

See Appeal and Error, 10.

EVIDENCE.*Of Other Transactions.*

1. **EVIDENCE of Other Transactions, When Admissible.**—In an action to recover money out of which the plaintiff is alleged to have been swindled by false athletic contests, the result of which has been arranged in advance, evidence of other transactions of like character in which the defendants had engaged previously to the one in question is admissible for the purpose of showing knowledge of the defendants of the methods and course of conduct on which the plaintiff relies for a recovery. (Mo.) *Hobbs v. Boatright*, 709.

2. **EVIDENCE of Other Transactions, Though Subsequent to that in Question, May be Admitted** where it tends to show knowledge of all the defendants of the character of the transaction, and throws light on their motives, and that after the plaintiff had been foully dealt with, defendants went on in their course of dealing and aided in victimizing others in the same manner. (Mo.) *Hobbs v. Boatright*, 709.

Of Foreign Law.

3. **EVIDENCE—Proof of Law of Sister State or Foreign Law—Evidence not Conclusive.**—Though the law of a sister state, sometimes called a foreign law, is ordinarily proved as a fact, still it is not in its essential nature a fact any more than domestic law is a fact. Evidence of foreign law by experts, though ever so clear and though uncontradicted, is not conclusive, since the court must examine and determine the law for itself. (N. Y.) *Knickerbocker Trust Co. v. Iselin*, 863.

Expert and Opinion Evidence.

4. **EVIDENCE.**—Expert Evidence cannot be Received in regard to matters of inquiry that may be presumed to lie within the experience and knowledge of all men of average education moving in the ordinary walks of life. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

5. **EVIDENCE—Expert.**—If the facts can be placed before the jury in the ordinary way, and they are of such a nature that jurors generally are competent to form opinions and draw inferences from them, then the opinions of experts are not admissible. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

6. **LABOR LAWS—Health Regulations—Expert Evidence.**—A statute imposing a penalty on anyone who works more than eight hours per day in any mine, smelter or mill for the reduction of ores is a valid health regulation, and expert or other evidence is not admissible in a prosecution under the statute to show that it is not injurious for persons to work more than eight hours per day in such places, as the court will take judicial notice to the contrary. (Nev.) *Ex parte Kair*, 817.

7. **EXPERT EVIDENCE** is Admissible only to prove matters not within the common knowledge of ordinary persons. (Ill.) *Star Brewery Co. v. Hauck*, 420.

8. **EVIDENCE.**—Opinions of a nonexpert witness are inadmissible. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

9. **EVIDENCE—Opinion.**—An inquiry as to whether an alleged incompetent servant was a wide-awake, attentive boy while engaged in his duties, is not open to the objection that it calls for the opinion of the witness, who is not an expert. (Ala.) *First Nat. Bank v. Chandler*, 39.

10. **EVIDENCE—Opinions as to Value of Injured Baggage.**—In an action against a railroad company for injury to wearing apparel carried as baggage, opinion evidence is admissible to show how much the articles depreciated in value by reason of the injury to them. (Mich.) *Withey v. Pere Marquette R. R. Co.*, 533.

See Constitutional Law, 24, 25.

Note.

Evidence. See Judicial Notice.

EXECUTIONS.

1. **EXECUTION SALE of Leasehold Interest.**—Upon foreclosure sale of a leasehold interest, the only interest remaining in the lessee is the right to redeem within twelve months, and to retain possession for fifteen months, and such interest is not subject to levy and sale under execution. (Ill.) *Commerce Vault Co. v. Barrett*, 382.

2. **EXECUTION SALE of Leasehold Estate—Right to Redeem.**—The right of a subsequent judgment creditor to redeem from a foreclosure sale of a leasehold estate does not exist by virtue of any lien, but only by reason of statutory provisions. (Ill.) *Commercial Vault Co. v. Barrett*, 382.

See Exemptions, 1.

EXECUTORS AND ADMINISTRATORS.

Qualifications and Appointment.

1. **EXECUTORS AND ADMINISTRATORS—Nonresidents—Qualification.**—Under statutes providing that when a will shall have been duly proved and allowed, the probate court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, and shall accept the trust and give bond, and that if an executor shall reside out of the state, or shall neglect to render his account, or perform any decree of the court, or abscond, or become otherwise incapable or unsuitable to discharge the trust, the probate court may remove him, a nonresident alien is not absolutely disqualified from serving as an executor, but his nonresidence is ground for the exercise of a discretion in the probate judge in the matter of appointing him an executor or in revoking his letters. (Mich.) *Breen v. Kehoe*, 558.

2. **EXECUTORS AND ADMINISTRATORS—Qualifications.—Indebtedness to Testator** does not of itself disqualify a person to act as his executor. (Mich.) *Breen v. Kehoe*, 558.

3. **EXECUTORS AND ADMINISTRATORS—Appointment.**—The appointment of an executor must ordinarily be made in accordance with the will of the testator, unless such executor is ineligible, or a statutory discretion, express or implied, to refuse it is lodged in the court. (Mich.) *Breen v. Kehoe*, 558.

Estate of Absentee.

4. **THE GRANT OF LETTERS of Administration on the Estate of a Live Man**, as if he were dead, is void. (Va.) *Selden's Exr. v. Kennedy*, 1076.

5. LETTERS OF ADMINISTRATION on the Estates of Absentees.—A statute providing for the taking of an absentee's property and administering on it when he is alive, without his knowledge or consent, and in a proceeding to which he is not a party and of which he has no notice, is in violation of his rights under the fourteenth amendment. (Va.) *Selden's Exr. v. Kennedy*, 1076.

6. LACHES in Suing for a Legacy, When not Fatal.—When one's estate has been administered upon as if he were dead, because of his absence from the state unheard of for more than seven years, and a legacy due him has been paid to his administrator, a suit brought by him to recover such legacy some fifteen years after becoming entitled thereto is not barred by laches, when the party whose duty it was to pay the legacy survives, no evidence has been lost by death, no records have been destroyed or papers lost, no uncertainty exists as to the amount due, and no presumption of payment. (Va.) *Selden's Exr. v. Kennedy*, 1076.

Mortgage Foreclosure.

7. ESTATE OF DECEDENT—Mortgage Foreclosure—Parties.—In an action by administrators to foreclose a deed intended as a mortgage, one of their number to whom the deed was executed is not, as an individual, a necessary party. (Cal.) *Churchill v. Woodworth*, 324.

8. ESTATE OF DECEDENT—Mortgage Foreclosure—Parties.—Where an action to foreclose a mortgage has been brought against the heirs of the mortgagor, the court may, after the subsequent appointment of an administrator, order him to be brought in as a party, and direct the service of summons on him more than a year after the commencement of the action, the time within which an action might be brought against him as a personal representative of the deceased not yet having expired. (Cal.) *Churchill v. Woodworth*, 324.

9. ESTATE OF DECEDENT—Mortgage Foreclosure—Parties.—The right to maintain an action to foreclose a mortgage against an administrator within a year after the issuance of letters is not waived by bringing the action against the heirs before his appointment. (Cal.) *Churchill v. Woodworth*, 324.

Sale by Coexecutors

10. EXECUTORS AND ADMINISTRATORS — Joint Executors' Sale With Only One Joining in Conveyance.—Where two executors, acting under an imperative power in a will, sell certain real estate at public auction, through an auctioneer, upon a published notice, over their names, of the time and place of sale but only one of such executors signs the deed, the other executor failing to sign it for no assigned reason, and the executor who did not join in the deed never at any time objected or in any manner contested the purchaser's title, and no proceedings were taken by the heirs, who were infants at the time of the sale and became of age ten or eleven years thereafter, to rescind it or contest the title, the purchaser becomes the owner of the whole equitable title with the right of possession, the heirs being at the most the holders of the legal title in trust for the purchaser at such executor's sale. (N. Y.) *Brown v. Doherty*, 915.

11. EXECUTORS AND ADMINISTRATORS — Quieting Title — Failure of Coexecutor to Join in Conveyance.—Where two executors, acting under an imperative power in a will, sell real estate belonging to the estate at auction, under a published notice over their joint names, but one of the executors, for no assigned reason, fails to join his coexecutor in the conveyance, and afterward dies, the pur-

chaser at the sale may, under the provisions of the Code of Civil Procedure, allowing one in possession of real property and claiming title to maintain an action to determine any adverse claim to the fee, obtain a judgment barring any claim by the heirs and establishing the purchaser's title, since equity will regard as done what should have been done. (N. Y.) *Brown v. Doherty*, 915.

See Limitation of Actions, 7.

Note.

Executors and Administrators, aliens may be appointed as, 562.

nonresidence does not disqualify, 562, 563.

nonresidence, removal of administrators because of, 565.

nonresident, duty of to come within the state, 562.

nonresidents, foreign corporations as, 656.

nonresidents, statutes excluding from administration, 564.

nonresidents, when become bona fide residents of the state for the purposes of, 564.

nonresidents, when should not be appointed administrators, 563, 564.

removal of for nonresidence, 563, 565.

EXEMPTIONS.

1. **EXEMPTION—Saloon Conducted Without a License.**—Where one partner in a firm conducting a saloon buys out his copartners, and thereafter continues the business without securing a new license as required by law, he cannot claim his statutory exemption as a saloon-keeper. (Mich.) *McCarthy v. Payne*, 548.

2. **EXEMPTION of Life Insurance Money from Claim for Alimony.**—Under the statute of Michigan creating an exemption in favor of the proceeds of certificates in beneficial associations, the circuit court has no jurisdiction, on a bill for a divorce and alimony, to enjoin the payment of the proceeds of such a certificate to the defendant. (Mich.) *Hunt v. Branch Circuit Judge*, 542.

3. **EXEMPTIONS—Effect of Garnishment.**—A vendee who is garnished for the purchase price of chattels in his hands cannot claim an exemption therein. (Ark.) *Liddell v. Jones*, 99.

EXPERT EVIDENCE.

See Evidence, 4-10.

EXPLOSIVES.

1. **EXPLOSIVES Left in Highways.**—The law implies a duty not to place, or cause to be placed, or cause to remain, in the public highway, a bomb or explosive capable of inflicting injury by being exploded, and a complaint averring facts from which the law will imply this duty is sufficient. (Ala.) *Wells v. Gallagher*, 50.

2. **EXPLOSIVES in Highways—Negligence.**—It is negligence to place, or cause to be placed, or cause to remain, in a public highway, a bomb or explosive capable of inflicting injury by being exploded; and it is unimportant how long such bomb or explosive is allowed to remain in the highway if injury results from placing or leaving it there. (Ala.) *Wells v. Gallagher*, 50.

3. **EXPLOSIVES in Highways—Negligence—Proximate Cause.**—If an injury is the proximate consequence of negligence in placing and leaving an unexploded bomb in a public highway, it is immaterial whether it was exploded where placed or was carried to an adjacent yard before being exploded. (Ala.) *Wells v. Gallagher*, 50.

4. **EXPLOSIVES in Highways—Evidence** to show that children were accustomed to play in an alley where an unexploded bomb was

placed and left, is admissible under a count in a complaint charging wantonness. (Ala.) *Wells v. Gallagher*, 50.

FORMER JEOPARDY.

See Criminal Law, 2, 3.

FRAUD.

1. **FRAUD—Burden of Proof.**—One alleging fraud has the burden of proof to establish it. (Ark.) *Nelson v. Cowling*, 155.

2. **FRAUD—Directing Verdict.**—Although fraudulent intent is a question of fact, yet it does not necessarily follow that such question of fact must in every case be left to the jury for determination, and if, from the uncontradicted evidence, all reasonable men must reach but one conclusion, it is proper for the court to direct a verdict as matter of law. (Neb.) *Wilcox v. County of Perkins*, 779.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS—Conflict of Laws—Contracts.**—Evidence by Which Contracts Shall be Proved is no part of the contracts themselves, and is governed, therefore, by the rule of the jurisdiction where the action is tried, and not that in which the contracts were made. (Neb.) *Marvel v. Marvel*, 792.

2. **TRUSTS BY PAROL—Statute of Frauds.**—A parol agreement entered into at the time of executing a conveyance of real estate in good faith, that the grantee shall hold the property in trust for the grantor, and, when sold, pay the proceeds to him, is void, as an attempt to create an express trust, by parol, and the land and its proceeds when sold are the property of the grantee. (Neb.) *Marvel v. Marvel*, 792.

See Landlord and Tenant, 4; License.

FRAUDULENT CONVEYANCES.

1. **DEED in Fraud of Wife—Effect of.**—A deed executed by a grantor in fraud of his wife's rights in the property is, when delivered, binding upon such grantors and his heirs, and a court of equity will not interfere at their instance to set it aside. (Ill.) *Jolly v. Graham*, 435.

2. **DEED in Fraud of Wife.**—A deed executed and delivered by a grantor in fraud of his wife's rights in the property does not create a trust as between the parties to it. (Ill.) *Jolly v. Graham*, 435.

3. **FRAUDULENT CONVEYANCES—Jurisdiction of Equity to Annul—Heirs.**—A person cannot deliberately put his property out of his control for a fraudulent purpose, and then, through the intervention of a court of equity, regain it after his fraudulent purpose has been accomplished. This rule applies not only to the fraudulent grantor, but also to his heirs and assigns. (Ill.) *Jolly v. Graham*, 435.

4. **FRAUDULENT CONVEYANCES—Trusts.**—If a deed is executed by a husband and wife for the fraudulent purpose on his part of placing the title to the property beyond the reach of his wife, and there is no agreement to reconvey, nor promise in writing that the property shall be held for the benefit of the grantor or his heirs, the conveyance does not create a trust for his benefit. (Ill.) *Jolly v. Graham*, 435.

GARNISHMENT.

1. **GARNISHMENT—Transfer of Lien.**—A garnishment when carried into judgment operates to transfer to the garnisher all the rights

and remedies possessed by the judgment defendant, including any lien to secure the indebtedness. (Ark.) *Liddell v. Jones*, 99.

2. **GARNISHMENT of Surplus of Execution Sale.**—If a leasehold interest is sold on foreclosure and redemption made by a creditor under a judgment recovered subsequently to the foreclosure sale, the surplus remaining in the hands of the sheriff, after satisfying such judgment, is held by him for the use of the debtor, and subject to garnishment, even though such officer has in his hands executions issued on other judgments rendered after the foreclosure sale. (Ill.) *Commercial Vault Co. v. Barrett*, 382.

3. **ATTACHMENT.**—A Notice of Attachment of Credits and effects is not a sufficient garnishment of a debt. (Cal.) *Clyne v. Easton etc. Co.*, 253.

4. **ATTACHMENT.**—The Admission by a Garnishee that the debt has been attached is not conclusive evidence that it has been. (Cal.) *Clyne v. Easton etc. Co.*, 253.

5. **ATTACHMENT—Estoppel of Garnishee by Refusing Payment.** If a garnishee should, by refusing to pay a debt on the ground that it has been attached, create an estoppel in favor of his creditors, this would not necessarily preclude him, as against the plaintiff, from denying the efficacy of the notice of garnishment. (Cal.) *Clyne v. Easton etc. Co.*, 253.

6. **ATTACHMENT—Appearance of Garnishee.**—Under the attachment laws of California, a garnishee is not required, and has no right to appear in the action. (Cal.) *Clyne v. Easton etc. Co.*, 253.

7. **ATTACHMENT—Limitation of Actions in Favor of Garnishee.** The running of the statute of limitations in favor of a debtor is not interrupted by making him a garnishee, if he denies the indebtedness or disputes the defendant's title to any property in his possession. (Cal.) *Clyne v. Easton etc. Co.*, 253.

8. **ATTACHMENT—Effect of Garnishment.**—A Contract liability is not changed or converted by garnishment into another sort of liability; the sole effect of the garnishment is to work a contingent transfer of the alleged indebtedness from the creditor to the garnisher, without any change in the nature of the liability. (Cal.) *Clyne v. Easton etc. Co.*, 253.

9. **ATTACHMENT.**—A Garnisher may Commence an Action against the garnishee, it seems, for the protection of his contingent interest in the debt or property attached, before he obtains a judgment in the attachment suit. (Cal.) *Clyne v. Easton etc. Co.*, 253.

GUARDIAN AND WARD.

GUARDIAN—Notice of Appointment.—Where an order appointing a special guardian is made on the same day that the petition for the appointment was filed, and recites that it was made "on reading and filing the petition," it cannot be presumed, in support of the jurisdiction of the court, that the statutory notice was given, if the record is silent in regard thereto. (Mich.) *Devereaux v. Janes*, 523.

See Equity, 3-6.

HABEAS CORPUS.

HABEAS CORPUS.—If One is Imprisoned on a conviction under a statute entirely void, the remedy is by habeas corpus. (Nev.) *Ex parte Kair*, 817.

HIGHWAYS.

See Dedication; Easement; Explosives.

Am. St. Rep., Vol. 113—71

HOMESTEAD.*Tenancy in Common—Partition.*

1. **HOMESTEAD, Holding by Tenancy in Common.**—A homestead may be held by a husband and wife, as tenants in common. (Minn.) *Grace v. Grace*, 625.

2. **HOMESTEAD, Partition of.**—Where a husband and wife are tenants in common of a homestead, she cannot, by leaving him, acquire a right to compel partition thereof. (Minn.) *Grace v. Grace*, 625.

3. **HOMESTEAD.—A Conveyance by a Husband to His Wife of the Undivided One-half of the Premises Occupied by Them as a Homestead** does not confer on her the power to compel partition thereof by a sale, though it be conceded that his homestead right is restricted to the undivided one-half. (Minn.) *Grace v. Grace*, 625.

4. **HOMESTEAD, Partition of at the Suit of a Wife.**—The law will not allow a wife to do with respect to her husband's homestead indirectly by a suit for partition by sale what she could not do directly by sale or conveyance. (Minn.) *Grace v. Grace*, 625.

5. **HOMESTEADS—Partition of.**—A homestead, though not liable for the debts of its deceased owner, may be partitioned prior to the settlement of his estate in probate. (Iowa) *Hild v. Hild*, 500.

Conveyance by Husband and Wife.

6. **HOMESTEADS—Conveyance of by Husband to Wife.**—If the statute provides that no conveyance of the homestead, not subscribed by the householder and his wife, shall be valid unless possession is abandoned or given pursuant to the conveyance, possession of a homestead under a deed not signed by the wife is given pursuant to the conveyance, whenever the possession would not have been delivered except for the conveyance and no other reason appears for such delivery of possession, no matter what length of time or what circumstances intervene between the execution of the deed and the delivery of possession. (Ill.) *Coon v. Wilson*, 441.

7. **HOMESTEADS—Conveyance of by Husband to Wife.**—Under a statute providing that no conveyance of the homestead, not subscribed by the householder and his wife, shall be valid unless possession is abandoned or given pursuant to the conveyance, if a husband for an adequate consideration conveys a homestead occupied by himself and his wife, to her, but the deed is inoperative because not signed by her, and they thereafter continue to reside on the premises for nine years, when they take up their abode elsewhere, and thereafter she leases the property to tenants, there is a sufficient delivery of possession to her pursuant to the conveyance to vest title in her. In such case it is not necessary that possession should be given at any particular time after the execution of the deed, or that delivery of possession should be so connected with the execution and delivery of the deed as to constitute one and the same transaction. (Ill.) *Coon v. Wilson*, 441.

See Specific Performance, 2, 3.

HUSBAND AND WIFE.

See Fraudulent Conveyance; Homestead, 5, 6.

INFANTS.

1. **INFANCY—Disaffirmance of Contract.**—If an infant employs an attorney to bring suit for him and afterward sells him the judgment recovered, the infant may subsequently disaffirm such sale and recover the amount collected on the judgment, less attorney's fees. (Ark.) *Vance v. Calhoun*, 111.

2. INFANCY—Estoppel by Agreement Concerning Title.—If, in a partition suit, both parties rely upon the validity of a deed executed to a son by his father, but wholly ineffective as a conveyance of the title, the grantee's minor heirs are not estopped by any agreement made by them as to the validity of such title, from claiming their undivided interests in the lands of such grantor through his grantee, and they may repudiate any conveyance of the land made by their father. (Ill.) *Jolly v. Graham*, 435.

See Parent and Child.

Note.

Infants, emancipation of, abandonment by parent, when amounts to, 116.

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INJUNCTION.

EQUITY JURISDICTION.—Equity has jurisdiction of a cross-complaint seeking to restrain plaintiff from obstructing streets and alleys upon which the defendant's land abuts. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

INSTRUCTIONS.

See Trial, 4-9.

INSURANCE.

Receipt of Premium.

1. INSURANCE, Receipt for Premium, When Does not Bind the Insurer.—If a receipt for a premium is given by a person who is the agent both of the insurer and the assured, who in giving the receipt was not acting as the agent of the insurer, but gave it for premiums paid or advanced for a building and loan association on policies in which it was interested, such receipt is not admissible against the insurer. (Va.) *Foreman v. German Alliance Ins. Assn.*, 1071.

Knowledge of Agent.

2. INSURANCE, Knowledge of Agent, When not Imputed to the Insurer.—If one who is agent of the insurer knows of the breach of

a condition in a policy, but acquires such knowledge when acting in the business of another principal, such knowledge is not imputed to the insurer unless shown to have been in the agent's mind when acting for the latter. (Va.) *Foreman v. German Alliance Ins. Assn.*, 1071.

Forfeitures.

3. **INSURANCE, Forfeiture, Estoppel to Urge.**—Any acts, declarations, or course of dealing by an insurer, with knowledge of facts constituting a breach of a condition in a policy, leading the person insured honestly to think by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting on the forfeiture. (Va.) *Foreman v. German Alliance Ins. Assn.*, 1071.

4. **INSURANCE, Forfeiture, When not Waived by Knowledge of a Breach of Condition.**—The knowledge by an insurer of a breach of condition forfeiting a policy does not amount to a waiver. There must exist, in addition, some positive act of confirmation upon which, in connection with the knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived. (Va.) *Foreman v. German Alliance Ins. Assn.*, 1071.

Oral Contracts.

5. **INSURANCE.**—**Oral Agreements for Insurance are Enforceable** although the charter of the insurers or the law of the state declares that the conditions of all policies shall be written on the face thereof, and that all policies and contracts of insurance made by the company shall be subscribed by the president or president pro tempore, and attested by the secretary. (Mo.) *King v. Phoenix Ins. Co.*, 678.

6. **INSURANCE, Parol Contracts of, Statute Construed as Giving Effect to.**—A statute declaring that parol contracts may be binding on aggregate corporations if made by an agent, duly authorized by the corporate vote or under the general regulations of the corporation, and that contracts may be implied on the part of such corporations from their acts or those of an agent whose powers are of a general character, must be construed as authorizing insurance corporations to make parol contracts of insurance. (Mo.) *King v. Phoenix Ins. Co.*, 678.

7. **INSURANCE, Oral Contracts of not Affected by the Failure to Stamp.**—The federal stamp act requiring all insurance contracts to have an internal revenue stamp pasted thereon does not make invalid other contracts of insurance. (Mo.) *King v. Phoenix Ins. Co.*, 678.

8. **INSURANCE, Oral Contracts of Agents, When Deemed to Have Authority to Make.**—An insurance agent intrusted with blank policies, signed by the president and secretary of the corporation, with authority to negotiate and fill up the same, may bind it by an oral contract of insurance. (Mo.) *King v. Phoenix Ins. Co.*, 678.

9. **INSURANCE, Oral Contract, When Valid as a Renewal.**—If a contract of insurance is about to expire and the assured applies for ten days' further insurance and agrees with the agent therefor, this may be regarded as a mere renewal of the pre-existing insurance contract, and as within the authority of the agent, when there is no limitation upon his power to renew a policy of insurance by oral agreement. (Mo.) *King v. Phoenix Ins. Co.*, 678.

Fire Insurance.

10. **INSURANCE—Builder's Contract, Amount Recoverable Under** If a policy of insurance issues in favor of a builder, the amount

which he is entitled to recover is not diminished by the fact that he has been paid the greater part of the contract price. If the building is destroyed, he is under obligation to rebuild it, and for so doing is not entitled to any payment beyond that stipulated for in the original contract. (Mo.) *King v. Phoenix Ins. Co.*, 678.

11. INSURANCE.—The Valued Policy Law of Missouri Applies in Favor of a Builder who, as such, has procured a policy of insurance on a building which he is constructing under a contract with the owners of real property, in which real property such builder has no interest. (Mo.) *King v. Phoenix Ins. Co.*, 678.

12. FIRE INSURANCE.—Construction in Favor of Insured.—Conditions in a policy of fire insurance which provide for a forfeiture of the interest of the assured or other persons claiming under the policy are strictly construed against the insurer; and if there is any ambiguity which reasonably may be solved by either of one of two constructions, that interpretation will be adopted which is the most favorable to the assured or the beneficiary in a deed of trust to whom the loss is made payable as his interest may appear. (Cal.) *Welch v. British-American Assur. Co.*, 223.

Mortgagor and Mortgagee.

13. FIRE INSURANCE.—Forfeiture by Mortgagor.—If a policy of fire insurance provides that, "If, with consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described therein, the conditions hereinbefore contained shall apply in the manner expressed in such conditions and provisions of insurance relating to such interest as shall be written upon, attached, or appended thereto," such provision has the effect of preventing the conditions previously mentioned from applying to such interest, unless they are again written upon, attached or appended to the policy, as applicable to that interest, and the interest of a mortgagee is free from all such conditions not thus attached, so that a conveyance by the owner, without the consent of the insurer, does not affect the rights of the mortgagee. (Cal.) *Welch v. British-American Assur. Co.*, 223.

14. MORTGAGES.—Insurance.—Equitable Lien.—If a mortgage contains a covenant that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy in his own name, and does not assign it nor make it payable to the mortgagee, and a loss occurs, such covenant creates an equitable lien in favor of the mortgagee to the extent of his mortgage interest upon the money due under the policy, even though the mortgage contains a provision that the mortgagee, in default of insurance by the mortgagor, may effect insurance at the expense of the mortgagor. (Neb.) *Hyde v. Hartford Fire Ins. Co.*, 796.

15. MORTGAGES.—Insurance.—Assignment.—If a mortgagee assigns his mortgage, containing a covenant on the part of the mortgagor to keep the premises insured and that the mortgagee may procure such insurance upon the failure of the mortgagor to insure, and in his assignment guarantees the payment of the mortgage indebtedness, and subsequently the assignor of the mortgage becomes the owner of the premises and insures them in his own name to the full amount of the insurable interest of the mortgaged property, and a loss occurs while he is guarantor of the mortgage debt, the assignee of the mortgage has an equitable lien on the proceeds of the policy to the extent of his interest in the loss. (Neb.) *Hyde v. Hartford Fire Ins. Co.*, 796.

16. MORTGAGES—Insurance—Statute of Limitations.—The fact that the statute of limitations has barred a personal action against the assignor of a mortgage on his guaranty of its payment, when suit is commenced by the assignee to establish a claim to the proceeds of a policy of insurance on the property taken out by such assignor after becoming the owner of the property, does not release or impair the assignee's equitable lien upon such proceeds. (Neb.) *Hyde v. Hartford Fire Ins. Co.*, 796.

See Benefit Society.

INTEREST.

See Usury.

INTOXICATING LIQUORS.

1. CONSTITUTIONAL LAW—Statutes Respecting Sale of Intoxicating Liquor.—Chapter 346 of the statutes of Minnesota of 1905, respecting the sale of intoxicating liquors, is not unconstitutional because of its committing to judicial officers powers not judicial in character, nor for any other reason. (Minn.) *State v. Bates*, 612.

2. INTOXICATING LIQUORS—Sale to Minor.—A person selling intoxicating liquor to a minor, who does not inform the seller that he is acting as agent for another, nor present an order for the liquor, is guilty of selling intoxicating liquor to a minor, although he is in fact purchasing for an adult third person. (Ala.) *Tony v. State*, 20.

3. INTOXICATING LIQUORS—Sale to Minor.—If a minor, employed by a company composed of his father and a third person, is ordered by such third person to purchase liquor for him, the order is not connected with the business of the company, and such third person does not have control of the minor so as to bring the sale within a statutory exception. (Ala.) *Tony v. State*, 20.

See Saloons.

JUDGMENTS.

Parties and Privies.

1. JUDGMENT—Reformation of Deed—Effect on Subsequent Issue—Marketable Title.—Where a father, through the mistake of the scrivener, conveyed land to his daughter for life, with remainder over to her children living at time of her death, and to her brothers upon her death without issue, or to the issue of such children or brothers of the grantee, instead of an absolute conveyance to the daughter, but the father died before correcting the mistake by another conveyance, though the brothers united in a warranty deed to her, a judgment, in an action by the daughter against her father's executor, her mother and her brothers, none of whom had been married, reforming the father's deed to conform to the intention of the parties, does not bar the title of persons born after the judgment was rendered, where they were not represented by any party to the action, and hence the daughter did not by such judgment obtain a marketable title to the fee. (N. Y.) *Downey v. Seib*, 926.

2. JUDGMENT—Who not Bound as Privies.—Where an action for damages for personal injuries is brought against one corporation member of a pool, a notice from that corporation to its associates of the bringing of the action and the day set for the trial will not make them privies to any judgment recovered. (Mich.) *White Star Line v. Star Line of Steamers*, 551.

Res Judicata.

3. **RES JUDICATA.**—The Only Parties Precluded by a Decree are Adversary Parties, and the matter determined must be in issue between them. (Ill.) *Gouwens v. Gouwens*, 395.

4. **RES JUDICATA**—Mortgage Foreclosure.—Parties on the same side of a foreclosure proceeding cannot be concluded by the decree thereon, as against each other if no issue between them was presented and adjudicated. (Ill.) *Gouwens v. Gouwens*, 395.

Presumption of Jurisdiction.

5. **JUDGMENT**—Presumption of Jurisdiction.—In the event of a collateral attack upon a judgment foreclosing a mortgage which recites that the defendants have been duly and regularly summoned'' and ''that the default of each for not appearing and answering has been duly and regularly entered,''' the case comes within the rule that in all particulars wherein the record is silent or noncommittal the presumption is in favor of the validity and regularity of the action of the court. (Cal.) *County Bank v. Jack*, 285.

Time of Docketing.

6. **JUDGMENT**, Docketing, Presumption of Time of.—When a clerk, in docketing a judgment, specifies that it was docketed at an hour designated, he is presumed to have done his duty, and no inference can be indulged that the docketing was earlier. (Minn.) *Brady v. Gilman*, 622.

Lien of Judgment.

7. **JUDGMENT LIENS**—Execution Sale of Leasehold.—After a leasehold estate has been sold on foreclosure, no lien can attach to such estate by reason of the subsequent rendition of a judgment against the lessee. (Ill.) *Commercial Vault Co. v. Barrett*, 382.

8. **JUDGMENT LIENS**—Foreclosure Sale of Leasehold.—Judgments rendered against a lessee after foreclosure sale of his leasehold interest are not liens upon the surplus remaining in the hands of the sheriff after one of such judgments has been satisfied by making redemption and reselling the property. (Ill.) *Commercial Vault Co. v. Barrett*, 382.

Foreign Judgment.

9. **JUDGMENTS, FOREIGN**—Attack on Jurisdiction.—A party, when sued upon a judgment rendered in a foreign state, may impeach its validity, for want of jurisdiction in the court rendering it. (Iowa) *Cuykendall v. Doe*, 472.

Judgment by Confession.

10. **JUDGMENTS by Confession**—Foreign Judgment.—A judgment by confession under warrant of attorney regularly entered in a state where the debtor resided when the power was given, in conformity to the law of that state, will be enforced in another state, though the entry of judgment in the same manner is not authorized by the law of the latter state. (Iowa) *Cuykendall v. Doe*, 472.

11. **JUDGMENTS by Confession by Attorney.**—If a note authorizes an attorney to appear for the maker at the suit of the payee and confess judgment, it authorizes the entry of a judgment upon the admission or confession of the debtor through the attorney without the formalities involved in an ordinary proceeding or action at law. (Iowa) *Cuykendall v. Doe*, 472.

12. **JUDGMENTS by Confession**—Provision for Stay of Execution. A stipulation between the parties that if judgment upon a note is

confessed before its maturity, no execution shall issue before the debt thus evidenced becomes due, does not prevent the exercise of the power to confess judgment after the maturity of the note and debt. (Iowa) *Cuykendall v. Doe*, 472.

13. **JUDGMENTS by Confession.**—If a power to confess judgment authorizes the making of the confession "as of the last week, or any other subsequent term or time after the date hereof," it authorizes a confession of judgment in vacation. (Iowa) *Cuykendall v. Doe*, 472.

14. **JUDGMENTS by Confession—Sister State—Judgment—Enforcement—Jurisdiction.**—If a foreign judgment has been duly entered, the omission to file with the court the instrument upon which such judgment is based does not affect the validity of the judgment in a suit thereon in another state. (Iowa) *Cuykendall v. Doe*, 472.

15. **JUDGMENT by Confession—Power of Attorney—Waiver of Statute of Limitations.**—An attorney empowered to confess judgment on a note has no authority to waive the statute of limitations. (Iowa) *Cuykendall v. Doe*, 472.

16. **JUDGMENTS by Confession—Sister State—Judgment—Limitation of Actions.**—If a note is accompanied by a power of attorney to confess judgment thereon, and authorizing suit in the state where the debtor then resided, at any time within twenty years from the date of the maturity of the note, and judgment is confessed within such time, it is no defense to an action on the judgment in another state that an action on the note was barred by the statute of limitations of that state. (Iowa) *Cuykendall v. Doe*, 472.

17. **JUDGMENTS by Confession—Sister State—Judgments—Sufficiency.**—The record of a sister state judgment by confession showing an appearance, a confession, the date, the principal sum due, the amount of costs, the date from which interest is to be computed, and which is officially attested, sufficiently establishes the validity of the judgment when suit is brought thereon in another state. (Iowa) *Cuykendall v. Doe*, 472.

18. **JUDGMENTS by Confession—Nonresidence of Debtor.**—If a note contains a power to any attorney to appear for the maker and confess judgment in accordance with the law of the state where the note is made, such power authorizes the entry of judgment after the maker of the note has become a nonresident, without service of notice to him, or other appearance than by attorney. (Iowa) *Cuykendall v. Doe*, 472.

See Assignment, 3.

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Judicial Notice of the laws of sister states, statutes authorizing the taking of by the courts, 871.

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JUDICIAL SALES.

1. **JUDICIAL SALES—Inadequacy of Price.**—A judicial sale will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience, or unless there are additional circumstances against its fairness. (Ark.) *George v. Norwood*, 143.

2. **JUDICIAL SALES—Setting Aside for Advanced Bid.**—In the absence of fraud, irregularity or misconduct affecting the validity of a judicial sale, it will not be set aside and confirmation refused in order

to allow the bid of the purchaser to be advanced by another person. (Ark.) *George v. Norwood*, 143.

3. **JUDICIAL SALES—Discretion of Court.**—An accepted bidder at a judicial sale acquires no independent rights until the sale is confirmed by the court, and while the court may exercise discretion in confirming or rejecting the sale, yet such discretion must be exercised according to fixed rules, and not arbitrarily, and the bidder has the right to insist upon the exercise of such discretion in such proper manner. (Ark.) *George v. Norwood*, 143.

4. **JUDICIAL SALES—Duty to Ratify.**—If a judicial sale is made in all respects according to the terms of the decree, and neither fraud, mistake, nor misrepresentation can be alleged against it, the faith of the court is pledged to ratify and confirm it. (Ark.) *George v. Norwood*, 143.

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JURISDICTION.

1. **JURISDICTION. Presumption of, When Indulged.**—When a Court of Record, Though of a Sister State, assumes to exercise jurisdiction over the subject matter of a controversy and pronounces judgment therein, its jurisdiction will be presumed upon production of a certified copy of the judgment, as required by the act of Congress. (Minn.) *State v. Weber*, 631.

2. **JURISDICTION—Necessity of Complaint.**—A civil action can be instituted only by the filing of a complaint; without such a foundation for its action, the judgment of a court of record is void, even though it be a court which has jurisdiction over the subject matter referred to in the judgment. (Cal.) *Tinn v. United States District Attorney*, 354.

LACHES.

See Equity, 7.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Renewal of Lease.**—If a tenant holds over, and he and the landlord are unable to agree upon the terms of the renewal of the lease, and the landlord claims that the tenant agreed to pay a certain amount as rent, this may be taken as an admission by the landlord as to the amount of rent due. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

2. **LANDLORD AND TENANT.**—Tenancy from year to year is not created against the contrary intent of both landlord and tenant, by the mere payment of rent, and such payment is but evidence of the intent of the parties. (Neb.) *Pusey v. Presbyterian Hospital*, 788.

3. **LANDLORD AND TENANT—Payment of Rent as Renewal.**—Payment and acceptance of money as rent, after the expiration of

a fixed term, does not, of itself, renew the term, but is merely evidence of an intent to renew. (Neb.) *Pusey v. Presbyterian Hospital*, 788.

4. **LANDLORD AND TENANT—Statute of Frauds.—Leases for More than One Year** cannot be made except in writing and if by an agent, he must be authorized by writing. (Neb.) *Pusey v. Presbyterian Hospital*, 788.

See Adverse Possession, 9.

LARCENY.

1. **LARCENY OF GAS.**—Gas used for illuminating and heating purposes may be the subject of larceny independently of any statute specially making the taking of such gas a crime. (Ill.) *Woods v. People*, 415.

2. **LARCENY OF GAS.**—Illuminating gas may be the subject of larceny, and the asportation is sufficient when the accused, receiving gas from a gas company, diverts some of it to his burners without passing the meter to be measured, the means employed being to use a pipe running directly from the entrance to the exit pipe. While the pipe remains thus connected, there is one continuous taking. (Ill.) *Woods v. People*, 415.

3. **LARCENY OF GAS—Grand Larceny.**—The wrongful taking and theft of gas constitutes grand larceny when the amount consumed from day to day at any one continuous period of taking exceeds the value fixed by statute as constituting such crime. (Ill.) *Woods v. People*, 415.

4. **LARCENY OF GAS.**—Selling Price of gas to consumers in the district in which the gas in question is stolen, and not the cost value of the material from which the gas was made, is to be considered in determining the value of the gas abstracted. (Ill.) *Woods v. People*, 415.

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LEASE.

See Landlord and Tenant.

LIBEL AND SLANDER.

1. **LIBEL AND SLANDER**—Privileged Communication.—An unverified written statement made by a person to a peace officer, informing him of a rumor connecting another with the commission of a crime, is privileged and not the subject of libel, if made in good faith with an honest desire to promote justice, but if it is made maliciously and without probable cause to believe it to be true, it is not privileged and is libelous. (Ark.) *Miller v. Nuckolls*, 122.

2. **LIBEL AND SLANDER**—Proof of Words as Alleged.—In an action for slander or libel the plaintiff must prove that the defendant used substantially the same words as those alleged in the complaint, and it is not sufficient to prove that the defendant made the same charge against the plaintiff in words substantially different from those alleged, even though of equivalent and similar import. (Ark.) *Miller v. Nuckolls*, 122.

See Abatement.

LICENSE.

1. **PAROL LICENSE**—When not Revocable.—Where one enters upon the land of another under a parol license and expends money or labor in the execution of the license, it becomes irrevocable for so long

a time as the nature of it calls for its continuance. (Cal.) *Stoner v. Zucker*, 301.

2. **A PAROL LICENSE to Construct an Irrigating Ditch**, when executed by the construction of the ditch, becomes in all essentials an easement for such length of time as the use itself may continue. (Cal.) *Stoner v. Zucker*, 301.

LIENS.

LIENS.—Equity Will not Set Aside, as a Cloud upon Title, a lien outlawed by the statute of limitations. (N. Y.) *House v. Carr*, 936.

See Maritime Liens; Mechanics' Liens.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS.**—The Liability of the Guarantor of a note secured by mortgage accrues at the time of the maturity of the note, without regard to the exhaustion of the security. (Cal.) *Woolwine v. Storrs*, 183.

2. **LIMITATION OF ACTIONS—Suspension of Statute.**—A written request for a year's extension of time for the payment of a note, accompanied by a written promise to pay the same at the end of that time, cannot save the debt from the operation of the statute of limitations, if the holder of the note does not accept the proposition thus made. (Cal.) *Woolwine v. Storrs*, 183.

3. **LIMITATION OF ACTIONS—Suspension of Statute.**—Where the guarantors of a note give their personal note for a part of the amount due, which note is paid before the commencement of an action on the original note, the right of the holder to maintain an action for the remainder of the indebtedness is not thereby suspended. (Cal.) *Woolwine v. Storrs*, 183.

4. **LIMITATION OF ACTIONS—Mortgage Debt.**—If the statute of limitations is running against a mortgage debt, including advances made by the mortgagee to discharge paramount liens, it continues to run against the advances, upon the giving of a new note which does not include them. (Cal.) *Churchill v. Woodworth*, 324.

5. **LIMITATION OF ACTIONS—Sufficiency of Plea.**—A plea that an action is barred by a certain section of the code, without specifying the subdivision thereof which alone can apply to the action, is not a nullity, and the objection to pleading the statute in this manner is waived by a failure to raise the question in the trial court. (Cal.) *Churchill v. Woodworth*, 324.

6. **LIMITATIONS—Barring of Different Remedies.**—Though the statute of limitations may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation applies, a creditor may enforce his claim through that remedy. (N. Y.) *House v. Carr*, 936.

7. **LIMITATION OF ACTIONS Against Estates of Decedents.**—The Statute of Limitations does not Begin to Run against the estate of a decedent until an executor or administrator has been appointed, though the creditor might have petitioned for, and procured, such appointment if the next of kin unreasonably neglected to do so. (Ohio St.) *Hoiles v. Riddle*, 946.

See Adverse Possession; Garnishment, 7.

LOCAL OPTION.

See Constitutional Law, 4.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION, When not Terminated.—If, in an action for malicious prosecution, it appears that the defendant had prosecuted the plaintiff before a justice of the peace for extorting money by blackmailing, and the plaintiff was held to answer, but on presentation of the same matter to the grand jury, it found two indictments against the plaintiff on the same evidence and founded on the same transaction, one for blackmailing and the other for assault with an intent to rob, and that the former indictment had been quashed and the second had not been disposed of when the action for malicious prosecution was commenced, it cannot be sustained, because the prosecution out of which it arose had not been finally determined. (Ohio St.) *Gaiser v. Hurleman*, 953.

2. THE MALICIOUS PROSECUTION Before a Court Having No Jurisdiction of an attachment, without reasonable or proper cause, renders the plaintiff liable to the defendant for any damages resulting to him from the levy of the writ. (Va.) *Ailstock v. Moore Lime Co.*, 1060.

3. MALICIOUS PROSECUTION, Acquittal on the Merits not Necessary to Maintain.—To support an action for malicious prosecution, it is not indispensable that plaintiff should have been acquitted after trial on the merits. It is sufficient that the prosecution against him has finally terminated so that it cannot be further maintained without commencing a new proceeding. (Va.) *Graves v. Scott*, 1043.

4. MALICIOUS PROSECUTION.—To Make Advice of Counsel a defense to an action for malicious prosecution, it must be shown that the advice was sought and acted upon in good faith after a full disclosure of all of the material facts. If the defendant did not state to counsel fully, accurately and truly the pretense that was made, the advice of counsel is no defense. (Mich.) *Davis v. McMillan*, 585.

5. MALICIOUS PROSECUTION.—Burden of Proving Want of Probable Cause in malicious prosecution cases is upon the plaintiff. (Mich.) *Davis v. McMillan*, 585.

6. MALICIOUS PROSECUTION—Want of Probable Cause. Discharge of one accused of crime has not of itself any tendency to show want of probable cause for instituting the prosecution. (Mich.) *Davis v. McMillan*, 585.

7. MALICIOUS PROSECUTION—Probable Cause—Question for Jury.—If plaintiff, in an action for malicious prosecution, shows his arrest and discharge, the failure of the defendant to accurately state the pretense to his counsel, and the relations theretofore sustained by the parties, the question of probable cause is for the jury to determine. (Mich.) *Davis v. McMillan*, 585.

8. MALICIOUS PROSECUTION — Malice — Want of Probable Cause—Proof.—Malice, as well as probable cause, must be shown in an action for malicious prosecution; but malice may be deducible from the facts and circumstances surrounding the transaction, and is inferable from want of probable cause. (Mich.) *Davis v. McMillan*, 585.

9. MALICIOUS PROSECUTION—Malice—Probable Cause.—In an action for malicious prosecution, evidence that one of the defendants urged his brother to cause the arrest of the plaintiff presents a question for the jury to determine his connection with the transaction. (Mich.) *Davis v. McMillan*, 585.

10. **MALICIOUS PROSECUTION—Excessive Damages.**—In an action for malicious prosecution for obtaining money under false pretenses, if it is shown that the plaintiff retains property which he obtained from the defendant by means of a representation which, though not proven false, has led the defendant to believe a falsehood, and to permit the plaintiff to retain the property, a verdict of four thousand dollars, most of which is for mortification suffered and for wounded feelings, is excessive. (Mich.) *Davis v. McMillan*, 585.

MARITIME LIENS.

1. **MARITIME LIENS.**—Contracts for Building Ships or for Furnishing Materials for their construction are nonmaritime contracts, not within the jurisdiction of admiralty courts, and liens arising under state laws out of such contracts may be enforced in the state courts. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

2. **CONSTITUTIONAL LAW—Maritime Liens.**—A state statute creating a lien for materials furnished for the original construction of a vessel, and providing for the enforcement of such lien, is valid, and not in violation of the provisions of the national constitution in relation to cases of admiralty or maritime jurisdiction. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

3. **MARITIME LIENS—Materials for Construction of Vessel.**—Materials furnished for the original construction of a vessel before and after she is launched, entitles the furnisher to a statutory lien, provided the materials are furnished before the vessel is entirely completed, enrolled and licensed. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

4. **MARITIME LIENS—Statutory Lien—Application—Interstate Commerce.**—A statute creating a lien for materials furnished for the original construction of a vessel which is used, or intended to be used, in navigating the waters of the state does not limit the lien to vessels intended to be used exclusively in navigating the waters of the state, and applies to vessels built within the state and navigating the waters of that as well as other states, and as to which there is no national admiralty jurisdiction. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

5. **MARITIME LIENS—Subcontractors.**—If a vessel is constructed under a contract with individuals who are to form a corporation to which the vessel is to be transferred when completed, the title to the vessel until thus transferred remains in the builder, and one furnishing material to be used in its construction under contract with the builder is not a subcontractor, and is entitled to enforce a statutory lien for such material furnished. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

6. **MARITIME LIENS—Statutory Lien.**—If material is furnished for the construction of a vessel under contract with the builder, a statutory lien may attach to the vessel therefor, as an incident to the contract, regardless of the fact that such materials were charged to the builder of the vessel and not to the vessel itself. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

7. **MARITIME LIENS—Notes as Payment.**—If materials are furnished for the construction of a vessel for which the materialman has a statutory lien, the fact that the builder's note for a portion of the amount due on a general account for materials furnished is accepted by the materialman, but not paid, does not constitute payment precluding the enforcement of such lien. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

8. MARITIME LIENS—Enforcement—Interstate Commerce.—Proceedings to enforce a statutory lien for materials furnished and used in the construction of a vessel may be commenced after the vessel has been enrolled, licensed, and has engaged in interstate commerce, without contravening national jurisdiction in admiralty. (Mich.) *Delaney Forge etc. Co. v. The Winnebago*, 566.

Note.

Marriage, emancipation of infant by, 118.

MASTER AND SERVANT.

Assumption of Risks and Contributory Negligence.

1. MASTER AND SERVANT—Injury to Servant—Contributory Negligence.—A railroad section-hand, who is killed by a train while helping to remove a handcar from the track under orders from a section foreman on whose vigilance he relies, is not guilty of contributory negligence. (Ark.) *St. Louis etc. R. R. Co. v. Mathis*, 85.

2. NEGLIGENCE—Assumption of Risk.—If the evidence shows that injury to a servant was the result of willful, wanton and reckless conduct of the defendant's engineer, a plea that plaintiff assumed the risk is no defense. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

3. RAILROADS—Injury to Employé—Contributory Negligence. An averment in an answer to a complaint of an engineer for injury received that he so carelessly and negligently operated his engine and train at a rapid rate of speed without ascertaining the condition of the road ahead of him as to run into a washout, which could have been avoided by the use of ordinary care and diligence, is a mere statement of the conclusion of the pleader, and is not permissible in pleading contributory negligence, where the facts must be averred. (Ala.) *Western Ry. v. Russell*, 24.

4. RAILROADS—Negligence Causing Death to Employé—Contributory Negligence.—In an action to recover for the death of a railroad engineer due to a defective roadbed, a plea alleging that the deceased had been warned of heavy rainfalls along the line of the road, and cautioned to look out for high water at all waterways, but not alleging that he was informed of the dangerous condition at the place of the accident or that, had he properly watched, he could have discovered the danger in time to avoid the accident, is not sufficient as a plea of contributory negligence. (Ala.) *Western Ry. v. Russell*, 24.

5. RAILROADS—Negligence Causing Death to Employé—Contributory Negligence.—Although a railroad engineer knew the place where he ran into a washout causing his death, but was not informed of any unusual conditions existing there at that time, he was not guilty of contributory negligence simply because he failed to exercise greater care at that place than at any other. (Ala.) *Western Ry. v. Russell*, 24.

6. RAILROADS—Negligence Causing Death of Employé—Contributory Negligence.—The mere fact that a railroad engineer had been warned that there had been a heavy rainfall along the road, and cautioned to look out for high water at all waterways, will not preclude a recovery for his death, caused by his running into a washout, without any negligence on his part. (Ala.) *Western Ry. v. Russell*, 24.

7. RAILROADS—Negligence Causing Death of Employé—Assumption of Risk.—Unless a railroad engineer is warned of the danger

where an accident happens, or knows of it personally, or it is obviously open to his observation, he does not assume the risk of injury resulting from a defective roadbed. (Ala.) *Western Ry. v. Russell*, 24.

Fellow-servants—Safe Appliances.

8. **MASTER AND SERVANT—Injury to Fellow-servant.**—Although a master is liable for the wanton, reckless, willful, or intentional acts of his employé, when acting within the scope of his employment, yet when the injury is to a fellow-servant, the master is not liable, unless the case is brought within statutory provisions, or if the common-law liability is relied on, negligence must be alleged and shown in the master himself. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

9. **MASTER AND SERVANT—Injury to Fellow-servant.**—A master is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

10. **EMPLOYER'S LIABILITY—Fellow-servants.**—The department rule does not obtain in the law of fellow-servants in California. (Cal.) *Leishman v. Union Iron Works*, 243.

11. **MASTER AND SERVANT—Appliances to be Constructed by Employés.**—The rule that an employer must furnish his employés safe appliances with which to do the work for which they are engaged does not require him to furnish them in their completed form; his obligation is discharged when he furnishes suitable materials with which to construct the appliances where, under the terms of the contract of employment, the employés are to do the constructing, and in that event he is not liable for an injury through a defect in the construction or adjustment of the appliances. (Cal.) *Leishman v. Union Iron Works*, 243.

12. **EMPLOYER'S LIABILITY—Fellow-servants—Safe Appliances.**—Where a foundryman maintains a carpenter-shop in which to make flasks for use in the molding department of his foundry, one employé having the supervision of both departments, the carpenters and the molders are fellow-servants, so that the employer is not liable to a molder injured by a defective flask, if he has employed competent carpenters and furnished them suitable materials. (Cal.) *Leishman v. Union Iron Works*, 243.

Incompetent Fellow-servants.

13. **MASTER AND SERVANT—Care in Selection of Servants.**—The master must exercise due and reasonable care in the selection and retention of his servants, with reference to their fitness and competency. (Ala.) *First National Bank v. Chandler*, 39.

14. **MASTER AND SERVANT.**—The Liability of Employers for Injury Caused by the Incompetency of a Fellow-servant depends upon its being established by affirmative proof that such incompetency was actually known to the master, or that, if he had exercised due and proper diligence, he would have learned that which would, in law, charge him with such knowledge. (Ala.) *First Nat. Bank v. Chandler*, 39.

15. **MASTER AND SERVANT—Negligence of Master—Burden of Proof.**—The presumption is that a master has exercised proper care in the selection of his servant, and it is incumbent upon the person charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency and bring-

ing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. (Ala.) First Nat. Bank v. Chandler, 39.

16. MASTER AND SERVANT.—Specific Acts of Incompetency of Fellow-servants cannot be shown to prove that such servants were negligent in doing, or omitting to do, the act complained of. (Ala.) First Nat. Bank v. Chandler, 39.

17. MASTER AND SERVANT.—Incompetent Servants—Proximate Cause.—The incompetency of a servant, in all cases, in order to charge the master with negligence, must be the proximate cause of the injury. The mere fact that the servant was incompetent and the master had knowledge thereof is of no importance, unless therein is found the cause of the injury or a cause contributory thereto, without which it might not have happened. (Ala.) First Nat. Bank v. Chandler, 39.

18. MASTER AND SERVANT.—Incompetent Servants.—Negligence such as unfits a person for service or renders it negligent in a master to retain him in the employment, must be habitual, rather than occasional, or of such a character as to render it imprudent to retain him in the service. A single exceptional act will not prove a servant incapable or negligent. (Ala.) First Nat. Bank v. Chandler, 39.

19. MASTER AND SERVANT.—Incompetent Servants—Waiver of Negligence of Master.—If the injured servant knew of the incompetency of his offending fellow-servant as well as his master knew of it, and, notwithstanding such knowledge, continued in the employment without objection, he thereby waived the negligence of the master in retaining in his employ such incompetent servant. (Ala.) First Nat. Bank v. Chandler, 39.

20. MASTER AND SERVANT.—Incompetent Servant—Negligence of Master.—If it is sought to recover for injury to a servant caused by the alleged incompetency of a fellow-servant, it is not necessary that the complaint in charging negligence should state the *quo modo*, or negative the fact that plaintiff knew of such incompetency before going into the place of danger where the injury was received. (Ala.) First Nat. Bank v. Chandler, 39.

21. MASTER AND SERVANT.—Incompetent Servant—Negligence of Master.—If a complaint for injury to a servant charges the master at common law in failing to inform himself of the incompetency of a fellow-servant of plaintiff, it is not necessary in such complaint to lay such failure to some person intrusted by the master with management and superintendence. (Ala.) First Nat. Bank v. Chandler, 39.

22. MASTER AND SERVANT.—Negligence of Fellow-servant.—If a servant is injured by the negligence of a fellow-servant in the operation of an elevator while the injured servant was at work in the shaft, the fact that the latter stated that he had only a small amount of work to do and that he would be through with it in a few moments did not justify the elevator operator in causing the elevator to descend the shaft without first ascertaining that the shaft was clear. Especially when such statement was not made to him or to anyone authorized to act upon it. (Ala.) First Nat. Bank v. Chandler, 39.

23. MASTER AND SERVANT.—Incompetent Servant—Evidence.—Proof of the fact that a servant disobeyed his master's instructions is competent on the issue of the servant's incompetency. (Ala.) First Nat. Bank v. Chandler, 39.

24. MASTER AND SERVANT—Incompetent Servant.—If it is sought to recover for injury to a servant caused by the alleged incompetency of a fellow-servant, an answer alleging that the injured servant had knowledge of his fellow-servant's ability to do his work is insufficient to charge the injured servant with knowledge of the incompetency of such fellow-servant. (Ala.) *First Nat. Bank v. Chandler*, 39.

25. MASTER AND SERVANT—Incompetent Servant.—An instruction that if an injury to a servant was caused by the slipping of the brake of an elevator, he cannot recover, is properly refused when the jury is entitled to find that the slipping of such brake was caused by the incompetency of a fellow-servant of the plaintiff. (Ala.) *First Nat. Bank v. Chandler*, 39.

Warning Trainmen of Danger.

26. RAILROADS—Duty to Warn Trainmen of Dangers in Roadbed. Trainmen do not assume the risk of defective track conditions and have a right to assume that the track is safe, and the duty to warn them of defects in the roadbed rests upon the company. (Ala.) *Western Ry. v. Russell*, 24.

Actions by Servant for Injuries.

27. MASTER AND SERVANT—Sufficiency of Complaint.—A complaint for injury to a servant caused by his being struck by defendant's railroad engine, failing to charge that the person whose negligence is complained of was in charge of such engine, does not state a good cause of action. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

28. MASTER AND SERVANT—Sufficiency of Complaint.—A complaint alleging that an injury to a servant resulted from the wanton, reckless or intentional act of a fellow-servant, but not alleging that the master was guilty of negligence in the selection of such servant, in the orders given him, or otherwise, does not state a good cause of action. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

29. MASTER AND SERVANT—Injury to Servant—Sufficiency of Complaint.—A complaint against a railroad company for the death of its engineer due to defects in the roadbed, alleging the negligent failure of the company to maintain its tracks in proper condition, and that a culvert was defectively constructed in being too small to carry off the water during heavy rains, and that the material of which it was constructed had become weak from decay, is sufficient as against demurrer. (Ala.) *Western Ry. v. Russell*, 24.

30. MASTER AND SERVANT—Injury to Servant.—If an employé is injured by the operation of an elevator below the first floor of a building, while he was in the elevator shaft in the basement, a request to charge concerning the running of such elevator to the first floor is properly refused. (Ala.) *First Nat. Bank v. Chandler*, 39.

Liability of Master for Acts of Servant.

31. MASTER AND SERVANT—Negligence.—A master is liable to third persons for the negligent conduct of his servant, while acting within the line of his duty and in obedience to his master's authority, independently of whether there is any liability of the servant to his master. (Ill.) *Star Brewery Co. v. Hauck*, 420.

32. MASTER AND SERVANT—Liability of Saloon-keeper for Assault by Bar-keeper.—A saloon-keeper is not liable for an assault

on one of his patrons committed by his bar-keeper not in the scope of his employment. (Ark.) *Anderson & Co. v. Diaz*, 180.

See Constitutional Law, 14-23.

MECHANICS' LIENS.

1. **MECHANICS' LIENS are Governed by the Law existing at the time the work is done and the liens are filed.** (Cal.) *Higgins v. Charlotta Gold Min. Co.*, 344.

2. **MECHANIC'S LIEN—Unrecorded Contract.**—A contract for plastering which does not expressly state the aggregate cost of the work, but which nevertheless clearly calls for an expenditure of over one thousand dollars, is, if not recorded, void under section 1183 of the Code of Civil Procedure, and the materials will be deemed furnished at the "personal instance of the owner," so that a lien therefor may be had against the building. (Cal.) *Smith v. Bradbury*, 189.

3. **MECHANIC'S LIEN—Unrecorded Contract.**—If a contract for more than one thousand dollars is void because not recorded, payment by the owner to the contractor is no defense to a claim of lien by employes. (Cal.) *Berentz v. Belmont Oil Min. Co.*, 308.

4. **MECHANIC'S LIEN on Leased Mining Claim.**—In the foreclosure of a mechanic's lien on a leased mining claim, a default judgment against the owner is erroneous, if the complaint does not allege the lessee's authority to develop the mine, nor the lessor's knowledge of the work, and the mine is charged with a lien for a larger amount than the demand stated in the summons, which in this particular does not correspond with the prayer in the complaint. (Cal.) *Berentz v. Belmont Oil Min. Co.*, 308.

5. **MECHANIC'S LIEN on Oil Lands.**—A Tract of Land in process of development as an oil mine is a mining claim within the meaning of the mechanic's lien law. (Cal.) *Berentz v. Belmont Oil Min. Co.*, 308.

6. **MECHANIC'S LIEN on Oil Lands.**—When Labor or Material is expended in developing an oil claim, a mechanic's lien attaches thereto. If it is the claim of a single locator to twenty acres, the lien covers the twenty acres; if it is a consolidated claim of several locators, worked as a whole, the lien covers the entire consolidated claim. (Cal.) *Berentz v. Belmont Oil Min. Co.*, 308.

7. **MECHANIC'S LIENS on Leased Mining Claim.**—Where a lease of mining property provides that the lessees shall work and develop the mine and pay the lessor a percentage of the net profits, the lessees are, under section 1183 of the Code of Civil Procedure, regarded as the agents of the lessor, and both his and their interests are subject to liens for work done in developing the mine and extracting ore. (Cal.) *Higgins v. Charlotta Gold Min. Co.*, 344.

MINES AND MINERALS.

1. **MINING CLAIM—Error in Date of Location.**—The date of the location of a mining claim as fixed by the locator upon his notice does not absolutely control in case the claim is also located by another. The conflicting rights of the parties are governed by the fact of the prior location, of which the written date of the notice is, at the most, only evidence. An error, if any, in the date must give way to the proved fact. (Cal.) *Webb v. Carlon*, 305.

2. **MINING CLAIM—Error in Date of Location.**—Where a notice of location is placed on a mining claim, and the boundaries are marked,

one who makes a subsequent location of the property cannot be misled by the erroneous date of the notice nor heard to say that he has been injured by the error. (Cal.) *Webb v. Carlon*, 305.

3. **MINES AND MINERALS.**—A mining right may be separated from the surface, the surface being held by one person and the mining right by another. (Ohio St.) *Gill v. Fletcher*, 962.

4. **MINES AND MINERALS.**—The Severance of a Mine and the Surface of Lands may be Accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception of the mines and minerals. (Ohio St.) *Gill v. Fletcher*, 962.

5. **MINES AND MINERALS, Exception of, What Amounts to.**—A conveyance of a tract of land providing that the grantor reserves to himself "one-half of the plaster or the proceeds thereof which may hereafter be found on such land," "to have and to hold the same, the one-half of the plaster as above designated only excepted," does not amount to a mere reservation of the grantor terminating with his life, but is an exception whereby the grantor retains to himself the fee simple in one-half of the plaster. (Ohio St.) *Gill v. Fletcher*, 962.

See Adverse Possession, 6-8; Mechanics' Liens.

MONOPOLIES.

MONOPOLIES.—A Combination Between Corporations engaged in carrying freight and passengers by steamer between points in different states, whereby the net earnings are pooled and divided in certain proportions, and whereby a monopoly in the traffic is created, is unlawful and invalid under the Sherman act. (Mich.) *White Star Line v. Star Line of Steamers*, 551.

MORTGAGES.

Foreclosure.

1. **MORTGAGE FORECLOSURE—Parties—Wife of Mortgagor.**—Effect of Decree.—If a mortgagor's wife is made a party to a proceeding to foreclose his mortgage, and subsequently acquires such interest as her husband had in the land, she is bound by the foreclosure decree. (Ill.) *Gouwens v. Gouwens*, 395.

2. **MORTGAGE FORECLOSURE—Res Judicata.**—Parties defendant to a foreclosure suit who claim liens may set up their claims by answer and make proof of the facts upon which they claim their liens, but unless there is a surplus after satisfying the mortgage debt, there is nothing to litigate between the defendants, and hence no adjudication which can become res judicata as between the mortgagor and such defendants as to the validity of their liens. (Ill.) *Gouwens v. Gouwens*, 395.

3. **MORTGAGES—Defenses.**—By a Foreclosure by Advertisement, the owner of the equity of redemption may be deprived of a defense which he could successfully interpose had an action been brought to foreclose the mortgage. (N. Y.) *House v. Carr*, 936.

4. **MORTGAGES—Enjoining Sale Under Power After Bar of Limitations.**—A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain a sale under the power of sale contained in the mortgage, where it is not shown that the bond and mortgage have been in fact paid. (N. Y.) *House v. Carr*, 936.

Redemption.

5. **REDEMPTION Under Supposed Lien, When Premature.**—If by statute a party is entitled to redeem from foreclosure sale only

by giving notice of his intention when he has a lien on the premises, a notice given of an intention to redeem under the lien of a judgment is entirely ineffective if the judgment is not docketed until some hours afterward. (Minn.) *Brady v. Gilman*, 622.

6. REDEMPTION, Validity of, When May be Questioned.—Though the amount paid for redemption is all that can be lawfully exacted, the validity of the redemption can be objected to where its effect is to subrogate the redemptioner to the rights of the purchaser at the foreclosure sale, and to thereby transmit an absolute title to the premises unless further redemption is made within the time specified by law. (Minn.) *Brady v. Gilman*, 622.

Forged Satisfaction.

7. MORTGAGES—Forged Satisfaction—Estoppel of Testamentary Trustees.—Where one of three testamentary trustees, holding a mortgage for the benefit of their trust, executed a satisfaction of the mortgage, purporting to be signed by himself and his cotrustees, but the signature of one of whom was forged and the other obtained by fraud, the fact that his cotrustees had surrendered to him full control of the trust estate and had failed, upon discovery of his dishonesty, to compel him to make restitution, and had failed to notify the mortgagor, and had obtained releases from their adult cestuis que trustent, does not estop them from enforcing, as trustees, the demands of the estate which they represent, even though it might be sufficient as an estoppel against them individually. (N. Y.) *Vohmann v. Michel*, 921.

See *Chattel Mortgages; Executors and Administrators, 7-9; Limitation of Actions, 4.*

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—Delegation of Power by State. While it is competent for the state to delegate its sovereign power to cities and villages in regard to the construction, management and control of these companies, such surrender of sovereignty cannot be implied, but must rest on express legislation containing a clear and unqualified grant of power. (N. Y.) *Village of Carthage v. Central New York Tel. etc. Co.*, 932.

2. MUNICIPAL CORPORATIONS, Liability of for Injuries Due to Ultra Vires Acts.—A municipal corporation is not liable for negligence in the doing of an ultra vires act. (Va.) *Donable v. Town of Harrisonburg*, 1056.

3. MUNICIPAL CORPORATIONS—Compelling the Placing of Telephone Wires Underground.—Under the transportation corporation law granting such corporations the right to construct and maintain telephone lines upon, over, or under any public roads, streets and highways, and the village law conferring upon the boards of trustees of villages the power to regulate the erection of telegraph, telephone or electric light poles, and the stringing of wires on those poles, the right of a telephone company to erect poles and string wires is derived from the state, but the village authorities may regulate their erection; that is to say, the location of the poles and the streets to be occupied. Hence a village has no power to compel a telephone conduits. (N. Y.) *Village of Carthage v. Central New York Tel. etc. Co.*, 932.

4. A MUNICIPAL CORPORATION is Restricted to Its Corporate Limits, as a general rule, in the exercise of its powers. (Va.) *Donable v. Town of Harrisonburg*, 1056.

5. **A MUNICIPAL CORPORATION in Operating a Rock Quarry Beyond Its Corporate Limits is Performing an Act Ultra Vires**, though its purpose is to procure stone necessary for use on its public streets. (Va.) *Donable v. Town of Harrisonburg*, 1056.

6. **OBSTRUCTION OF STREETS.—Title to Land cannot be Tried** in a prosecution in a municipal court for obstructing a street. (Mich.) *People v. Wolverine Mfg. Co.*, 544.

7. **OBSTRUCTION OF STREETS.—To Oust a Court of Jurisdiction** of a prosecution for obstructing a street because the title to land is involved, it is essential that there should be a bona fide contention either as to the existence of the highway or the title of the lands where the obstructions are placed. (Mich.) *People v. Wolverine Mfg. Co.*, 544.

8. **OBSTRUCTION OF STREET.—Abutting Owners on Both Sides of a Cul-de-sac** used only for their private purposes may build a fence across it without being liable to prosecution in a municipal court under an ordinance forbidding the obstruction of streets. (Mich.) *People v. Wolverine Mfg. Co.*, 544.

See Estoppel, 4-6.

NATURALIZATION.

1. **NATURALIZATION—Attack upon Judgment.**—A judgment admitting an alien to citizenship cannot be set aside except by one of the three modes prescribed by law, which are: (1) By appeal, (2) by a suit in equity, (3) by a motion within six months after the judgment is taken. Therefore, an order vacating the judgment on motion of the United States district attorney, without any complaint or other pleading, for fraud in its procurement, more than three years after the naturalization, is void and will be annulled on certiorari. (Cal.) *Tinn v. United States Dist. Attorney*, 354.

2. **NATURALIZATION—Conclusiveness of Judgment.**—An order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction. (Cal.) *Tinn v. United States Dist. Attorney*, 354.

3. **NATURALIZATION in Sister State, Jurisdiction of Court, When Presumed.**—If a court of a sister state having a judge, clerk and seal assumes jurisdiction over naturalization and pronounces a judgment admitting an applicant to citizenship, its jurisdiction will be presumed. (Minn.) *State v. Weber*, 631.

4. **NATURALIZATION, Judgment of, When Sufficient.**—The record of a court showing the appearance of a designated person before it, and that he is an alien and native of Germany, and has proved that he made in the court, two years before, the requisite declaration of his intention to become a citizen of the United States, and that he has resided therein for five years last past and in the state for one year, during all of which time he has been well behaved and of good moral character, attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same, and that he further, in open court, made solemn oath that he will support the constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly all allegiance and fidelity to the Emperor of Germany, "whereupon it is ordered by the court that a certificate of naturalization be issued to him on payment of the costs of this application," amounts to a sufficient judgment admitting the applicant to citizenship. (Minn.) *State v. Weber*, 630.

NEGLIGENCE.

In General.

1. **NEGLIGENCE—Damages—Sufficiency of Complaint.**—In an action to recover damages for alleged negligence, the complaint is sufficient if it alleges a duty owing to the plaintiff from the defendant, or states facts which the law will imply the duty. (Ala.) *Wells v. Gallagher*, 50.

2. **NEGLIGENCE, What Necessary to Sustain an Action for.**—An action for negligence lies only where there has been a failure to perform some legal duty, owed by the defendant to the plaintiff. (Va.) *Williamson v. Southern Ry. Co.*, 1032.

3. **NEGLIGENCE, Presumption of from Accident.**—When the thing which caused injury is under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care on the part of the defendant. (Ohio St.) *Cincinnati Traction Co. v. Holzenkamp*, 980.

4. **NEGLIGENCE—Ordinance as Evidence.**—An ordinance regulating the speed for driving animals upon the streets and prohibiting heedless and reckless driving is properly admitted in evidence in an action to recover for the death of a boy run over and killed by a wagon where the complaint charges careless and negligent driving as the cause of the accident, and there is evidence to sustain the allegation. (Ill.) *Star Brewery Co. v. Hauck*, 420.

5. **NEGLIGENCE—Playing in Street—Violation of Ordinance—Proximate Cause.**—If a boy is killed in the street by being run over by a wagon, and the defense is set up that he was playing a game in the street in violation of a city ordinance prohibiting persons from engaging in games or sports in the street having a tendency to frighten horses or interfere with teams or vehicles, it must be shown, to sustain such defense, that the violation of the ordinance was the proximate and efficient cause of the injury. (Ill.) *Star Brewery Co. v. Hauck*, 420.

Contributory Negligence.

6. **NEGLIGENCE—Contributory—Proximate Cause.**—Even though a person's own negligence exposes him to danger, if the proximate cause of his injury was the result of the negligence of the person injuring him in failing to use ordinary care to avoid the accident after becoming aware of the danger, the latter is liable. (Ill.) *Star Brewery Co. v. Hauck*, 420.

7. **NEGLIGENCE—Contributory—Age of Person Injured.**—In determining whether a boy ten years old was guilty of contributory negligence in failing to see, hear and get out of the way of a wagon, which ran over and killed him, the jury may consider his age, intelligence, experience and ability to comprehend danger and take care of himself, and such failure alone is not contributory negligence as matter of law. (Ill.) *Star Brewery Co. v. Hauck*, 420.

8. **NEGLIGENCE, CONTRIBUTORY—Defense.**—To sustain the defense of contributory negligence, the conduct of the plaintiff must be negligent, and must also contribute proximately to the injury. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

9. **NEGLIGENCE—CONTRIBUTORY—Willful Injury.**—If there is evidence tending to sustain counts of wanton, reckless, and intentional misconduct of another resulting in injury to the plaintiff, it is proper to refuse to instruct the jury that if there was a safe way

for plaintiff to have discharged his duties, and an obviously dangerous way, and he chose such dangerous way, he cannot recover. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

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NEW TRIAL.

NEW TRIAL—Assignment of Error.—If the attention of the court is not called to the particular error complained of, the assignment of error is too indefinite as a basis for a motion for a new trial. (Ark.) *Miller v. Nuckolls*, 122.

OFFICERS.

1. OFFICERS—Settlement of Accounts—Conclusiveness.—If a full and complete settlement of a county officer with the county commissioners, who are authorized to make it, has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition making such settlement. (Neb.) *Wilcox v. County of Perkins*, 779.

2. OFFICIAL BONDS—Irregularities—Defense.—Although an official bond of a county officer as executed is irregular in being joint, instead of joint and several, as required by statute, this is not an objection thereto of which the obligors thereon can avail themselves as a defense thereto. (Neb.) *Wilcox v. County of Perkins*, 779.

3. PUBLIC OFFICE—Intention to Abandon.—An office cannot be abandoned without an intention, actual or imputed, to abandon it. (Mich.) *Attorney General v. Maybury*, 512.

4. PUBLIC OFFICE.—The Voluntary Relinquishment of an office by abandonment, which is to be ipso facto a vacation of the office,

should be equally well defined as other well-defined modes of voluntary relinquishment, and should not be confounded with mere nonuser and neglect of duty which would be grounds for proceedings against an officer, but do not of themselves produce a vacation of the office without judicial proceedings. (Mich.) Attorney General v. Maybury, 512.

5. **PUBLIC OFFICE.**—The Intention to Abandon an office may be inferred from the conduct of the officer. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created, and no judicial determination is necessary. (Mich.) Attorney General v. Maybury, 512.

6. **PUBLIC OFFICE**—Abandonment by Leaving Country.—Where a city officer suddenly leaves for a foreign country pending proceedings by the council for his removal, and thereafter makes no claim to his office for seventeen months, the jury are authorized in finding that he has abandoned the office. (Mich.) Attorney General v. Maybury, 512.

See Civil Service; Constitutional Law, 2.

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PARENT AND CHILD.

PARENT AND CHILD—Emancipation of Infant.—If a father permits his infant son to make his own contracts, collect his own wages and appropriate them to his own use, such wages are the son's property until the license is revoked, and he is entitled to recover them. (Ark.) Vance v. Calhoun, 111.

Note.

Parent and Child. See Infants.

PARI DELICTO.

1. **IN PARI DELICTO, Public Policy, What is.**—The question of what is public policy in a given case is as broad as the question of what is fraud in a given case, and is addressed to the good common sense of the court. (Mo.) Hobbs v. Boatright, 709.

2. **IN PARI DELICTO, Relief, When May be Granted.**—There may be such an inequality of conditions between persons in pari delicto that relief may be given to the more innocent, if there are collateral and incidental circumstances attending the transaction and affecting the relations of the parties which render one of them comparatively free from fault, or where the courts intervene from motives of public policy. (Mo.) Hobbs v. Boatright, 709.

3. IN PARI DELICTO—Relief in Favor of a Plaintiff Who has been Entrapped by a Gang of Swindlers into Joining Them in a Supposed Scheme to Swindle Third Persons.—If an organized gang exists assuming to be an athletic club, but in fact devising fake contests, the result of which is agreed upon and known in advance, for the purpose of cheating the public, and representatives of such gang or club induce a third person to wager his money on a contest which they assure him is to result in a particular manner, when it has been arranged to result precisely the contrary, whereby the money so wagered by him is lost, public policy will permit the maintenance of an action in favor of such person to recover the money so lost. (Mo.) *Hobbs v. Boatright*, 709.

4. AID OF PERSONS in Pari Materia.—The doctrine that the courts will not aid a plaintiff who is in *pari materia* with the defendant is not a rule of universal application. It is based on the principle that to give plaintiff relief in such a case would contravene public morals and impair the good of society. Therefore, the rule should not be applied in a case in which to withhold the relief would to a greater extent offend public morals. (Mo.) *Hobbs v. Boatright*, 709.

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PARTIES.

1. PARTIES.—In Every Case There Must be Such Parties before the court as to insure a fair trial of the issue, in behalf of all. (N. Y.) *Downey v. Seib*, 926.

2. PARTIES—Privity of Interest—Representation of Unborn Remaindermen.—Where, in a suit by the grantee of a deed to reform it to conform to the intention of the parties, the deed granted a life estate to the grantee with remainder to her children, and on a failure of such issue to her brothers and their issue, but the brothers conveyed by warranty deed to the grantee prior to the commencement of the suit, the unborn issue of the brothers are not repre-

sented by the brothers being made parties defendant, since the interest of the brothers was to protect their warranty of title, and the interest of the plaintiff was to destroy the conveyance creating the title in remainder. (N. Y.) *Downey v. Seib*, 926.

PARTITION.

1. PARTITION—Life Estate and Estate in Remainder.—Property held by joint owners or cotenants consisting of a life estate and an estate in remainder may be partitioned in equity at the suit of the life tenant when the property cannot be equitably divided. (Ala.) *Fitts v. Craddock*, 53.

2. PARTITION—Duration of Estate.—Partition is a matter of right among joint owners or tenants in common holding the lands, without reference to the duration of the estate, and may be compelled against a life tenant, as well as at his suit in equity when the property cannot be equitably divided. (Ala.) *Fitts v. Craddock*, 53.

3. PARTITION—Life Estates and Remainders.—Partition may be had at the instance of a life tenant of property held in common, and the court in decreeing partition may make such orders as are necessary to preserve to the remainderman his share of the estate at the termination of the particular estate. (Ala.) *Fitts v. Craddock*, 53.

4. PARTITION—Proof of Default.—Failure of defendant in a partition suit to answer does not dispense with the necessity for proof when the statute provides that "the petitioner shall nevertheless make out his case by exhibiting to the court his evidences of his title." (Ark.) *Moore v. Willey*, 151.

5. PARTITION—Procedure.—While the statutory procedure in partition must be followed in suits at law, such is not the case in equity. The remedy provided by the statute is cumulative only. (Ark.) *Moore v. Willey*, 151.

6. PARTITION—Sale of Property.—If a complaint in partition in equity asks "that the land be partitioned as the law in such case provides, and if not susceptible of division, that the same be sold, a finding that a sale is necessary, not based on the consent of the parties or the report of commissioners or on evidence heard by the chancellor, will not support the order of sale. (Ark.) *Moore v. Willey*, 151.

7. PARTITION—Parties.—One who holds a vendor's lien on land held in common is not a necessary party to a suit to partition the land. (Ark.) *Moore v. Willey*, 151.

See Homestead, 1-4.

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PARTNERSHIP.

1. PARTNERSHIP.—Corporations cannot Enter into Copartnerships with each other. (Mich.) *White Star Line v. Star Line of Steamers*, 551.

2. PARTNERSHIP.—An Agreement Between Corporations, which operate distinct lines of steamers plying between the same ports, to pool their earnings, and, after the payment of ordinary running expenses and specified extraordinary expenses, to divide the net earnings in stated proportions, does not create a partnership. (Mich.) *White Star Line v. Star Line of Steamers*, 551.

See Attorneys.

PAYMENT.

1. PAYMENT.—Money Paid Under a Mistake of Fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, but if the circumstances exist which make such recovery inequitable, the burden of proving them rests upon the party resisting the payment. (N. Y.) *Hathaway v. County of Delaware*, 909.

2. PAYMENT—Mistake of Fact Need not be Mutual.—Although in actions to recover money paid under a mistake of fact, the mistake under which the money is paid is generally a mutual one as to the existence or nonexistence of a fact which justifies or requires the payment, still it is not essential that the mistake should be of that character. (N. Y.) *Hathaway v. County of Delaware*, 909.

3. PAYMENT—Recovery of Money Paid to County on Its Forged Note.—Where an ex-county treasurer, who was a defaulter, and who had during his term of office borrowed money on behalf of the county on obligations purporting to have been given by the county, presented a forged note of the county to plaintiff, on the representation that he was obtaining a loan for the county, and thereupon received plaintiff's check payable to the order of the county treasurer, but turned over the check to the county treasurer in payment of his personal defalcation, the plaintiff on discovering the forgery may recover the sum so paid under mistake of fact, where it does not appear that the county's claim against the defaulter or his sureties has been in any manner jeopardized or impaired. (N. Y.) *Hathaway v. County of Delaware*, 909.

PHYSICIANS.

1. PHYSICIANS.—The Right to Practice Medicine is, like the right to practice any other profession, a valuable property right, under the constitution and laws of the state, one which is entitled to be protected and secured. (Cal.) *Hewitt v. State Board of Medical Examiners*, 315.

2. PHYSICIANS—Revocation of License.—A Statute authorizing the state board of medical examiners to revoke the license of a physician for making "grossly improbable statements" in advertising his medical business, which does not define what constitutes such statements, but leaves the determination of that question to the board of examiners, is unconstitutional. (Cal.) *Hewitt v. State Board of Medical Examiners*, 315.

PLEADING.

1. FOREIGN LAWS.—When a Pleading Contains Allegations of Foreign Law, they are not admitted by a demurrer. (N. Y.) *Knickerbocker Trust Co. v. Iselin*, 863.

2. PLEADING—Action to Recover Money Obtained by a Fraudulent Scheme.—A complaint alleging that the defendants conspired to have what is called fake footraces run on which strangers were en-

ticed to bet, and that the races were so arranged in advance that a stranger was sure to lose, no matter which of the racers he bet upon, that schemes to entice strangers were devised, and that plaintiff was caught in one of these schemes and inveigled into putting six thousand dollars into the hands of the defendant Boatright, as a stakeholder in what the plaintiff supposed was a race, with the result that the man he bet on, who was one of the conspirators, was beaten in the race, as it had previously been agreed between him and his co-conspirators he should be, so that plaintiff lost his money, and that the defendants Exchange Bank and J. P. S. aided and abetted the defendant B. and his gang in perpetrating the fraud, contains more allegations than is necessary to maintain an action for money lost at gambling, but is sufficient as disclosing a common-law right of action against defendants for obtaining the money of the plaintiff by a fraudulent scheme. (Mo.) *Hobbs v. Boatright*, 709.

3. **PLEADING.—A Sham Answer is One** that is false and untrue. (Minn.) *State v. Weber*, 630.

4. **PLEADING.—A Frivolous Answer** is one that does not, in any view of the facts pleaded present a defense to the action. (Minn.) *State v. Weber*, 630.

5. **PLEADING, Sham Answers, Power of the Court Over.**—The court has the right to strike out a sham answer even though verified, and its power is not limited to cases where bad faith affirmatively appears. The court will not, however, where fair doubts exist as to the truth or falsity of an answer, summarily dispose of the case, but will leave the parties to litigate the issues in the usual way. (Minn.) *State v. Weber*, 630.

See Equity, 7-9.

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POWER OF ATTORNEY.

See Principal and Agent, 5.

POWERS.

1. **POWERS, EXECUTION OF.**—The question whether a deed was made in execution of a power contained in a will is one of intention, to be gathered from the terms of the deed and the circumstances under which it was made. (Ark.) *Walters v. Bristow*, 136.

2. **POWERS, EXECUTION OF.**—If a deed is executed under a power contained in a will, it is not absolutely essential that the deed should refer to the power, but when the deed is silent on that point, and the maker has an interest in the land that will pass by the deed, without regard to the power, this, though not conclusive, is a circumstance tending strongly to show that there was no intention to execute the power. (Ark.) *Walters v. Bristow*, 136.

3. **POWERS—Execution of.**—If a widow and devisee join in a deed in their individual capacity and convey land by warranty for less than its real value, and such deed makes no reference to a power in a will giving the widow authority to convey, it must be deemed that they conveyed only their individual interest in the land and had no intention to execute the power contained in the will. (Ark.) *Walters v. Bristow*, 136.

PRINCIPAL AND AGENT.*In General.*

1. **PRINCIPAL AND AGENT—Authority of Agent.**—An agent authorized only to lease and generally look after his principal's lands has no authority to construct a ditch on such land for the benefit of his own, and his act in so doing is not binding on his principal. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

2. **EVIDENCE.**—An Agent's Authority cannot be Proved by His Declarations. (Ohio St.) *General Cartage etc. Co. v. Cox*, 959.

3. **AGENCY.**—One Who is Permitted, Temporarily, in the Absence of the Manager of a Company, to assume authority and discharge the functions of such manager, has for the time being the same power as if he were the regular manager. (Ohio St.) *General Cartage etc. Co. v. Cox*, 959.

4. **AGENCY, Implied Authority of Agents, Estoppel to Controvert.** When a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it. (Ohio St.) *General Cartage etc. Co. v. Cox*, 959.

Power of Attorney.

5. **POWERS OF ATTORNEY to Two or More.**—One of several persons who are appointed attorneys in fact by a power of attorney may act for the principal, when the power contains no provision requiring more than one to join in its execution. (Neb.) *United States Fidelity etc. Co. v. Ettenheimer*, 783.

PROCESS.*Exemption from Service.*

1. **PROCESS—Exemption from Service of.**—A person cannot be lawfully served with civil process while he is attending on a court in

a state other than that of his residence, either as a party or a witness, or while going to or returning therefrom. (Ark.) *Martin v. Bacon*, 81.

2. **PROCESS—Exemption from Service of.**—If a nonresident is attending court within the state as a party to a suit therein, service on him of process in another civil suit will be set aside upon his motion. (Ark.) *Martin v. Bacon*, 81.

Presumption to Support Service.

3. **PROCESS—Presumption to Support Service.**—An affidavit of service of summons which is silent as to the venue of the notary will, in case of a collateral attack upon the judgment, be presumed to have been made in the county of his appointment. (Cal.) *County Bank v. Jack*, 285.

4. **PROCESS—Presumption to Support Service.**—If an affidavit of service of summons is ambiguous as to whether or not a copy of the complaint and summons was delivered to each defendant, it will be presumed, in case of a collateral attack upon the judgment, that it satisfactorily appeared to the court that each of the defendants at the time of the service received a copy of the complaint and summons. (Cal.) *County Bank v. Jack*, 285.

PROHIBITION.

1. **PROHIBITION—Conflict of Jurisdiction in Divorce Case.**—If a wife brings an action for a divorce in one court and her husband shortly afterward institutes a like action against her in another court, and the two courts, proceeding simultaneously, make conflicting orders, prohibition is the proper remedy to settle the conflict of jurisdiction, vacate improper orders already made, and prevent the making of others. (Mich.) *Wells v. Montcalm Circuit Judge*, 520.

2. **WRIT OF PROHIBITION** is an **Extraordinary Remedy**, and should be issued only in cases of extreme necessity, and not until it appears that the petitioner has applied to the inferior tribunal for relief. (Nev.) *Bell v. District Court*, 854.

3. **PROHIBITION—Remedy by Appeal.**—Prohibition does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. (Nev.) *Bell v. District Court*, 854.

4. **THE WRIT OF PROHIBITION** is not a **Writ of Right**, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. (Nev.) *Bell v. District Court*, 854.

5. **WRITS OF PROHIBITION, Like All Other Prerogative Writs, are to be Used with Caution and Forbearance**, for the furtherance of justice, and the securing of order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable. (Nev.) *Bell v. District Court*, 854.

6. **WRIT OF PROHIBITION—When Granted.**—The writ of prohibition should not be granted, except in cases of usurpation or abuse of power, and not then unless the other remedies provided by law are inadequate to afford full relief. If the inferior court has jurisdiction of the subject matter of the controversy, and only errs in the exercise of its jurisdiction, this will not justify a resort to the extraordinary remedy by prohibition. (Nev.) *Bell v. District Court*, 854.

7. **WRIT OF PROHIBITION—Constitutional Law.**—If persons are sought to be removed from office for malfeasance under a statute authorizing the filing of a complaint by a private individual, the

hearing of the matter by summary proceedings, and also providing that, if an appeal is taken from an order of removal, the officer removed shall not occupy the office pending the appeal, and it is claimed that such statute is unconstitutional, the petitioners' remedy by appeal is not adequate, and they are entitled to a determination of the constitutionality of the statute on a writ of prohibition to restrain the further prosecution of the removal proceedings against them. (Nev.) *Bell v. District Court*, 854.

PUBLIC LANDS.

1. **PUBLIC LANDS—Possession in Good Faith.**—The possession of an entryman on public lands, as against another claimant of the same lands, will be presumed to be in good faith, if he goes into possession under an approved application, and legal advice that he has a right to such possession, and thereafter complies with the law in relation to cultivation. This presumption is not overcome by the fact that his previous application for such lands has been canceled. (Iowa) *Blumer v. Iowa R. R. Land Co.*, 444.

2. **PUBLIC LANDS—Title of Entryman Before Issuance of Patent.**—Although the title to public land does not finally pass from the United States until the issuance of a patent, the receiver's receipt, issued to a homestead entryman in possession and claiming under section 2290 of the Revised Statutes, constitutes ample title to enable him to maintain or defend any suit concerning the land. (Cal.) *Thompson v. Basler*, 321.

3. **PUBLIC LANDS—Jurisdiction of Land Department.**—The land department has exclusive power to determine the facts of residence and cultivation with relation to homestead entries, and its determination of these questions is conclusive upon the courts. (Cal.) *Thompson v. Basler*, 321.

4. **PUBLIC LANDS—Jurisdiction of Land Department.**—When a question is under the consideration and within the control of the land department, the courts will not render a decree in advance of the action of the government officials and thereby render such action nugatory. (Cal.) *Thompson v. Basler*, 321.

5. **PUBLIC LANDS—Conflict Between Homestead and Mining Claimant.**—Where a homestead entryman brings ejectment against a mining claimant who has made a location after the issuance of a receiver's receipt to the plaintiff, evidence of the receipt, coupled with evidence of possession, prima facie establishes a right of recovery, and the defendant cannot attack such right by evidence that the plaintiff has failed to reside on the land and cultivate it as required by statute. (Cal.) *Thompson v. Basler*, 321.

See Adverse Possession, 3-5.

RAILROADS.

Accidents at Crossings.

1. **NEGLIGENCE, CONTRIBUTORY, When Conclusively Presumed Against Person Injured by Railway Train.**—When the train by which a person was injured must have been plainly visible from a point at which the testimony showed that he looked and listened therefor, the law conclusively presumes either that he did not look and listen, or if he did look or listen, or both, that he afterward heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the railway corporation responsible under ordinary circumstances for the dangerous consequences of a collision of which the person injured or killed was the proximate cause. (Minn.) *Carlson v. Chicago etc. Ry. Co.*, 655.

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2. RAILWAYS.—Signals, Omission of, When does not Relieve Person Injured of Consequence of His Contributory Negligence.—Negligence of Employés of a Railway Corporation in Failing to Whistle or Ring the Bell is excused by negligence on the part of a person about to cross in failing to use his senses to discover danger. (Minn.) *Carlson v. Chicago etc. Ry. Co.*, 655.

3. RAILWAYS, Injuries Due to Collision with an Extra Train.—That a train which did damage was an extra did not relieve either party from his duty of care. Swiftly moving and irregular trains are to be expected, and it is the duty of persons about to go on a crossing to look and listen for such trains as well as for those on time or which run slowly. (Minn.) *Carlson v. Chicago etc. Ry. Co.*, 655.

4. RAILWAYS, Presumption that Person Looked and Listened, When Destroyed.—If it appears that decedent, if he had looked and listened before driving upon a railway crossing, must have seen and heard the train approaching, the presumption that he looked and listened before attempting to cross is destroyed. (Minn.) *Carlson v. Chicago etc. Ry. Co.*, 655.

5. RAILWAY CROSSING — Open Safety Gates.—The fact that safety gates at a railway crossing are open is not such an assurance of safety as justifies a traveler on the highway in driving across the tracks regardless of all ordinary precautions against any danger from approaching trains. (Cal.) *Koch v. Southern California Ry. Co.*, 332.

Licenses on Track.

6. RAILWAYS, Persons Walking on Tracks and Rights of Way of, When Mere Licensees and not Invited Guests.—Though a railway corporation builds a bridge across a river for its own use, with a walkway on each side of the tracks, and persons using the bridge are in the habit, after landing, of walking along the right of way of the railway to their homes and places of business, and so have been for many years with the knowledge of the company, such persons are mere licensees and not invited guests, especially if danger signals have been kept posted warning all persons to keep off the tracks. (Va.) *Williamson v. Southern Railway Co.*, 1032.

7. RAILWAYS, Duty of to Licensees on Their Tracks.—If the right of way of a railway corporation at a particular point has long been in use as a walkway, and this is well known to the company, it is under the duty of using reasonable care to discover, and not to injure, persons whom it might reasonably expect to be on its tracks at that point. (Va.) *Williamson v. Southern Ry. Co.*, 1032.

8. RAILWAYS, Licensees on Tracks, No Duty of Prevision Owed to.—Though a railway corporation has reason to expect that its tracks in a particular locality may be used by licensees, it does not owe them any duty of prevision, or of making preparations in advance for their protection. Its sole duty is to use reasonable care to discover, and not to injure, such persons. It need not provide its engines with artificial lights for the protection of bare licensees. There is no obligation on the railway to do anything to make the conditions more favorable than the natural surroundings make them. (Va.) *Williamson v. Southern Ry. Co.*, 1032.

See Adverse Possession, 3; Carriers; Street Railways.

Note.

Railways, presumption of negligence against from happening of accidents, 1023-1029.

REDEMPTION.

See Mortgages, 5-7.

RELEASE.

1. **RELEASE OF HEIRSHIP**—Proof of Fairness.—Where a release of a right of inheritance is made to the ancestor, the rule requiring the person relying on it to prove its fairness is no longer in force. (Cal.) Estate of Edelman, 231.

2. **HUSBAND AND WIFE, Release of Heirship as Between.**—If a husband and wife execute an agreement of separation whereby each releases all claim to the property of the other and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he will not be heard to say, after her death, that the contract is unfair. (Cal.) Estate of Edelman, 231.

3. **RELEASE OF HEIRSHIP**—Equitable Estoppel.—While the law may not give effect to transfers or releases of heirship, they are cognizable in equity, and in property cases afford a complete defense by way of estoppel. This equitable defense by way of estoppel is cognizable by the court in probate. (Cal.) Estate of Edelman, 231.

Note.

Res Ipsa Loquitur, rule of in its application to cases of alleged negligence, 999-1002.

RES JUDICATA.

See Judgments.

SALES.

SALE ON CREDIT—Premature Action for Price.—If goods are sold on an unconditional credit which is not obtained by fraud nor based upon a consideration that has failed or has been waived, an action will not lie for the purchase price until the expiration of the term of credit, although the buyer refuse to accept the goods and repudiates the contract. (Cal.) Tatum v. Ackerman, 276.

SALOONS.

1. **SALOONS**—Liability of Keeper for Assault.—A patron of a saloon who, while lying drunk therein, is assaulted by a stranger is not entitled to recover damages therefor from the saloon-keeper. (Ark.) Anderson & Co. v. Diaz, 180.

2. **SALOONS**—Liability of Keeper of.—A saloon-keeper does not hold himself out to the public as a protector of his patrons, and is not bound to the same degree of care to protect them as is required of an innkeeper or a common carrier. (Ark.) Anderson & Co. v. Diaz, 180.

SEDUCTION.

1. **SEDUCTION**—Suspension of Prosecution—Presumption.—If the record of a former trial for seduction shows that the prosecutrix and the accused were married in open court, and the case was thereupon continued, it must be presumed that the accused consented to the suspension of the prosecution, and the prosecution need not prove an express consent. (Ark.) Burnett v. State, 94.

2. **SEDUCTION**—Corroboration of Prosecutrix.—In a prosecution for seduction, in order to secure a conviction, there must be corrobora-

tion of the prosecutrix as to the promise of marriage, its falsity, and that the accused obtained carnal intercourse with her by virtue of such false promise. (Ark.) *Burnett v. State*, 94.

Note.

Sham Answer. See Pleadings.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

1. CONTRACT for Personal Services—Specific Performance.—If, under a contract for personal services, the services have been fully performed or there has been substantial performance of the services by the person agreeing to render them, the contract may be specifically enforced. (Neb.) *Teske v. Dittberner*, 802.

2. HOMESTEADS—Contract to Convey—Specific Performance.—A contract to convey homestead property, reserving to the homestead claimants the right to use and occupy the premises until their death or abandonment of the homestead, is an encumbrance of the title thereto, within the meaning of the homestead law, and such contract cannot be specifically enforced. (Neb.) *Teske v. Dittberner*, 802.

3. HOMESTEADS—Conveyance or Agreement to Convey.—If a homestead, the legal title to which is in the husband, is occupied by himself, his wife and his family, it cannot be conveyed or encumbered, nor can a valid contract therefor exist, except when the instrument is signed and acknowledged by the wife of the homesteader as required by statute. (Neb.) *Teske v. Dittberner*, 802.

STATES.

1. ACTIONS Against State, What is.—A state industrial school, being a component part of one of the departments of the state, is within a constitutional prohibition against the state being made a party defendant to any suit. (Ala.) *Alabama Industrial School v. Addler*, 58.

2. ACTIONS Against States—Waiver of Prohibition.—If the constitution contains a prohibition against the state being made a party defendant to any suit, and does not provide for any waiver of such exemption, the legislature has no power to pass a law permitting such waiver, nor can the state or its agent waive such exemption by failure to plead to the jurisdiction or otherwise. (Ala.) *Alabama Industrial School v. Addler*, 58.

3. ACTIONS Against States—Void Judgment.—The supreme court will take cognizance of the lack of capacity of an inferior court to render a judgment in an action against the state expressly prohibited by the constitution, although no objection to the jurisdiction was made in the latter court. (Ala.) *Alabama Industrial School v. Addler*, 58.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Title of Act.

1. **CONSTITUTIONAL LAW—Title of Act.**—A statute entitled “An act relating to elections,” and providing for the removal of officers for malfeasance by summary proceedings on complaint of a private individual, is in violation of a constitutional provision requiring each law to embrace but one subject, and matter properly connected therewith, which shall be briefly expressed in its title, since such removals from office have no proper connection with the subject of elections. (Nev.) Bell v. District Court, 854.

Validity and Interpretation.

2. **CONSTRUCTION OF STATUTE—Resort to Title of Act.**—In construing the language of a code section, resort with propriety may be had to the title of the act. (Cal.) Estate of Clark, 197.

3. **STATUTES.**—Neither Bad Grammar nor Bad English will Viti-ate a Statute if the meaning of the legislature can be clearly discovered. Awkward, slovenly, or ungrammatical phrases and sentences may yet convey a definite meaning, and if they do so, the courts must except it as the meaning of the lawmakers. (Minn.) State v. Bates, 612.

4. **STATUTES, Interpretation in Favor of Validity of.**—A statute must be given the benefit of every reasonable inference. An interpretation which renders a statute null and void cannot be admitted. It ought to be interpreted in such a manner as that it may have effect, and not be found vain and nugatory. (Minn.) State v. Bates, 612.

5. **STATUTES, Omitting Words for the Purpose of Interpreting.**—The court may, in interpreting a statute, omit a word to render the statute intelligible, if, as it stands, it is devoid of sensible meaning. (Minn.) State v. Bates, 612.

6. **STATUTES, Rule with Respect to Conflicting Provisions—Intent First Expressed, When to Control.**—The rule that what appears last in a statute is the last expression of the legislative will should not be applied where the provision standing first in the act is more in harmony with other statutes in pari materia, and especially when it is in harmony with the unquestionable general purpose of the statute to be interpreted. (Minn.) State v. Bates, 612.

Repeal by Implication.

7. **STATUTES—Repeal by Implication.**—As between two conflicting statutes, the one first enacted to take effect after sixty days is impliedly repealed by the one enacted a day later to take effect immediately. (Cal.) Ex parte Sohneke, 236.

8. **STATUTES—Repeal by Implication.**—An unconstitutional statute does not repeal by implication portions of a former statute inconsistent therewith. (Cal.) Ex parte Sohneke, 236.

STREET RAILROADS.

1. **STREET RAILWAYS—Negligence, Contributory, When Imputed to Person Injured by.**—One who alights from a street car, and whose view is obstructed by it and who knows that, by waiting a short time, it will move on and his view become unobstructed, is guilty of contributory negligence if he at once crosses the other track, where he is struck by another car which he must have seen and been able to avoid had he waited until his view became unobstructed. (Mo.) Hornstein v. United Railways Co., 693.

2. **STREET RAILWAYS.**—The Duty to Stop, Look and Listen applies to street as well as to steam railways. (Mo.) *Hornstein v. United Railways Co.*, 693.

3. **STREET RAILWAYS.**—The Failure to Sound the Gong or Give Other Warning, though it constitutes negligence on the part of the operatives of a street railway, will not entitle a person to recover for injuries due to a collision, if he was guilty of contributory negligence in not stopping, looking, and listening to ascertain whether a car was approaching. (Mo.) *Hornstein v. United Railways Co.*, 693.

Note.

Street Railways, presumption of negligence from accidents on, 1028, 1029.

STREETS.

See Dedication; Municipal Corporations.

SUFFRAGE.

See Elections.

SUMMONS.

See Process.

SUPERSEDEAS.

See Appeal and Error, 11.

TAXATION.

Of Vessels.

1. **VESSEL**—Situs for Purposes of Taxation.—If a vessel is owned by residents of different states, and is engaged in commerce on the high seas, her home port, for purposes of taxation, is that where her managing owner resides, notwithstanding she has never been in the waters thereof, nor received permanent registration thereat, but is temporarily registered in another state whose waters she enters as an incident of her employment in foreign commerce. (Cal.) *Olson v. San Francisco*, 191.

Of Stock of Foreign Corporation.

2. **TAXATION.**—Shares of Stock in a Foreign Corporation owning property within and without the state are, under the Michigan statutes, assessable to a shareholder residing in that state. (Mich.) *Thrall v. Guiney*, 528.

3. **TAXATION**—Stock in a Foreign Corporation.—A resident of this state, who owns stock in a foreign corporation, cannot complain of an assessment in this state on his stock at four-fifths its value, when one-fifth of the property of the company is situated within the state and four-fifths thereof is located in other states and there taxed according to their laws. (Mich.) *Thrall v. Guiney*, 528.

Of Railroads.

4. **RAILROADS**—Value for Taxation.—The cash value of a railroad for the purpose of taxation must be determined by its net earnings, capitalized at the current rate of interest, taking into consideration any immediate prospect of an increase or decrease in its earning capacity, and if it appears that its actual cost, which is *prima facie* its value, was in excess of the necessary cost, the necessary cost

is the proper standard. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

5. **RAILROADS—Taxation—Net Income.**—The net income of a railroad, for the purposes of taxation, is the difference between the gross receipts and necessary expenses under reasonably economical and prudent management. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

6. **RAILROADS—Earning Capacity for Purposes of Taxation—Evidence.**—On the question as to the earning capacity of a railroad for the purposes of taxation, classifications of items of expense by the railroad company in its accounts are not evidence in its favor, except as substantiated by the original entries of the transactions in its books. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

7. **RAILROADS—Earning Capacity for Purposes of Taxation—Evidence—Waiver of.**—If, on the question as to the earning capacity of a railroad for the purposes of taxation, its books of account are not placed in evidence, and the opposing parties seek to prove a result from them by the opinion of an expert, and each party objects to the opinion of the opposing witness, without objection as to the books themselves, the introduction of the books in evidence is waived. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

8. **RAILROADS—Earning Capacity for Purposes of Taxation—Expenditures—Presumption.**—On the question as to the earning capacity of a railroad for the purposes of taxation, it is presumed that charges for things essential to the operation of the road represent reasonable and economical expenditures. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

9. **RAILROADS—Taxation of Earning Capacity—Evidence.**—If on the issue as to the earning capacity of a railroad for the purposes of taxation, the question whether certain charges of expense are legitimate, and whether earnings other than those shown should not have been received is disputed, it is error to permit expert accountants who have examined the railroad books to give parol evidence of their opinion as to what the railroad's net earnings should have been based on an arbitrary classification and exclusion of debts and credits. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

10. **RAILROADS—Value for Taxation.**—On the issue as to the value of a railroad for taxation, evidence of an offer of a certain sum for the road made to its general manager by persons who had neither the intention nor the ability to buy for themselves, but who made such offer on behalf of others who are not shown to have been able to buy or to have known the value of the property, is not admissible. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

11. **RAILROADS—Value for Taxation.**—In estimating the value of a railroad for the purposes of taxation, taxes actually paid by the railroad company should be added to its operating expenses and deducted from its gross income. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

12. **RAILROADS—Value for Taxation—Indebtedness.**—In estimating the value of a railroad for the purpose of taxation, evidence of the value of its bonds secured by mortgage, and of the value of bonds issued by a county to aid in its construction, is admissible to show the cost of the road. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

13. **RAILROADS—Value for Taxation—Cost—Presumption.**—The presumption that a railroad, for the purpose of taxation, is worth its cost continues until it is shown that it is less by reason of insufficient

earning capacity to pay net current rates of interest on its cost, or from other causes. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

14. **RAILROADS—Value for Taxation—Evidence.**—If a witness has not made computations of a railroad's earning balances for a number of years, as to which he is asked to testify, and does not know whether such balances are correct, nor what items they include his testimony on that point is not admissible. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

Validity of Tax—Uniformity—Double Taxation.

15. **TAXATION.**—Presumptions are in Favor of the Validity of an official tax levy. (Nev.) *State v. Nevada Central R. R. Co.*, 834.

16. **TAXATION and the Fourteenth Amendment to the Constitution of the United States.**—The fourteenth amendment to the constitution of the United States imposes limits on the exercise of the powers of the state, including that of taxation. (Mo.) *State v. Chicago etc. R. R. Co.*, 661.

17. **TAXATION, Uniformity Required in.**—The general rule is that taxes must be uniform and equal, coextensive with the territory to which the tax applies. (Mo.) *State v. Chicago etc. R. R. Co.*, 661.

18. **TAXATION, Discrimination in Favor of Localities, When Forbidden by the Fourteenth Amendment to the Constitution of the United States.**—An amendment to the constitution of the state authorizing the county courts to levy, at their discretion, a special amount of taxes for road and bridge purposes, but exempting designated cities in different counties of the state, makes a discrimination in favor of those cities and against other portions of the state not permitted by the fourteenth amendment to the constitution of the United States. (Mo.) *State v. Chicago etc. R. R. Co.*, 661.

19. **TAXATION.**—A Prohibition Against Double Taxation contained in a state constitution applies only to the taxing of property by that state, and therefore is not violated where stock in a foreign corporation is assessed by that state to a shareholder therein residing, while the property of the corporation is taxed in another state where it is situated. (Mich.) *Thrall v. Guiney*, 528.

Tax Sale and Deed.

20. **TAX SALE—Deed from State—Recitals as Evidence.**—When the state conveys land acquired by it for taxes, the requirement of section 3898 of the Political Code that the deed to the purchaser shall recite "the facts necessary to authorize such sale and conveyance, which deed shall convey all the interest of the state in and to such property, and shall be prima facie evidence of all facts recited therein," does not operate as proof of the execution of a prior deed whereby the title of the taxpayer has been transferred from him to the state. (Cal.) *County Bank v. Jack*, 286.

21. **TAX DEEDS—Description.**—A tax deed describing the land as "part E. 1², N. E. 1⁴, Sec. 32," is void for insufficiency of description. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

22. **TAX DEEDS—Limitation of Actions.**—A tax deed, void for uncertainty of description of the land intended to be conveyed does not set the statute of limitations in operation. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

23. **TAX DEEDS—Sale for Excessive Sum.**—The sale of an entire tract of land for the whole of the taxes assessed, when part of the taxes thereon have been paid, renders the sale and tax deed void. (Ark.) *Dickinson v. Arkansas City Imp. Co.*, 170.

TELEGRAPHS AND TELEPHONES.*In General.*

1. **TELEGRAPHS AND TELEPHONES**—Source of Power to Erect Poles.—In New York the telegraph and telephone companies derive the right to erect their poles and string their wires directly from the state. (N. Y.) *Village of Carthage v. Central New York Tel. etc. Co.*, 932.

2. **TELEGRAPH COMPANIES**—Authority of Agent—Presumption.—It is presumed that a telegraph agent intrusted with receiving messages for transmission has authority to bind it by his agreement as to the time for sending it, even to the extent of disregarding the regulations as to the hours of opening and closing its office, to which the message is to be sent. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

3. **TELEGRAPH COMPANIES**—Limitation of Liability.—A stipulation on a blank on which a telegraph message is written that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," does not bar a right to recover, although the claim was presented after that time, if the delay was caused by the misleading statements of the company's agent. (Ark.) *Arkansas etc. Ry. Co. v. Stroude*, 130.

4. **TELEGRAPH COMPANIES**—Stipulation as to Notice—Excuse for Noncompliance.—A stipulation in a telegram requiring notice of a claim for damages to be given within sixty days after sending the message as a condition precedent to recovery does not require that the addressee give such notice before he could, with reasonable diligence, ascertain that the telegraph company had failed to deliver the message. (Ark.) *Arkansas etc. Ry. Co. v. Stroude*, 130.

Failure to Deliver Message—Free Delivery Limits.

5. **TELEGRAPH COMPANIES**—Failure to Deliver Message.—Exemplary Damages cannot be recovered against a telegraph company for its failure to deliver a telegram unless the company's employes knew where the addressee might be found and willfully and wantonly failed to deliver the message. (Ark.) *Arkansas etc. Ry. Co. v. Stroude*, 130.

6. **TELEGRAPH COMPANIES**—Failure to Send Message—Damages—Proximate Cause.—If damages are sustained by reason of the failure of a telegraph company to send a message notifying the sendee of the serious illness of his wife, it is error to charge, as matter of law, that he is entitled to recover damages for mental anguish and pain suffered by him. That is a question to be determined by the jury upon consideration of whether such failure was the proximate cause of the suffering, or whether it would not have followed if the message had been promptly transmitted and delivered. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

7. **TELEGRAPH COMPANIES**—Failure to Deliver Message—Presumption as to Free Delivery Limits.—If a telegraphic message is handed in for transmission, the presumption is that the sendee lives within free delivery limits and that the sender takes the risk of delivery unless he makes arrangements for delivery at a greater distance. Handing in such a message without explanation casts no duty on the transmitting operator, other than to forward the message accurately and with proper diligence, and it casts no duty on the terminal operator other than to copy the message correctly and to

deliver it with all convenient speed, if the sendee resides within the free delivery limits. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

8. **TELEGRAPH COMPANIES—Failure to Send Message—Presumption of Negligence.**—Failure to send a telegraphic message raises the presumption of negligence, and casts upon the telegraph company the burden of overcoming such presumption. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

9. **TELEGRAPH COMPANIES—Failure to Send Message—Free Delivery Limits.**—If a telegraph company wishes to avail itself of the defense that the residence of the sendee and his place of business were beyond the free delivery limits, it must plead and prove such facts, and that it transmitted the message promptly, and a failure to start the message is a breach of the entire contract. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

Damages for Mental Suffering.

10. **TELEGRAPH COMPANIES—Damages for Mental Suffering.** A statute declaring that all telegraph companies doing business in the state shall be liable in damages for mental anguish and suffering arising from their negligence, applies as well to corporations doing a public telegraph business as to strictly telegraph companies. (Ark.) *Arkansas etc. Ry. Co. v. Stroude*, 130.

See *Municipal Corporations*, 3.

TENANT IN COMMON.

See *Adverse Possession*, 8.

THEATERS AND SHOWS.

See *Constitutional Law*, 1.

TIME.

TIME, Fractions of a Day, When Will be Considered.—The legal fiction that there are no fractions of a day has no application to a case when the statute, to avoid confusion, expressly requires that notice shall be taken of the precise time an official act is done and that a record thereof be made. (Minn.) *Brady v. Gilman*, 622.

TRIAL.

Demand for Jury.

1. **PLEADING AND PRACTICE—Demand for Jury Trial.**—A statute requiring that a demand for a jury be indorsed on the pleadings does not necessarily make such requirement mandatory. (Ala.) *Western Union Tel. Co. v. Merrill*, 66.

Argument of Counsel.

2. **TRIAL—Argument of Counsel.**—A statement by an attorney in argument to the jury that if accused was guilty of the crime charged, he ought not to be permitted to live in the county, is improper, but a subsequent statement merely that if the accused was guilty of the crime charged he was not fit to live in that county is not improper or objectionable. (Ark.) *Miller v. Nuckolls*, 122.

3. **TRIAL—Argument of Counsel.**—If, on objection to remarks made by counsel, the court "quietly" cautioned him not to make improper remarks, it is the duty of opposing counsel, if he is not satisfied, to request the court to instruct the jury to disregard such remarks, or to ask for a more emphatic reprimand. (Ark.) *Miller v. Nuckolls*, 122.

Instructions to Jury.

4. **TRIAL—Affirmative Charge.**—If the evidence clearly makes a case for the jury, the defendant is not entitled to a general affirmative charge. (Ala.) *First Nat. Bank v. Chandler*, 39.

5. **TRIAL—Instructions.**—If a complaint contains several counts, it is proper to refuse a charge instructing the jury, if it believes the evidence, to find for the defendant on one of the counts. (Ala.) *Tennessee Coal etc. R. R. Co. v. Bridges*, 35.

6. **TRIAL—Contradictory Instructions.**—An erroneous instruction is not necessarily cured by another correctly stating the law, when the two are essentially contradictory. (Ark.) *Miller v. Nuckolls*, 122.

7. **TRIAL—Instructions—Harmless Error.**—If, in an action for libel and slander, the evidence offered by plaintiff tended only to prove that defendant used language substantially the same as that set out in the complaint, and not that he used words substantially different, an instruction justifying a finding against defendant if he falsely used words substantially different from those alleged, though of equivalent or similar import, though erroneous, is not prejudicial. (Ark.) *Miller v. Nuckolls*, 122.

8. **TRIAL—Instructions—Prejudicial Error.**—If a party to a suit has the full benefit of the proposition of law contained in an instruction asked by him, he cannot be prejudiced by a slight modification in the wording of the instruction. (Ill.) *Star Brewery Co. v. Hauck*, 420.

9. **TRIAL—Inspection by Jury of Injured Chattels.**—The refusal of a court to require the production of articles of baggage claimed to have been injured through the negligence of a carrier is not an abuse of discretion, if the defendant's witnesses have had an opportunity to inspect them, and it is not clear that the jury would be aided by an examination of them. (Mich.) *Withey v. Pere Marquette R. R. Co.*, 533.

Verdict.

10. **TRIAL Directing Verdict—Review.**—If the trial court directs a verdict for the defendant, the question on appeal is whether the evidence introduced by plaintiff was legally sufficient to support a verdict in his favor, and in testing that question the testimony must be given its strongest probative force, and that view of the facts accepted which it will warrant most favorable to plaintiff's cause of action. (Ark.) *Rodgers v. Choctaw etc. R. R. Co.*, 102.

11. **TRIAL—Verdict—Excessiveness.**—If there are counts in a complaint that claim more than the amount of the verdict, it is not excessive because it is for more than is claimed in some other counts. (Ala.) *First Nat. Bank v. Chandler*, 39.

TRUSTS.

1. **DEEDS OF TRUST—Sales—Trustee's Duty.**—A trustee must, in all cases in conducting sales, discharge his duties impartially with the view of protecting the interests of all parties, and is vested with a discretion as to the manner of conducting the sale, which discretion should always be exercised in such manner as to produce the best results for those interested. (Mo.) *Givens v. McCray*, 736.

2. **DEEDS OF TRUST—Trustee's Sales—Trustee's Discretion.**—If the owner of a homestead subject to a deed of trust dies leaving a widow and minor children, and a third person acquires the interest of some of the children, after which the trustee in the deed of trust proceeds to sell the premises during the minority of two of the chil-

dren, such third person has no absolute right to control the method of the sale, and the trustee must exercise a sound discretion for the protection of all of the persons interested in the premises. (Mo.) *Givens v. McCray*, 736.

3. DEEDS OF TRUST—Trustee's Sales—Setting Aside.—The right to have a trustee's sale under a deed of trust set aside depends on the allegations of the petition therefor, and if it does not contain allegations of fraud, unfair dealing, inadequate consideration, or abuse of discretion on the part of the trustee, and none that the sale was made in bulk to increase the trustee's fees, these matters cannot be considered, at law or in equity, in passing upon the sufficiency of the petition. (Mo.) *Givens v. McCray*, 736.

4. DEEDS OF TRUST—Trustee's Sales en Masse—Discretion.—A discretion is vested in a trustee in a deed of trust to sell in the way which will produce the largest sum, and a sale en masse will not be set aside simply because the land was not sold in parcels, in the absence of evidence of fraud, unfair dealing, inadequacy of price, or abuse of confidence. (Mo.) *Givens v. McCray*, 736.

5. DEEDS OF TRUST—Trustee's Sales—Petition to Vacate—Sufficiency of.—A petition to vacate a sale of land en masse made by a trustee under a deed of trust, which merely alleges that the trustee sold in bulk and refused to sell in parcels, but failing to allege that the sale as made operated to petitioner's injury, and which does not allege the true nature and character of the property sold, its susceptibility to division, or any abuse of discretion or confidence on the part of the trustee in making the sale, or that in conducting such sale he in any manner acted otherwise than impartially with all parties in interest, or did not exercise a proper or sound discretion in adopting methods and manner of the sale of such property, does not state facts constituting a cause of action. (Mo.) *Givens v. McCray*, 736.

6. TRUSTS.—Where the *Cestui Que Trust* has Assented to or concurred in the breach of trust or has subsequently acquiesced in it, he cannot afterward proceed against those who would otherwise be liable therefor. (N. Y.) *Vohmann v. Michel*, 921.

7. TRUSTS—Effect of Release of Trustee's Defalcation by Beneficiary.—Where *cestuis que trustent* were, at the time of giving to the trustees holding a mortgage for their benefit releases of liability for the defalcation of one of such trustees, who had forged a satisfaction of the mortgage, entitled to the remainder of their shares of the trust fund, the trustees cannot enforce the mortgage as far as their interests are concerned, since their interests were at the time of their ratification subject to alienation and disposition, and the trustees who represent their interests can have no greater interests than they have. (N. Y.) *Vohmann v. Michel*, 921.

See Frauds, Statute of, 2.

USURY.

1. CONSTITUTIONAL LAW—Usury Statute—Uniform Operation. A statute which makes the loaning of money in specified amounts in excess of a prescribed rate of interest a misdemeanor, and which makes the same acts punishable by different degrees of punishment according as they are committed by employes or officers of the corporations authorized by such statute, or by other persons or corporations, transgresses the constitutional provision that all laws shall be uniform in operation. (Cal.) *Ex parte Sohneke*, 236.

2. CONSTITUTIONAL LAW—Usury Statute—Discrimination.—A statute forbidding the loaning of small amounts at more than a specified rate of interest on certain kinds of chattels, while it permits any rate to be charged on such loans on other chattels, is unconstitutional, if there is no reasonable distinction between the different classes of persons and things affected by the law. (Cal.) *Ex parte Sohneke*, 236.

VOTING.

See Elections.

WAREHOUSES.

STORAGE COMPANY, Implied Authority of Agents of.—An agent of a storage company, acting as its general manager, has implied authority to agree to effect insurance on goods being stored with it, and the company is liable for damages resulting from the failure to perform such agreement, though it had not in fact given such agent authority to enter into it. (Ohio St.) *General Cartage etc. Co. v. Cox*, 959.

WATERS AND WATERCOURSES.

Surface Waters.

1. WATERS, SURFACE—Damages from Overflow—Contributory Negligence.—If it is sought to recover damages caused by an overflow of surface water resulting from an insufficient outlet, the fact that the land owner seeking to recover constructed drainage ditches across his land in the direction of such outlet does not affect his right to recover unless it is shown that the collection of water at the outlet was increased and augmented thereby, and that he thereby contributed to his own injury. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

2. WATERS, SURFACE—Insufficient Outlet—Liability.—If a Railroad Company fails to provide a sufficient drain or outlet through its right of way to afford a reasonably prompt passage for the surface water seeking outlet there in times of heavy or long-continued rainfall, it is liable to adjoining land owners for the overflow of their lands resulting therefrom. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

3. WATERS, SURFACE—Damage from Overflow—Permanent or Continuing Injury.—If the injury to land is caused by a wrongful overflow thereof by surface water, is of a permanent character, and will continue indefinitely unless a change is effected by human labor, the damages are permanent and recoverable once for all, and are measured by the decrease in the fair market value of the property; but when the injury from such overflow is temporary in its nature, or is of a recurring character, the damages are ordinarily regarded as continuing, and one recovery against the wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

4. WATERS, SURFACE—Damages from Overflow—Permanent or Continuing Injury.—Damages arising from the occasional flooding of land by surface water caused by an insufficient culvert upon the land of an adjacent proprietor are not original and permanent, but continuing, although if the claim for damages is made, and the action is tried on the theory that they are original and permanent, the parties will be bound by the judgment. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

5. WATERS, SURFACE—Damages for Overflow.—A land owner, to recover damages for a wrongful overflow of his land by surface

water, must show that he has in fact suffered injury therefrom, and can recover only for the injury thus sustained and not for any threatened injury. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

6. **WATERS, SURFACE—Measure of Damages for Overflow.**—The measure of damages for injury to land caused by its wrongful overflow by surface water is the difference between its fair market value immediately before and immediately after the injury. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

7. **WATERS, SURFACE—Measure of Damages for Overflow.**—In determining the value of land immediately before and immediately after an injury thereto caused by the wrongful overflow of surface water, the value and condition of the crops thereon, if any, and the extent to which they are injured or destroyed, are material matters for the consideration of the jury. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

8. **WATERS, SURFACE—Damages for Overflow of Land.**—If one person's land is overflowed by surface water through the negligent act of another, the former is entitled to recover nominal damages, although he furnishes no evidence affording a proper measure of actual damages. (Iowa) *Harvey v. Mason City etc. R. R. Co.*, 483.

Accretions.

9. **ACCRETIONS.—Title to Accreted or Reclaimed Land** goes with the fee of the land to which it is annexed. (Iowa) *Sioux City v. Chicago etc. Ry. Co.*, 501.

10. **ACCRETIONS.**—If there is a process of accretion going on along the shore line of a river, and this process continues until the bed of the river rises to the level of the bed of a creek, which had previously run into the river above, and then as the waters of the river receded the flow from the creek prevented further deposits in its extended channel and established a permanent channel along the old bed of such river, the land which formed as an accretion between the river and the creek belongs to the owner of the land beyond the creek lying adjacent to the former shore line of the river. (Ark.) *Dowdle v. Wheeler*, 106.

11. **ACCRETIONS.**—If an accretion is begun by a deposit against the shore of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the owner of the mainland. (Ark.) *Dowdle v. Wheeler*, 106.

WILLS.

In General.

1. **WILLS—Power to Dispose of Property.**—A person has the power to make such final disposition of his estate by his last will as he may choose, and if he has the requisite mental capacity, he has the power to disinherit his heirs, and leave his property to charitable and educational objects, and if he does so, the validity of his will is not thereby affected. (Ill.) *Dillman v. McDanel*, 400.

2. **WILLS—Unequal Distribution.**—If a testator assigns a substantial and sufficient reason for any inequality in the distribution of his property among children by will, such reason must be accepted as true when there is no evidence in the record tending to disprove it. (Ill.) *Waters v. Waters*, 359.

3. **WILLS—Knowledge of Contents—Presumption.**—If the evidence shows that when a testatrix executed her will she knew what she was doing, and was in good mental condition, it will be presumed

that she knew the contents of her will. (Ill.) *Waters v. Waters*, 359.

4. WILLS—Trusts—Power of Disposition, When Imperative.—A clause of a will bequeathing the residuary estate to executors in trust and authorizing them "to rent, sell, or dispose of the rest, residue and remainder of my said real estate, either at public or private sale, as they may deem most advantageous to my estate," and authorizing the placing of the money, after the payment of the debts, at interest, for the benefit of testator's widow and minor children, creates an imperative power to dispose of the residuary estate. (N. Y.) *Brown v. Doherty*, 915.

Testamentary Capacity.

5. WILLS—Testamentary Capacity—Evidence of Insanity.—If the sanity or insanity of a testator is the subject of judicial investigation, and there is no other evidence tending to show his mental unsoundness, it is competent to show the insanity of his collateral blood relations, not further removed than uncles and aunts, without making proof that the insanity from which they suffered was hereditary in character. (Ill.) *Dillman v. McDanel*, 400.

6. WILLS—Testamentary Capacity.—The disposal for an inadequate consideration, and without apparent reason of valuable property by a testator, after his severe illness and partial paralysis, to persons to whom he was under no special obligation, when prior to such illness he had been very close and penurious, indicates a marked change in mentality, and tends to show unsoundness of mind. (Ill.) *Dillman v. McDanel*, 400.

7. WILLS—Testamentary Capacity—Evidence—Other Wills and Declarations.—If a will is attacked upon the ground of mental incapacity on the part of the testator, proof of other wills and declarations of the testator conforming substantially to the disposition of property as made by the will in question must be confined to wills and declarations made at a time when the testator is conceded to be of sound mind. (Ill.) *Dillman v. McDanel*, 400.

8. WILLS.—Lack of Testamentary Capacity disqualifies a testator from making a valid will even though the incapacity does not amount to absolute imbecility. (Ill.) *Dillman v. McDanel*, 400.

9. WILLS—Testamentary Capacity.—Neither Illness, Old Age nor Physical or mental weakness renders a testator incapable of making a valid will unless the mental weakness deprives him of testamentary capacity. (Ill.) *Dillman v. McDanel*, 400.

10. WILLS—Testamentary Capacity.—Capacity to comprehend a few simple details, if the estate is small, may qualify a person to intelligently dispose of his property by will, while, if the estate is large, requiring the remembrance of many facts and the comprehension of many details and the disposition to be made is complicated, the same mental capacity may be wholly insufficient to the intelligent understanding of the business requisite to the making of a valid will. (Cal.) *Dillman v. McDanel*, 400.

11. WILLS—Testamentary Capacity.—Unless the person whose testamentary capacity is questioned had, at the time of making his will, such mind and memory as enabled him to understand the business in which he was then engaged and the effect of the disposition made by him of his property, he did not possess the sound mind and memory required to enable him to make a valid will. (Ill.) *Dillman v. McDanel*, 400.

12. **WILLS—Testamentary Capacity.**—The intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, his family, the claims of particular individuals, and the known financial conditions of his relatives, may be considered by the jury in determining the question of his mental capacity. (Ill.) *Dillman v. McDanel*, 400.

13. **WILLS—Testamentary Capacity.**—In determining whether a man was of sound mind and memory at the time of executing his will, his manner, talk, and actions, at a time when it is alleged he was not sane, should be compared with his manner, talk and actions at a time when his sanity was not questioned. (Ill.) *Dillman v. McDanel*, 400.

14. **WILLS—Testamentary Capacity—Instructions.**—If a will is contested on the ground of want of mental capacity in the testator, an instruction that "where witnesses are otherwise equally credible and their testimony otherwise is entitled to equal weight, greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge," is harmless if all the witnesses gave affirmative evidence on the subject of mental capacity without any dispute as to transactions or events. (Ill.) *Dillman v. McDanel*, 400.

15. **WILLS—Want of Mental Capacity—Evidence.**—To sustain an allegation of want of mental capacity in a testatrix to make a will, something more must be shown than mere physical suffering, disease, and old age, on her part. (Cal.) *Waters v. Waters*, 359.

16. **WILLS.—Testamentary Capacity Exists**, if the testator, at the time of making his will, had such mind and memory as enabled him to understand the business in which he was then engaged, and the effect of the disposition made by him of his property. (Ill.) *Waters v. Waters*, 359.

Undue Influence.

17. **WILLS—Undue Influence—Unequal Distribution.**—Inequality in the distribution by will of the property of a testator among his children cannot itself have the effect of invalidating the will on the ground of undue influence. (Ill.) *Waters v. Waters*, 359.

18. **WILLS—Undue Influence—Burden of Proof.**—The certificate of the oaths of subscribing witnesses to a will is *prima facie* proof of its validity, which is contested on the ground of undue influence and want of mental capacity, and the contestants have the burden of overcoming the *prima facie* case thus made. (Ill.) *Waters v. Waters*, 359.

19. **WILLS—Undue Influence.**—The presumption is in favor of the validity of a will when a person provided for therein, to the exclusion of another, has maintained more intimate and affectionate relations with the testatrix than has the excluded person. (Ill.) *Waters v. Waters*, 359.

20. **WILLS—Undue Influence—Evidence.**—The fact that the testatrix ceased to talk to a neighbor about her will when beneficiaries favored therein came into the room does not show that the mind of the testatrix was influenced by fear of such beneficiaries, or that they imposed upon her in any way. (Ill.) *Waters v. Waters*, 359.

21. **WILLS—Undue Influence.**—Influence over a testatrix gained by affection and friendship to her is not undue influence. (Ill.) *Waters v. Waters*, 359.

Will Contest.

22. WILL CONTEST—Order of Proof—Interest of Contestant.—In controlling the order of proof in a will contest, the court may require the contestant to first establish his interest, and may dismiss the proceedings if he fails to do so. (Cal.) *Estate of Edelman*, 231.

23. WILLS—Contests—Allegations and Proof.—If a bill in chancery is filed to set aside the probate of a will, the complainant will be allowed to impeach the prima facie case made in favor of the validity of the will, only upon the particular grounds that are alleged in the bill. (Cal.) *Waters v. Waters*, 359.

Declarations of Testator.

24. WILLS—Undue Influence.—Declarations of Testator made prior to the execution of his will and opposed to its provisions are not admissible to prove undue influence. (Ill.) *Waters v. Waters*, 359.

25. WILLS—Evidence—Declaration of Testator.—Statements made by a testator, either before or after the execution of a contested will, which are in conflict with the provisions thereof, do not invalidate or modify such will in any manner. (Ill.) *Waters v. Waters*, 359.

Agreement to Make Will.

26. WILLS—Agreement to Make Devise.—An agreement, upon sufficient consideration, to devise or bequeath property is valid and enforceable. (Neb.) *Teske v. Dittberner*, 802.

27. WILLS—Agreement to Make Devise—Specific Performance.—An agreement, upon sufficient consideration, to devise or bequeath property may be specifically enforced, and equity will impress a trust upon the property which will follow it into the hands of personal representatives of the promisor, or grantees without consideration. (Neb.) *Teske v. Dittberner*, 802.

28. WILLS—Agreement to Make Devise.—An agreement to devise or bequeath property need not be in express terms to make a will. A promise that the promisee shall receive the property or that it shall be left to him at the death of the promisor is sufficient. (Neb.) *Teske v. Dittberner*, 802.

29. WILLS—Agreement to Make Devise—Violation.—If a person who has agreed to leave his property, or some part of it, to another upon his death, conveys the property in question to a third person, without consideration, or with notice, the conveyance may be immediately set aside at the suit of the promisee who is defrauded thereby. (Neb.) *Teske v. Dittberner*, 802.

30. WILLS—Agreement to Make Devise—Statute of Frauds.—Performance of services by one, under an agreement by another to make a devise or bequest to him, when of such a character that their value cannot be pecuniarily estimated and the court cannot restore the promisee to the situation held by him when the agreement was made, nor compensate him in damages, is sufficient to take such agreement out of the statute of frauds. (Neb.) *Teske v. Dittberner*, 802.

31. WILLS—Agreement to Make Bequest or Devise—Performance by Promisee—Revocation.—If a person agrees to leave another property by will in consideration of personal services to be performed by the latter, such contract is not revocable as being testamentary in character, after such services have been performed. (Neb.) *Teske v. Dittberner*, 802.

32. HOMESTEADS—Agreement to Devise—Specific Performance. A parol agreement by a husband alone with a third person to devise the latter homestead property is in conflict to the homestead law, and cannot be specifically enforced, though substantially performed on his part by the promisee. (Neb.) *Teske v. Dittberner*, 802.

33. HOMESTEADS — Agreement to Devise — Encumbrance.—An agreement to devise homestead property in a certain way and on certain conditions, thereby subjecting it to a trust in favor of the promisee, is an encumbrance of the homestead title, and such agreement is neither valid nor enforceable. (Neb.) *Teske v. Dittberner*, 802.

34. WILLS—Agreement to Devise Land—Partial Specific Performance.—If a husband alone contracts to devise land to a third person, and part of such land is included in the promisor's homestead, the contract may be specifically enforced only as to such of the land as is not included in the homestead, upon substantial performance of his part of the contract by the promisee. (Neb.) *Teske v. Dittberner*, 802.

Foreign Wills.

35. FOREIGN WILLS—Original Probate.—A court has jurisdiction to grant original probate of the will of a nonresident who died leaving property in this state. (Cal.) *Estate of Edelman*, 231.

36. FOREIGN WILLS—Construction of Statute.—The words "all wills" in a code section may be construed to read all "foreign wills," when the chapter or article in which the section appears is entitled "Probate of Foreign Wills." (Cal.) *Estate of Clark*, 197.

37. FOREIGN WILLS—Jurisdiction to Probate.—Courts may grant original probate upon wills of deceased nonresidents leaving property in the state; but the exercise of this jurisdiction can affect only the property within the state. (Cal.) *Estate of Clark*, 197.

38. FOREIGN WILLS—Jurisdiction to Probate.—While in matters of probate states by comity permit ancillary jurisdiction of foreign wills, they are jealous in the extreme of any invasion of their original jurisdiction of such matters. (Cal.) *Estate of Clark*, 197.

39. FOREIGN WILLS.—It is the Duty of a Court to Refuse Probate to an instrument offered as a foreign will, when satisfied from the evidence that the testator was in fact a resident of the state at the time of his death. (Cal.) *Estate of Clark*, 197.

40. FOREIGN WILLS.—Authority to Take Proof of Wills is confined to courts whose territorial jurisdiction includes the domicile of the decedent. (Cal.) *Estate of Clark*, 117.

41. FOREIGN WILLS.—When the Will of a Nonresident is admitted to probate on original proceedings for the purpose of administering upon his property within the state, the decree therein binds that property here and everywhere that our courts are accorded full faith and credit, but it is not binding as to the will itself in other jurisdictions where the deceased may have left property, nor is it binding on the courts of his domicile. (Cal.) *Estate of Clark*, 197.

42. FOREIGN WILLS.—When a Will has been admitted to probate here on proof of its admission to probate in some other jurisdiction, not including the domicile of the decedent, the decree and proceedings regularly taken under it are secure against collateral attack. (Cal.) *Estate of Clark*, 197.

Note.

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WITNESS.

1. WITNESSES—Leading Questions.—Questions intended to call attention to subjects about which testimony is desired, and not in themselves suggesting the answers expected, are not objectionable as leading. (Mich.) *People v. Hodge*, 525.

2. WITNESS, Contradiction of the Party's Own.—Though the plaintiff has taken the deposition of an insurance agent and has offered it in evidence at a pre-existing trial of the cause, he may, at a trial at which he does not offer such deposition, prove statements contradicting those of the witness as therein shown. (Mo.) *King v. Phoenix Ins. Co.*, 678.

WRIT OF PROHIBITION.

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